

No. 10-\_\_

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IN THE  
*Supreme Court of the United States*

AVA HEYDT-BENJAMIN,  
*Petitioner,*  
v.

THOMAS HEYDT-BENJAMIN,  
*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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### **QUESTION PRESENTED**

The United States is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. Under the Convention, U.S. courts are required to return a child who has been wrongfully removed from her country of “habitual residence.” The courts of appeals are divided three ways over the definition of “habitual residence.” The question presented is:

What is the test for determining a child’s country of habitual residence for purposes of the Convention?

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### **Other Authorities**

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Ava Heydt-Benjamin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

### **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-5a) is unpublished but is reported at 2010 WL 5294639 (2d Cir. Dec. 28, 2010). The Second Circuit's order denying rehearing en banc (Pet. App. 27a) is unreported, as is the opinion of the district court (Pet. App. 7a-26a).

### **JURISDICTION**

The Second Circuit issued its decision on December 28, 2010 (Pet. App. 1a-5a) and denied rehearing en banc on March 2, 2011 (Pet. App. 27a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### **RELEVANT STATUTORY PROVISIONS**

The relevant provisions of the Hague Convention on the Civil Aspects of International Child Abduction (Pet. App. 87a-90a) and the International Child Abduction Remedies Act (Pet. App. 91a-95a) are reproduced in the Petition Appendix.

### **STATEMENT OF THE CASE**

This case presents an important question of child abduction law over which the federal courts of appeals and state courts are intractably divided: the test to be used to determine a child's "habitual residence" for purposes of the Hague Convention on

the Civil Aspects of International Child Abduction. Because the Hague Convention offers relief only when a child has been abducted from his habitual residence to another signatory state, this threshold question goes to the heart of the Convention.

1. The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670 (“Hague Convention” or “Convention”), to which the United States is a signatory, was enacted in response to a rise in international abductions by parents seeking a more advantageous forum in which to litigate custody disputes. *See* 42 U.S.C. § 11601(a)(3); *Abbott v. Abbott*, 130 S. Ct. 1983, 1989 (2010). The Convention aims “to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence.” Hague Convention preamble. The International Child Abduction Remedies Act (“ICARA”), 42 U.S.C. § 11601 et seq., implements the Convention.

The Convention seeks to deter child abductions by depriving an abductor of any jurisdictional advantage in a subsequent custody dispute. *See* Hague Convention art. 12; *see also* Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* (“Pérez-Vera Report”), in ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 429 (1980).<sup>1</sup> To this end, if a parent

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<sup>1</sup> As this Court recognized in *Abbott*, the Pérez-Vera Report is the “official history for the Convention and a source of background on the meaning of the provisions of the Convention

wrongfully removes a child from the child's country of "habitual residence," the Convention requires the automatic return of the child (subject to certain exceptions not before this Court), so that courts in the child's country of habitual residence can resolve any custody disputes. Hague Convention arts. 3, 12.

2. Petitioner Ava Heydt-Benjamin and respondent Thomas Heydt-Benjamin were married in June 2003. Pet. App. 11a. In summer 2004, the couple moved to Massachusetts so that respondent could pursue graduate studies. *Id.* Their daughter, I.H.-B., was born in Massachusetts in December 2005. *Id.*

In summer 2007, the family traveled to Zurich, Switzerland so that respondent could begin a three-month internship with IBM. Pet. App. 11a. While there, respondent was accepted into a three-year Ph.D program at the Swiss Federal Institute of Technology in Zurich and was offered ongoing employment with IBM. *Id.* The couple's son, L.H.-B., was born in Zurich in September 2007. *Id.*

In November 2007, the family returned briefly to the United States to prepare for its move to Switzerland. Pet. App. 11a. Petitioner and respondent put their furniture in storage, emptied respondent's office, and shipped a variety of household goods – including computers, clothing, books, musical instruments, toys, and baby supplies – to Zurich. *Id.* 35a, 61a, 65a. At the time of the move

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available to all States becoming parties to it." 130 S. Ct. at 1998 n.1 (quotation marks omitted).

to Switzerland, the family neither owned nor leased a residence in the United States. *Id.* 38a.

In January 2008, petitioner, respondent, and their children returned to Switzerland. Pet. App. 11a. They leased an apartment and furnished it with three thousand dollars' worth of furniture, including dressers, kitchen items, a bed, sofa, crib, television, and numerous other fixtures. *Id.* 20a, 37a-38a, 66a. Petitioner started a play group with local children. *Id.* 43a-45a, 67a. The couple endeavored to learn German, while respondent purchased a motorcycle, joined a rock-climbing club, and occasionally performed at local music clubs. *Id.* 40a-43a, 73a-74a. The family maintained medical insurance in Switzerland, *id.* 43a, and the children received regular check-ups from a Swiss physician, *id.* 46a. The children attended daycare, where they made friends, celebrated birthday parties, and went on field trips. *Id.* 20a, 46a, 54a. Petitioner took the children to visit Swiss museums, public parks, gardens, and community fairs. *Id.* 40a-41a, 54a. Apart from a visit to the United States during parts of July and August 2008, the children lived in Switzerland continuously between January 2008 and January 2010. *Id.* 11a-12a.

During this period, the relationship between petitioner and respondent deteriorated. Pet. App. 12a. In February 2009, petitioner left Switzerland to work temporarily in the United States. *Id.* Although the couple discussed the possibility that the children would accompany her, respondent eventually demanded that they remain in Zurich. *Id.* 20a-21a. In August 2009, respondent filed for divorce. *Id.* 75a.

Upon her return to Switzerland in September 2009, petitioner moved out of the family home. Pet. App. 12a. Because respondent no longer provided her with financial support, *id.* 71a, in October 2009, petitioner again traveled to the United States to take another temporary job. *Id.* 12a. She returned to Switzerland in December 2009 and continued to see the children regularly – both during the day and for overnight visits – through an informal agreement with respondent. *Id.* 12a, 53a, 55a-56a.

While petitioner visited her children frequently throughout January 2010, the informal arrangement with respondent was sufficiently strained that on January 14, 2010, petitioner formally filed an action in Swiss court seeking custody of her children. Pet. App. 4a; Petr. C.A. Br. 15.

On January 19, 2010, respondent's Swiss attorney advised him in an email that petitioner was likely to prevail in the Swiss custody case. Pet. App. 96a-97a. Seven days later, without petitioner's knowledge or consent, respondent fled with the children to his parents' home in New York. *Id.* 12a.

3. On February 4, 2010, petitioner filed this suit in the United States District Court for the Southern District of New York seeking the return of her children to Switzerland pursuant to the Hague Convention and ICARA. Pet. App. 77a-86a. Almost six weeks later, the district court denied relief under the Convention. *Id.* 19a. Although it acknowledged that respondent's abduction of the children was "motivated by forum shopping," *id.* 24a, the court nevertheless concluded that the removal was not "wrongful" within the meaning of the Hague

Convention because the children's habitual residence was the United States. *Id.* 25a.

To reach this conclusion, the district court applied the "shared intent" test employed in the Second Circuit to determine habitual residence. Pet. App. 14a. Under this test, a court inquires into the "shared intent of those entitled to fix the child's residence . . . at the latest time their intent was shared." *Id.* The answer to this question ordinarily resolves the habitual residence determination because there is a presumption that "the shared intent of the parents should control the habitual residence of the child." *Id.* (quoting *Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005)).

Based primarily on "credibility determinations" regarding the testimony given by petitioner, respondent, and both of respondent's parents over several days of evidentiary hearings, the court found that petitioner and respondent last shared an intention regarding their children's habitual residence in summer 2007, when the family temporarily resided in Switzerland during respondent's internship. Pet. App. 19a. At that point, the court concluded, the couple shared an intention to return to the United States at the end of the summer; this last shared intent therefore established the United States as the children's habitual residence. *Id.* Moreover, the court explained, although the family had moved to Switzerland in 2008 for respondent to start a three-year graduate program, there could be no mutual intent for the children to reside there because petitioner had apparently expressed some dissatisfaction regarding the move. *Id.* 18a, 22a.

Having decided that the parties' last shared intent occurred in late 2007 and was to fix their children's habitual residence in the United States, the court then considered whether the presumption created by that last shared intent could be rebutted by "evidence [that] unequivocally points to the conclusion that the child[ren] had acclimatized to the new location and thus . . . acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent." Pet. App. 14a, 25a (quoting *Gitter*, 396 F.3d at 134). Although petitioner's son had never lived in the United States, and her daughter had lived there only as an infant, the district court rejected the possibility that the children could have "become more Swiss than American." *Id.* 25a. Instead, the district court reasoned, the children were "in the position, not unlike children raised to parents in the foreign service or the military, who may be spending a few years of their young lives abroad but whose habitual residence is nevertheless, unquestionably, the United States." *Id.*

4. On appeal, the Second Circuit affirmed. Applying the test outlined in *Gitter*, the Second Circuit explained that it found "no error in either the district court's factfinding or its application of the *Gitter* shared intent standard." Pet. App. 5a.

Petitioner filed a petition for rehearing *en banc*, which was denied. Pet. App. 27a. This petition followed.

### **REASONS FOR GRANTING THE WRIT**

This case presents an ideal opportunity for the Court to resolve a widely acknowledged circuit split

on an important and recurring question of child abduction law. Nine federal courts of appeals and one state court of last resort starkly disagree over the role that parental intent should play in deciding a child's "habitual residence" for the purposes of the Hague Convention. Six courts of appeals – the First, Second, Fourth, Seventh, Ninth, and Eleventh Circuits – have adopted a test which presumes that the parents' last shared intent regarding their child's habitual residence is dispositive. In contrast, the Sixth Circuit and the Nevada Supreme Court have both held that the parents' intent is completely irrelevant in determining the child's habitual residence; instead, those courts consider only the child's objective circumstances and past experiences. Finally, the Third and Eighth Circuits likewise consider the child's factual experiences, but those courts also take parental intent into account as an additional factor.

This conflict is untenable because it leads to inconsistent application of our international treaty obligations – and thus to inconsistent results for similarly situated parents who seek the return of their children – based on geographic happenstance. Moreover, allowing the conflict to persist will provide child abductors with perverse incentives to engage in forum shopping within the United States by removing children to the jurisdictions in which courts are least protective of the rights of the parent who is left behind.

This case presents an appropriate vehicle for the resolution of the conflict, as the issue of habitual residence was litigated below and was the sole basis for the Second Circuit's decision. Certiorari is

further warranted because the Second Circuit's test for determining habitual residence is wrong on the merits, contravening the purpose, text, and history of the Hague Convention.

**I. Federal And State Courts Are Irreconcilably Divided Over The Role Of Parental Intent In Determining A Child's "Habitual Residence" Under The Hague Convention.**

The division of opinion among federal courts on how to determine a child's habitual residence under the Hague Convention is well recognized by courts in this country and abroad, as well as by commentators and even the Hague Conference on Private International Law.<sup>2</sup> *See, e.g., Vazquez v. Estrada*, No. 3:10-CV-2519-BF, 2011 WL 196164, at \*3 (N.D. Tex. Jan. 19, 2011) (describing three-way circuit split "as to what role the intentions of parents should play when determining a child's habitual residence");

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<sup>2</sup> The Hague Conference on Private International Law is an intergovernmental organization made up of seventy-two members, "[t]he purpose of [which] is to work for the progressive unification of the rules of private international law." Statute of the Hague Conference on Private International Law art. I (1955). The Conference is responsible for facilitating the drafting, negotiation, and ratification of international conventions addressing issues "such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status." Hague Conference on Private International Law, *Overview*, available at [http://www.hcch.net/index\\_en.php?act=text.display&tid=26](http://www.hcch.net/index_en.php?act=text.display&tid=26).

*Robert v. Tesson*, 507 F.3d 981, 989-90, 998 (6th Cir. 2007) (recognizing circuit split); *Punter v. Secretary of Justice*, [2007] 1 NZLR 40, ¶¶ 98-99 (CA) (N.Z.) (New Zealand Court of Appeals recognizing that the Second Circuit’s test “has not been accepted in all circuits of the United States Court of Appeals”); Peter McEleavy, Hague Conference on Private Int’l Law, *Aims & Scope of the Convention: Habitual Residence*, INCADAT, available at <http://www.incadat.com/index.cfm?act=analysis.show&sl=3&lng=1> (identifying the three different approaches taken in federal courts of appeals); Tai Vivatvaraphol, *Back to Basics: Determining a Child’s Habitual Residence in International Child Abduction Cases under the Hague Convention*, 77 FORDHAM L. REV. 3325 (2009) (noting “a split among courts on how to properly determine a child’s habitual residence”).

1. The Second Circuit and five other circuits apply a heavy presumption that a child’s habitual residence should be determined by “the shared intent of those entitled to fix the child’s residence (usually the parents) at the latest time that their intent was shared.” *Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005); *Nicolson v. Pappalardo*, 605 F.3d 100, 104 (1st Cir. 2010); *Maxwell v. Maxwell*, 588 F.3d 245, 251 (4th Cir. 2009); *Koch v. Koch*, 450 F.3d 703, 715 (7th Cir. 2006); *Mozes v. Mozes*, 239 F.3d 1067, 1075 (9th Cir. 2001); *Ruiz v. Tenorio*, 392 F.3d 1247, 1252-53 (11th Cir. 2004) (per curiam).<sup>3</sup>

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<sup>3</sup> Two state intermediate appellate courts have also adopted this test. See *In re S.J.O.B.G.*, 292 S.W.3d 764, 780

This presumption may be overcome only if “the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents’ latest shared intent.” *Gitter*, 396 F.3d at 134. Accordingly, as the Second Circuit has explained, this presumption is difficult to rebut: only in “relatively rare circumstances” will “the child’s acclimatization to [a particular] location . . . be so complete that serious harm to the child can be expected to result from compelling his return to the family’s intended residence.” *Id.*; see also *Mozes*, 239 F.3d at 1079; *Ruiz*, 392 F.3d at 1254.

2. In sharp contrast to the six courts of appeals that have adopted the “shared intent” test, the Sixth Circuit and the Nevada Supreme Court have squarely held that parental intent is irrelevant to a child’s habitual residence. Both of these courts instead hold that the determination of a child’s habitual residence should be based only on the objective circumstances of the child – such as the child’s physical presence in a country, the duration of residency, and evidence of acclimatization.

The Sixth Circuit first articulated this test in *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993). *Friedrich* involved a German father seeking the return of his one-and-a-half-year-old child, whom his wife – a member of the U.S. Army stationed in

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(Tex. App. 2009); *In re Marriage of Forrest & Eaddy*, 51 Cal. Rptr. 3d 172, 179-80 (Ct. App. 2006).

Germany – had abducted to the United States. *Id.* at 1398-99. In determining whether the child should be returned to Germany pursuant to the Convention, the Sixth Circuit rejected the mother’s argument that the United States was the child’s habitual residence simply because she “intended to return to the United States with [the boy] when she was discharged from the military.” *Id.* at 1401.

The court acknowledged that the mother “may well have intended for [the child] to move to the United States at some time in the future,” but it deemed the mother’s intent “*irrelevant* to our inquiry.” *Friedrich*, 983 F.2d at 1401 (emphasis added). Instead, it explained, the determination of habitual residence “must focus on the child, not the parents, and examine past experience, not future intentions.” *Id.* at 1401. Under this test, the court found the case to be “simple.” *Id.* at 1402. The boy had been “born in Germany and [had] resided exclusively in Germany” at the time of removal. *Id.* As a result, Germany was the child’s country of habitual residence.

In 2007, the Sixth Circuit reaffirmed that courts should determine a child’s habitual residence based “solely on the past experiences of the child, not the intentions of the parents.” *Robert*, 507 F.3d at 991 (citing *Friedrich*, 983 F.2d at 1401). The court further explained that a child’s habitual residence is the country where, at the time of removal, the child has been “present long enough to allow acclimatization, and where this presence has a degree of settled purpose from the child’s perspective . . . .” *Id.* at 993 (quotation marks omitted). In addition to physical presence and length of stay,

factors such as the child’s “social engagements,” “academic activities,” and “meaningful connections with the people and places” in a new country, along with the extent to which a child’s “personal belongings” are present in the country, are also relevant in determining the child’s degree of acclimatization and settled purpose. *Id.* at 995-97 (quotation marks omitted).

The Nevada Supreme Court has similarly rejected any reliance on parental intent in determining a child’s habitual residence. In *Vaile v. Eighth Judicial District Court*, that court held that “courts must look to the past experiences of the parties, and not to the parties’ future intentions.” 44 P.3d 506, 517 (Nev. 2002) (citing *Friedrich*, 983 F.2d at 1401). Like the Sixth Circuit, the court emphasized that the focus of the inquiry “is on the child, not the parents,” and that, as a result, “any subjective intentions that the parents harbor regarding where the child is to live are irrelevant.” *Id.*

3. The Third Circuit, like the Sixth Circuit and the Nevada Supreme Court, determines a child’s habitual residence by looking to the child’s experiences. More specifically, the court deems a country to be the child’s habitual residence when it is “the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child’s perspective.” *Karpenko v. Leendertz*, 619 F.3d 259, 263 (3d Cir. 2010).

Unlike the Sixth Circuit, however, the Third Circuit allows courts to give some consideration to parental intent in determining habitual residence. In

*Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995), the court acknowledged that the Sixth Circuit had deemed parental intent “irrelevant” to a determination of habitual residence. The Third Circuit nonetheless adopted a test in which the parents’ “shared intentions regarding their child’s presence” may be taken into account. *Id.* at 224.<sup>4</sup>

The Eighth Circuit similarly looks to the child’s objective circumstances to determine his habitual residence while also allowing consideration of parental intent as one factor. In that circuit, the factors “relevant to the determination of habitual residence” include “the settled purpose of the move to the new country from the child’s perspective, *parental intent* regarding the move, the change in geography, the passage of time, and the acclimatization of the child to the new country.” *Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010) (emphasis added) (quotation marks omitted); *see also Sorenson v. Sorenson*, 559 F.3d 871, 873-74 (8th Cir. 2009);

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<sup>4</sup> In circumstances involving very young children, the Third Circuit has accorded more weight to parental intent, based on its judgment that “[a] very young child . . . does not have [the] capability” to acclimatize and “acquire a sense of environmental normalcy.” *Whiting v. Krassner*, 391 F.3d 540, 550-51 (3d Cir. 2004) (parental intent important when infant was one year old at time of removal); *see also Delvoe v. Lee*, 329 F.3d 330, 332-34 (3d Cir. 2003) (parental intent important in determining habitual residence of two-month-old baby). In other words, absent any objective indicia of acclimatization, parental intent necessarily figures more prominently in the Third Circuit’s analysis.

*Silverman v. Silverman*, 338 F.3d 886, 898 (8th Cir. 2003) (en banc).<sup>5</sup>

4. Petitioner would prevail in the Third, Sixth, and Eighth Circuits, as well as in Nevada. In this case, the Second Circuit relied solely on what it regarded as petitioner and respondent's last shared intent to determine that their children's habitual residence was the United States. Pet. App. 4a-5a. But in the Third, Sixth, and Eighth Circuits and Nevada, a court would instead have begun by considering the children's physical presence in Switzerland, the length of their stay there, and other objective evidence of their acclimatization. See *Robert*, 507 F.3d at 993; see also *Feder*, 63 F.3d at 224.

All of this objective evidence points to Switzerland as the children's habitual residence. Like the child in *Friedrich*, who had lived in Germany for the entirety of his short life, petitioner's son was born in Switzerland and had *never* lived in

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<sup>5</sup> The Tenth Circuit and the New York Appellate Division have followed similar approaches. In *Kanth v. Kanth*, an unpublished opinion, the Tenth Circuit cited the Third Circuit's decision in *Feder* in upholding a district court's determination of habitual residence based on "an analysis of the children's circumstances and the parents' shared intentions." No. 99-4246, 2000 WL 1644099, at \*2 (10th Cir. Nov. 2, 2000). And in *People ex rel. Ron v. Levi*, the New York Appellate Division held that habitual residence refers to "a 'degree of settled purpose,' as evidenced by the child's circumstances in that place and the shared intentions of the parents regarding their child's presence there." 719 N.Y.S.2d 365, 367 (N.Y. App. Div. 2001) (citing *Feder*, 63 F.3d at 224).

the United States until respondent abducted him when he was twenty-eight months old.<sup>6</sup> Pet. App. 11a-12a. Similarly, petitioner's daughter had lived in the United States for only eighteen months before moving to Switzerland for more than two years. *Id.* Indeed, both children spent more time in Switzerland than the twenty-two months that the children in *Vaile* spent in Norway – a stay that the Nevada Supreme Court found sufficient to establish habitual residence. *Vaile*, 44 P.3d at 280.

Moreover, the children acclimatized to Switzerland during those two years. The children lived in the same apartment in Zurich for a year and a half prior to their abduction – an apartment that the family furnished with several thousand dollars' worth of furniture and decorations. Pet. App. 36a-38a, 65a-66a. During their time in Switzerland, the children also attended day care, made friends, visited Swiss museums, gardens, and parks, went to community fairs, and participated in a play group. *Id.* 40a-41a, 43a-46a, 54a-55a.

Even to the extent that courts in the Third and Eighth Circuits would also consider the intent of the children's parents, those courts would still conclude that the children's habitual residence was Switzerland. Although the district court found that

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<sup>6</sup> Although petitioner's son did visit the United States briefly during the winter of 2007 and summer of 2008, *see* Pet. App. 11a-12a, in *Friedrich* the Sixth Circuit easily determined that Germany was the child's habitual residence notwithstanding a similar visit by the child to the United States in that case. *See* 983 F.2d at 1399.

petitioner “never intended at any time relevant to this Court’s determination to have Switzerland be her children’s place of habitual residence,” Pet. App. 22a, both the Third and Eighth Circuits have held that one parent’s subjective reluctance to move her family to a new location cannot override evidence of actual acclimatization by the children. *See Feder*, 63 F.3d at 224; *Silverman*, 338 F.3d at 899; *see also Barzilay*, 600 F.3d at 918.

5. The courts of appeals are unlikely to resolve this conflict on their own. This question has arisen repeatedly in the circuits over the past eighteen years, but there is no sign of any emerging consensus on the relevance of parental intent. To the contrary, two courts of appeals have expressly recognized the conflicting approaches taken by other circuits but nonetheless rejected those approaches in favor of a different one. *See Mozes*, 239 F.3d at 1076 n.22; *Ruiz*, 392 F.3d at 1253 n.3.<sup>7</sup>

Other circuits have adopted a test to determine habitual residence and then declined to reconsider that approach, even in the face of the conflicting tests in other circuits. For example, since its decision in *Friedrich* nearly twenty years ago, the Sixth Circuit

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<sup>7</sup> Only the Fifth and the D.C. Circuits have yet to weigh in on the issue, though district courts in those circuits have relied freely on the decisions from other circuits. *See, e.g., Clausier v. Mueller*, No. 4:03-CV-1467-A, 2004 WL 906514, at \*1 (N.D. Tex. Apr. 27, 2004) (citing *Feder* for test that “[a] child’s habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child’s perspective”).

has on three separate occasions reaffirmed its initial view that parental intent plays no role in determining a child's habitual residence. *See Jenkins v. Jenkins*, 569 F.3d 549, 556 (6th Cir. 2009); *Simcox v. Simcox*, 511 F.3d 594, 602 (6th Cir. 2007); *Robert*, 507 F.3d at 991-93, 998 (acknowledging conflicting tests employed in Third and Ninth Circuits and reiterating that "focusing on the child's experience, and not the parents' subjective desires, best serves the Hague Convention's purposes"). Other circuits have similarly adhered to their original approaches.<sup>8</sup>

Finally, the question is so settled in the Second Circuit that decisions there routinely apply the *Gitter* test to determine habitual residence in summary orders, without any substantive discussion or analysis. *See, e.g.*, Pet. App. 1a; *Halaf v. Halaf*, 372 Fed. Appx. 176 (2d Cir. 2010); *Poliero v. Centenaro*, 373 Fed. Appx. 102 (2d Cir. 2010); *Daunis v. Daunis*, 222 Fed. Appx. 32 (2d Cir. 2007).

## **II. This Case Is An Appropriate Vehicle To Resolve The Question Presented.**

Certiorari is also warranted because this case is an appropriate vehicle to resolve the question of

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<sup>8</sup> *See Karpenko v. Leendertz*, 619 F.3d 259, 263 (3d Cir. 2010); *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 271-72 (3d Cir. 2007); *Karkkainen v. Kovalchuk*, 445 F.3d 280, 291-92 (3d Cir. 2006); *Whiting v. Krassner*, 391 F.3d 540, 546-47 (3d Cir. 2004); *Delvoye v. Lee*, 329 F.3d 330, 332-33 (3d Cir. 2003); *Barzilay v. Barzilay*, 600 F.3d 912, 917-18 (8th Cir. 2010); *Sorenson v. Sorenson*, 559 F.3d 871, 873 (8th Cir. 2009); *Papakosmas v. Papakosmas*, 483 F.3d 617, 622-23 (9th Cir. 2007); *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004).

which test courts should use to determine a child's habitual residence. That question was raised below, Petr. C.A. Br. 2, and squarely addressed by the district court and the Second Circuit, Pet. App. 2a-5a, 14a-17a. Moreover, the question is outcome determinative in this case: if the courts below had applied the tests espoused by either the Sixth Circuit or the Third and Eighth Circuits, they would have determined that the children's habitual residence was Switzerland. That determination, in turn, would have led the courts to conclude that the Convention's automatic return remedy applied, and that the children should be returned to Switzerland for the Swiss courts to resolve the couple's custody dispute.<sup>9</sup>

### **III. The Question Presented Is Profoundly Important And Recurs Frequently.**

Given the persistent conflict among U.S. courts over how to determine a child's country of habitual

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<sup>9</sup> The remaining elements of petitioner's Hague Convention claim are easily satisfied: there is no real dispute that petitioner had a right of custody when respondent abducted the children to the United States, *see* Petr. Trial Memo. 8-10, *Heydt-Benjamin v. Heydt-Benjamin*, No. 10-cv-0881 (S.D.N.Y. 2010), nor can respondent seriously dispute that petitioner was actually exercising that right given her regular contact with the children, Pet. App. 12a. Nor do any exceptions to the return remedy apply. As the district court strongly suggested, *id.* 24a, respondent cannot establish that there was a "grave risk that the children's return would expose them to physical or psychological harm or otherwise place them in an intolerable situation," *id.* 13a. In any event, if this Court were to grant certiorari, each of these issues could easily be resolved on remand. *See Abbott*, 130 S. Ct. at 1997 (remanding for consideration of "grave risk" defense).

residence, there are four reasons for this Court to address the question now.

1. The question of how courts should determine habitual residence is critical to the proper resolution of Hague Convention cases. The child's habitual residence is not only the "threshold issue" that a court must decide before considering the merits of any parent's petition brought under the Convention, *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995), but it is also – as the Ninth Circuit acknowledged in *Mozes*, 239 F.3d 1067, 1072 (9th Cir. 2001) – "often outcome-determinative" in cases brought under the Convention. If the court concludes that the country from which the child was removed was not his country of habitual residence, the Convention does not apply at all.

Not surprisingly, given its status as the threshold issue in any Convention case, habitual residence is frequently disputed. In just the first three months of this year, for instance, federal district courts decided eight cases involving contested determinations of a child's habitual residence.<sup>10</sup>

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<sup>10</sup> See *Nelson v. Petterle*, No. 2:11-CV-00140, 2011 WL 1048107, at \*6 (E.D. Cal. Mar. 18, 2011); *Boehm v. Boehm*, No. 8:10-CV-1986-T-27TGW, 2011 WL 863066, at \*3 (M.D. Fla. Mar. 10, 2011); *Roche v. Hartz*, No. 1:10-CV-1819, 2011 WL 841556, at \*5-\*6 (N.D. Ohio Mar. 7, 2011); *Barr v. Barr*, No. H-11-337, 2011 WL 797664, at \*2 (S.D. Tex. Feb. 28, 2011); *Johnson v. Johnson*, No. 11 Civ. 37(RMB), 2011 WL 569876, at \*2-\*3 (S.D.N.Y. Feb. 10, 2011); *Vazquez v. Estrada*, No. 3:10-CV-2519-BF, 2011 WL 196164, at \*3 (N.D. Tex. Jan. 19, 2011); *Seaman v. Peterson*, No. 5:10-CV-462 MTT, 2011 WL 124223, at \*9-\*10

2. The stakes in Hague Convention proceedings are unquestionably high. As Congress and this Court have recognized, “[a]n abduction can have devastating consequences for a child.” *Abbott v. Abbott*, 130 S. Ct. 1983, 1996 (2010). Among other things, it can trigger a “loss of community and stability,” as well as “loneliness, anger, and fear of abandonment.” *Id.* Indeed, “[s]ome child psychologists believe that the trauma children suffer from these abductions is one of the worst forms of child abuse.” H.R. REP. NO. 103-390 at 2 (1993). The Hague Convention exists to deter and mitigate these harms.

3. Review is also necessary to ensure a uniform interpretation of the Hague Convention within the United States – a goal that this Court implicitly recognized as important in deciding to grant certiorari in last Term’s Hague Convention case, *Abbott v. Abbott*, 130 S. Ct. at 1989. Without this Court’s intervention, the test used in the United States to determine “habitual residence” for purposes of the Convention will hinge solely on geographic happenstance. This is because ICARA authorizes a parent to file a petition for the return of her child only in the jurisdiction where the child is currently located. 42 U.S.C. § 11603(b). Thus, for example, if respondent had abducted the children to New Jersey instead of New York, courts there would have determined that their habitual residence was Switzerland simply because the Third Circuit –

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(M.D. Ga. Jan. 14, 2011); *McKie v. Jude*, No. 10-103-DLB, 2011 WL 53058, at \*7-\*15 (E.D. Ky. Jan. 7, 2011).

unlike the Second – does not treat parental intent as presumptively dispositive of a child’s habitual residence. This is precisely the result Congress sought to avoid when it implemented the Convention through ICARA. *See* H.R. REP. NO. 100-525, at 17-18 (1988) (Executive Communication submitted by the U.S. Department of State to the House of Representatives on Mar. 6, 1987) (“It is hoped that enactment of the bill will ensure greater uniformity in the Convention’s implementation and interpretation in the United States.”).

Worse still, such inconsistencies actually encourage forum shopping within the United States. Without a uniform test, a parent who lives abroad with his children but who seeks to obtain a more favorable custody determination through abduction can accomplish that goal by taking his children to whichever U.S. jurisdiction happens to have the most favorable test to determine habitual residence (even if he has no prior connection to that jurisdiction or does not intend to remain there), thereby ensuring that the left-behind parent will not be able to avail herself of the Convention at all.

4. Disagreement among the circuits has the further deleterious effect of discouraging the “uniform international interpretation of the Convention” that Congress specifically envisioned. 42 U.S.C. § 11601. By granting review and clarifying the test that applies in the United States, the Court can contribute to greater uniformity among member states and provide guidance to other nations where the law remains unsettled. Indeed, foreign courts have already looked to the United States on this very question. *See, e.g., L.K. v. Director-General*, (2009)

237 CLR 582, ¶ 28 (Austl.); *Punter v. Secretary of Justice*, [2007] 1 NZLR 40, ¶¶ 98-99 (CA) (N.Z.).

#### **IV. The Second Circuit’s “Shared Intent” Test Flouts The Purpose, Text, History, And International Interpretations Of The Hague Convention.**

By creating the presumption that custody disputes will be resolved in whichever country the parents last shared an intention to reside – rather than in the country in which the child was actually physically present and settled – the Second Circuit’s habitual residence test contravenes the purpose, text, and history of the Hague Convention. The Second Circuit’s interpretation is also at odds with that of numerous sister signatories.

1. As this Court explained in *Abbott*, the Hague Convention is “based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence.” 130 S. Ct. 1983, 1995 (2010). By keeping the child in his country of habitual residence while custody proceedings are ongoing, the Convention seeks to prevent the loss of a child’s “community and stability.” *Id.* at 1996.

The Second Circuit’s “shared intent” test, however, often leads to the loss of a child’s “community and stability.” In the Second Circuit’s view, the child’s habitual residence is the country in which his parents last shared an intent to reside, even when that country is a place where the child has never lived – as is true of petitioner’s son here – and is not the place to which the child has become acclimatized. This test allows the child to be

uprooted from his day-to-day surroundings and transplanted to a new environment for the duration of his parents' custody dispute, so long as – at some point in time – the parents harbored a mutual intent that he should reside elsewhere.

The Second Circuit's test for determining habitual residence also undermines the Convention because it lacks the predictability necessary to deter parents from abducting their children. Deciding a child's habitual residence under the "shared intent" test will often hinge on complex and unpredictable credibility determinations involving extensive testimony regarding past thoughts and conversations. Additionally, such credibility determinations will be especially difficult in light of the context in which international child abductions commonly occur, in which the relationship between the two parents has become so poisonous that one parent is willing to take the child to another country to gain the upper hand in a custody dispute. Not only do the parents almost always disagree as to the child's habitual residence – as both the Second and Ninth Circuits have acknowledged, *see Gitter v. Gitter*, 396 F.3d 124, 133 (2d Cir. 2005); *Mozes v. Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001) – but they often disavow prior expressions of intent and accuse one another of fabricating and misconstruing testimony.

A test that relies on objective, child-centered factors, by contrast, provides considerably clearer ex ante guidance and deterrence than one that relies primarily on parental intent. Objective factors relating to the child's experience – such as a child's physical presence and the amount of time spent in a

country, and whether the child was enrolled in school and participated in social activities – can be easily demonstrated through credible evidence.

2. Three words in the text of the relevant Hague Convention articles – “child,” “habitually,” and “resident,” arts. 3-4, 12 – confirm that a child should be returned to the country where the child has grown settled and acclimatized over time, rather than to some country in which the parents may wish to live in the future.

To begin with, the Second Circuit’s test cannot be squared with the Convention’s choice of the word “resident.” Although that word most naturally refers to past and current physical presence, the Second Circuit’s approach ignores a child’s actual physical presence by focusing instead on the subjective future intentions of the child’s parents. In this case, the Second Circuit found the children to be habitually “resident” in the United States even though neither child had been physically present in the United States for more than two years apart from a vacation there during parts of July and August 2008. Pet. App. 11a-12a. Indeed, with the exception of two trips to the United States, the couple’s son had spent his *entire life* outside the United States. *Id.*

The Second Circuit’s test also cannot be reconciled with the Convention’s use of the word “habitually” to modify “resident.” The word “habitually” signifies that, whatever else may be true of a child’s residence, at the very least it must be the child’s ordinary or customary place of living. *See, e.g., Cameron v. Cameron*, [1995] 1996 S.C. 17 (Sess.) (Scot.) (habitual residence is “the same for all practical purposes” as “ordinary residence”)

(quotation marks omitted). Yet the Second Circuit's test presumes a child's "habitual" residence to be the country where her parents hoped to live in the future, rather than the country in which the child has been living as an ordinary matter. In this case, for instance, it is difficult to imagine – and neither the district court nor the Second Circuit explained – how the children could have possibly been more "habitually" resident in the United States than in Switzerland at the time of removal.

Finally, as even the Second Circuit has acknowledged, *see Gitter*, 396 F.3d at 132, the Convention makes clear that the relevant inquiry is the child's habitual residence, and not that of her parents. *See* Hague Convention art. 3 (referring to "the State in which the *child* was habitually resident") (emphasis added). The Second Circuit's approach ignores this language by focusing on parental intent instead of the child's own circumstances.

3. The history of the Hague Convention further reinforces that the Second Circuit's shared intent test is incorrect.

a. First, the Hague Conference consciously decided to attach the availability of the return remedy to the child's removal from his "habitual residence" rather than the child's "domicile." The determination of an individual's domicile normally requires an inquiry into intent. *See, e.g., Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989) (domicile requires "a certain state of mind concerning one's intent to remain there"); *see also* CODE CIVIL [C. CIV.] art. 103 (Fr.) (domicile requires "intention to fix one's main establishment");

SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 23 (Switz.) (domicile is the place where a person “resides with the intention of settling there”). Moreover, determinations regarding a *child’s* domicile hinge on the intentions of the child’s parents. *See Mississippi Band of Choctaw Indians*, 490 U.S. at 48 (a child’s domicile will sometimes be “a place where the child has never been” because it is determined by parental intent).

It was for this exact reason that the Hague Conference declined to use the term “domicile” in its various conventions, opting instead for the term “habitual residence.” *See* P. Bellet & B. Goldman, *Explanatory Report on the 1970 Hague Divorce Convention* (“Bellet Report”), in ACTES ET DOCUMENTS DE LA ONZIÈME SESSION, TOME II, at 10-11 (1968) (Convention deliberately used habitual residence in lieu of domicile); Pérez-Vera Report at 445 (habitual residence regarded as different from domicile); Michel Verwilghen, *Explanatory Report on the 1973 Hague Maintenance Conventions*, in ACTES ET DOCUMENTS DE LA DOUZIÈME SESSION, TOME IV, at 441 (1972) (habitual residence is a concept “distinct, in particular, from domicile”). The explanatory report on the 1970 Hague Divorce Convention, for example, specifically cites the intent element of domicile as a reason for rejecting that term in favor of the term “habitual residence.” *See* Bellet Report at 11; *see also* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, REPORT OF THE SECOND SPECIAL COMMISSION MEETING, Pt. Three, Response to Question 5 (1993).

b. Second, although none of the various Hague Conventions that use the phrase “habitual residence” have specifically defined the term,<sup>11</sup> the explanatory reports that accompany these conventions indicate that a child’s “habitual residence” should be determined by reference to the child’s objective experiences and not to parental intent. As the Pérez-Vera Report explains, the Convention’s object is to prevent situations in which “the child is taken out of the family and social environment in which its life has developed” – a definition that leaves no room for habitual residence determinations that look presumptively to parental intent divorced from objective factors involving a child’s experience. Pérez-Vera Report at 428; *see also* W. de Steiger, *Explanatory Report on the 1961 Hague Protection of Minors Convention*, in ACTES ET DOCUMENTS DE LA NEUVIÈME SESSION, TOME IV, at 14 (1960) (describing habitual residence as “the effective center of the child’s life” (Eng. trans.)). The Pérez-Vera Report’s further declaration that “children must no longer be regarded as parents’ property, but must be recognised as individuals with their own rights and needs,” only reinforces the point. Pérez-Vera Report at 431 (quotation marks omitted).

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<sup>11</sup> *See, e.g.*, Paul Lagarde, *Explanatory Report on the 1996 Hague Child Protection Convention*, in PROCEEDINGS OF THE EIGHTEENTH SESSION, TOME II, at 553 (1996) (“A positive definition [of habitual residence] had been proposed . . . but it went against the Conference’s tradition and received no support.”).

The 2006 Special Commission Report on the Child Abduction Convention confirms that an objective, child-centered approach to habitual residence is the correct one. That report recognized the use of conflicting tests to determine habitual residence, and it described a “wide consensus” that courts should adopt a uniform approach based on factual considerations such as “the child’s schooling, the time spent in one place, the settling of the family in a certain place, and the integration of the child.” HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, REPORT ON THE FIFTH MEETING OF THE SPECIAL COMMISSION 44-45 (2006). In short, the history of the Hague Convention confirms what the Convention’s purpose and text already make clear: the Second Circuit’s test is inconsistent with the Convention’s intent that a child’s habitual residence will be the country to which she has grown accustomed over time.

4. In construing the terms of a treaty, “the opinions of our sister signatories [are] entitled to considerable weight.” *Air France v. Saks*, 470 U.S. 392, 404 (1985) (quotation marks omitted). Although the other signatory states have yet to reach consensus on a single test to be used in determining a child’s habitual residence, several foreign courts have recently rejected the Second Circuit’s view that a child’s habitual residence should be presumptively based on parental intent. In a 2009 decision, for instance, the European Court of Justice made clear that parental intent is just one factor to be considered in determining habitual residence. Case C-523/07,

2009 E.C.R. I-02805 ¶¶ 38-40.<sup>12</sup> The ECJ explained that courts should also focus on the child's objective experiences, as reflected by his "physical presence" in a particular country, the "duration" and "regularity" of his residence there, his "attendance at school," and his "social relationships." *Id.* ¶¶ 38-39.<sup>13</sup>

Other countries' courts have similarly rejected the view that parental intent is presumptively dispositive of a child's habitual residence. The Australian High Court, for instance, has stated that parental intent is "not to be given controlling weight" in determining a child's habitual residence, *L.K. v. Director-General*, (2009) 237 CLR 582, ¶ 28 (Austl.),

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<sup>12</sup> The ECJ issued its decision with respect to the test for determining a child's habitual residence under an EU Regulation, Council Regulation 2201/2003, arts. 11, 60, 2003 O.J. (L 338) (EC), which incorporates the terms of the Hague Convention.

<sup>13</sup> Because the European Union has incorporated the Hague Convention into the body of EU law through Regulation 2201, arts. 11, 60, 2003 O.J. (L 338) (EC), the ECJ's construction of the habitual residence test is binding on all twenty-seven EU member states except Denmark, *id.* (31), all of which are, in turn, signatories to the Hague Convention. *See id.* art. 72 ("This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community."); Court of Justice of the European Union, *Jurisdiction*, available at [http://curia.europa.eu/jcms/jcms/Jo2\\_7024/](http://curia.europa.eu/jcms/jcms/Jo2_7024/) ("[A] Court of Justice [reply to a reference for a preliminary ruling] is not merely an opinion, but takes the form of a judgment or reasoned order. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given. The Court's judgment likewise binds other national courts before which the same problem is raised.").

and New Zealand appellate courts have noted that parental intent, “albeit important, is only one factor to be taken into account,” *S.K. v. K.P.* [2005] 3 NZLR 590, ¶75 (CA) (N.Z.); see also *Punter v. Secretary of Justice*, [2007] 1 NZLR 40, ¶ 106 (CA) (N.Z.). And the Hague Conference has identified additional countries whose courts apply a “child-centred, factual approach” in determining a child’s habitual residence. See Peter McEleavy, Hague Conference on Private Int’l Law, *Aims & Scope of the Convention: Habitual Residence*, INCADAT, available at <http://www.incadat.com/index.cfm?act=analysis.show&sl=3&lng=1> (citing cases from Germany, Switzerland, and Quebec, Canada). This Court should not permit this country’s law to diverge from such international decisions, particularly in the absence of this Court’s consideration of the issue.

**CONCLUSION**

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

Respectfully submitted,

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