No. 10-1303

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

REPLY BRIEF FOR THE PETITIONER

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Respondent does not seriously dispute that the circuits are split over the proper standard for determining a child's country of "habitual residence" under the Hague Convention. Nor does he dispute the importance of this issue, which is the often-litigated gateway determination in every Hague Convention case. Nor is the Convention's own importance subject to dispute. Thus, *Abbott v. Abbott*, 130 S. Ct. 1983 (2010), presented the narrower question of whether a *ne exeat* right is a "right of custody" under the Convention. The Court called for the views of the Solicitor General on whether certiorari should be granted, and the United States urged this Court to grant review, including because of the recurring importance of litigation under the Convention. Because respondent's arguments against review are unpersuasive, certiorari should be granted.

1. Respondent essentially concedes that the circuits are split over the proper test for determining the child's habitual residence. *See* BIO 15, 17-18. His attempts to minimize the extent of the conflict are unpersuasive.

a. Respondent's statement that in the Second Circuit intent can "be overcome by a showing of other relevant factors," BIO 14, is not a fair characterization of that court's precedent, which refuses to consider factors other than shared parental intent absent proof that "serious harm to the child can be expected to result from compelling his return to the family's intended residence," Pet. App. 3a (quoting *Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir.

2005)). Respondent identifies no case in which a court in the Second Circuit has found this exceptionally rigorous standard to be met. And indeed, petitioner's research reveals only three such cases in which the standard has even arguably been met in *all of* the jurisdictions that apply the same test as the Second Circuit. *Haro v. Woltz*, No. 10-C-389, 2010 U.S. Dist. LEXIS 85590, at *11 (E.D. Wis. Aug. 19, 2010); *Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1146, 1149 (E.D. Wash. 2007); *Lockhart v. Smith*, No. 06-cv-160-P-S, 2006 U.S. Dist. LEXIS 77424, at *9 (D. Me. Oct. 20, 2006). By contrast, in other circuits, factors other than intent *must* be considered, without having to meet this very high threshold.

b. The Sixth Circuit unquestionably would have reached the opposite result in this case because, as the petition explains, Pet. 15-17, all of the objective evidence regarding the children's perspective leads to the conclusion that Switzerland was their country of habitual residence at the time of the abduction. The children in this case had unquestionably been raised principally in Switzerland; in fact, one of them had never resided in the United States at all. Respondent fled with the children to this country only after his Swiss lawyer told him that there was a substantial chance that the Swiss courts would award petitioner custody of the children in the couple's *ongoing* Swiss custody proceeding, and the federal district court found accordingly that respondent abducted the children to engage in "forum shopping." Pet. App. 24a. But the lower courts deemed any facts regarding the children's circumstances to be irrelevant as a matter of law under the Second

Circuit's standard, which looks to the last shared intent of the parents as the effectively exclusive determinant of the child's habitual residence. *Id.* 3a, 14a.

Respondent's contrary assertion that the Sixth Circuit's "actual jurisprudence has been shifting to more closely match the dominant view," BIO 20, is inaccurate. As an initial matter, respondent does not seriously try to distinguish *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993), in which the Sixth Circuit held that a child who was younger than petitioner's son and who had never lived in the United States was a habitual resident of Germany. Instead, respondent speculates only that the Second Circuit might have decided the case the same way because there was "no evidence that Mr. Friedrich ever intended to leave Germany." BIO 18. But this misses the point: the Sixth Circuit did not discuss Mr. Friedrich's intent only because that factor was irrelevant as a matter of law under its jurisprudence.

Nor have courts in the Sixth Circuit "chipped away" at that clear rule. *Contra* BIO 19. To the contrary, as the petition explained (at 12-13 & 18), the Sixth Circuit itself has repeatedly acknowledged the conflicting tests employed in other circuits but adhered to its view that parental intent plays no role in determining a child's habitual residence.

Respondent cites only district court decisions, and they do not call the Sixth Circuit's rule into question. *Maynard v. Maynard*, 484 F. Supp. 2d 654, 660 (E.D. Mich. 2007), found it "unnecessary to decide whether the parents' intent should be considered." Any discussion of the parents' intent was dictum illustrating that the court would have

reached the same result even if intent were considered.

McKie v. Jude, 2011 U.S. Dist. LEXIS 1834 (E.D. Ky. Jan. 7, 2011), reached the unremarkable conclusion that a child who had spent only one of twelve months of his life abroad was habitually resident in the United States. Although the court's habitual residence analysis suggested that judge's view that parental intent could play a role in cases involving newborns, the court also made clear that even under the purely objective *Friedrich* analysis, the child's "habitual residence would still be the United States." *Id.* at *45.

c. The Third and Eighth Circuits would also have ruled for petitioner. *See* Pet. 16-17. Those courts deem the child's perspective to be the focus of the habitual residence determination, *see* Pet. 13-15, but also allow consideration of parental intent as one of the factors in the habitual residence enquiry – a standard that cannot be reconciled with the Second Circuit's insistence that shared parental intent is presumptively dispositive.

Contrary to respondent's argument (BIO 21-22), the district court's finding here that the children had not "somehow become more Swiss than American" does not suggest that he would have prevailed in the Third or Eighth Circuit. The district court in this case was considering whether this was one of the rare cases in which the children were so acclimatized as to overcome the presumption in favor of parental intent. *See supra* at 1-2 (describing exceptionally rigorous standard that must be met to overcome presumption). But the Third and Eighth Circuits would never have started with such a presumption.

Those courts would instead undertake a broader inquiry, looking at "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).

A decision issued by the Eighth Circuit after the filing of the petition vividly illustrates the conflict. In *Stern v. Stern*, 639 F.3d 449 (8th Cir. 2011), *pet. for reh'g pending* (filed June 3, 2011), the Eighth Circuit criticized precedent adopting the standard applied in this case, and it reiterated the "contrast" between the circuits' competing standards. *Id.* at *7 (reporter pagination not yet available). As in this case, the father in *Stern* argued that the parents' intent to eventually return home (to Israel) after the mother completed her Ph.D studies in Iowa rendered Israel the child's place of habitual residence. But the Eighth Circuit rejected that argument, explaining that even if "one or both parents intended to return [to Israel] eventually," the "parties maintained no home in Israel after coming to Iowa," the father closed down his business in Israel before "rejoining his family in the United States," and "[a]ny agreement of the pair to return to Israel would have involved staying in the United States for the indefinite amount of time it would take [the mother] to finish her doctorate." *Id.* at *9. Those facts cannot be fairly distinguished from this case, and the Eighth Circuit thus would have been compelled to deem Switzerland the country of habitual residence of these parties' children.

Although the Third Circuit alone grants additional weight to the parents' shared intent in cases involving extremely young children, *see* BIO 17, Pet. 14 n.4 (citing *Whiting v. Krassner*, 391 F.3d 540, 550-51 (3d Cir. 2004); *Delvoye v. Lee*, 329 F.3d 330, 332-34 (3d Cir. 2003)), the children in this case are not so young. Here, the children were two and four years old when respondent abducted them from Switzerland. They were involved in a play group and certainly were aware of their familial surroundings in Zurich.

d. The petition also demonstrated that, as in *Abbott v. Abbott*, certiorari is warranted because the question presented is also the subject of an established conflict among signatory nations to the Hague Convention. Respondent also does not contest the showing of *amici* that decisions of U.S. courts interpreting the Convention are an important influence on the decisions of other signatory states.

Respondent errs in denying the important role of foreign rulings in the certiorari determination because "[c]ourts of other countries have also consistently *looked to* the intent of the parents . . . in determining habitual residence under the Hague Convention." BIO 25 (emphasis added). Foreign rulings that "look to" the parents' shared intent as one relevant factor among many cannot be reconciled with the Second Circuit's general refusal to consider any other factor.

Respondent thus ignores the 2009 decision of the European Court of Justice holding that parental intent is just one factor to be considered in determining habitual residence, in addition to the child's objective experiences. *See* Pet. 29-30. As the

petition explained, that interpretation is binding on twenty-six European Union members, all of which are Hague Convention signatories – including England and Scotland, on whose decisions (circa 1989, 1990, and 1995) respondent relies. Thus, even to the extent that there is no consensus on the proper test for habitual residence, the current trend is much more accurately described as moving toward a child-centered approach that may include consideration of parental intent.

Even the decisions on which respondent relies provide scant support for his position. He cites the Australian High Court's decision in *L.K. v. Director-General*, (2009) 237 CLR 582, at *8 (Austl.), for the proposition that the "examination of a person's intentions will usually be relevant to a consideration of where that person habitually resides," BIO 25, but conveniently omits that court's statement – in the same case – that parental intent is "*not to be given controlling weight*" (emphasis added).

2. The Second Circuit's near exclusive reliance on the shared intent of the parents cannot be reconciled with the plain text of the Convention. The Convention applies when a "child" has been wrongfully removed from the country "in which the child was habitually resident immediately before the removal or retention." Pet. App. 88a (Article 3(a)). That language most naturally requires some degree of physical presence by the child in the place of habitual residence. *See* Pet. 25. But here, the parties' son had never lived in the United States, and their daughter had spent the majority of her life elsewhere. On respondent's contrary interpretation of the Convention, even if he had abducted the

children to Brazil, rather than the United States, the Second Circuit would deem the *United States* rather than Switzerland to be the children's habitual residence.

Respondent's contrary argument that the United States was the children's habitual residence relies principally on his own self-serving testimony (which the district court did not credit, *id.* 18a-19a, 23-24a) in an attempt to suggest that petitioner was less than devoted to her children (a claim the district court affirmatively rejected, *id.* 23a-24a). But in any event, the issue is the habitual residence of the children, not petitioner.

To the extent that respondent relies on the district court's finding that petitioner intended *eventually* to raise her children in the United States, *id.* 21a, 23a, that argument should have no bearing on where the children were habitually resident *at the time* respondent abducted them. Respondent's insistence, and the Second Circuit's conclusion, that a child has habitually resided in a place where he has never resided at all underscores the degree to which that court's test is divorced from the actual text of the Convention.

Respondent next argues that the Second Circuit's exclusive reliance on the shared intent of the parents would "further[] the goals of the Hague Convention," BIO 26, because it would allow the children to remain in the United States, where their father and grandparents now are, and where their parents intended them to live. The Convention embodies a judgment that the best interests of children collectively are served by returning wrongfully removed children to the country of their habitual

residence, so that courts in that country can resolve any disputes over custody. *Abbott v. Abbott*, 130 S. Ct. at 1995. Concerns about the child's welfare are resolved under other provisions of the Convention not at issue here.

Moreover, as a result of respondent's actions in abducting the child to secure a more sympathetic forum in the United States – which the district court characterized as "forum shopping," *see* Pet. App. 24a – there are now ongoing custody proceedings in two different fora, the United States and Switzerland. Once again, this is precisely the kind of conduct that the Convention seeks to deter. Further, the fact that the proceedings remain ongoing in the Swiss family court strongly suggest that the Swiss court regards itself as having jurisdiction over the case (which is in turn a good indicia that the children's habitual residence is in fact Switzerland).

3. Nor is there any credence to respondent's suggestion that certiorari is not warranted because both petitioner and respondent are now in the United States and – among other things – lack a "valid Swiss residency permit." BIO 29. Many of these purported obstacles to this Court's review are problems of respondent's own making: he no longer has a job in Switzerland, for example, because he abducted the children to the United States, which in turn forced petitioner to follow him. And the visa issue is just a straw man; there is no reason to believe that either parent would be unable to return to Switzerland for further proceedings in the family court there. *See* Passports & Visas, *available at* http://www.myswitzerland.com/en/travel/information/Entry/passport-visa.html (visited June 9, 2011)

("official website of Swiss tourism" explaining that, for U.S. residents, no visa required for stay of less than ninety days). Once again, the whole point of the Hague Convention is that a custody determination should be made by the courts in the child's country of habitual residence; respondent cannot cite these purported obstacles to preclude this Court from granting review to resolve the question of how a determination of habitual residence should be made.

Relatedly, respondent cannot plausibly argue that the children cannot be returned to Switzerland because they, along with petitioner and respondent, are in the United States and they have become attached to him, their grandparents, and the United States. Such an argument is precluded by the Convention. *See* Pet. App. 89a (Article 12 of the Convention allows, but does not require, judge to decline to order return of child who is "now settled in its new environment" only when petition for the child's return was filed more than a year after abduction – a scenario not present here). And with good reason: it perversely allows the abducting parent to benefit from his unlawful conduct. It would also place a left-behind parent such as petitioner in an impossible bind that the drafters of the Convention could not have intended.: she could risk waiving her Hague Convention claim by following the abducted children to the new country so that she can see them; or she could preserve the Convention claim by staying in the children's country of habitual residence, even if that residence is a continent away.

Nor does the recent decision by a New York intermediate appellate court somehow "complicate[] Petitioner's ability to get the result she seeks."

Contra BIO 30. As even respondent acknowledges, that decision is "independent and apart from the district court's findings on habitual residence," *id.*; all that the court did was to allow respondent's custody suit to move forward in state court. *See* Reply App. 1a-3a. Respondent certainly cannot invoke the mere existence of state-court custody proceedings as an excuse to prevent petitioner from obtaining this Court's review of the Second Circuit's decision. If this Court were to grant review and reverse, and on remand the district court were to hold that Switzerland was the children's habitual residence, the New York court's holdings on custody would be irrelevant.

The Tenth Circuit's decision in *Navani v. Shahani*, 496 F.3d 1121 (10th Cir. 2007), on which respondent relies, *see* BIO 30, actually supports petitioner on this point. In that case, a mother appealed a district court decision granting the father's Hague Convention petition, which sought the child's return to England, on the ground that the father lacked sufficient "rights of custody" to trigger the Convention's protections. The Tenth Circuit dismissed the appeal as moot in light of a decision by a family court in England – which in that case was indisputably the child's country of habitual residence – making clear that the father enjoyed full rights of custody. The court reasoned that it would be unable to order any relief because, even if it were to agree with the mother that the district court decision was erroneous, the only remedy for the error "would be to order [the child's] return to the United States to be reunited with" his mother – a scenario specifically prohibited by the English custody order. Moreover,

the Tenth Circuit made clear, the very purpose of the Hague Convention is "[t]o defeat attempts to re-litigate custody matters in a foreign country" by "requir[ing] contracting states to respect custody orders issued by the country of the child's habitual residence and forbid[ding] contracting states from deciding anew the underlying merits of custody orders."

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari and *amicus* brief, certiorari should be granted.

Respectfully submitted,

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