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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it is proper for a court to consider a factual finding that the American parents of very young children -- aged one and three for much of the time at issue -- intended that those children, also American citizens, return to the United States following their father's temporary work-study appointment abroad in determining that those children's "habitual residence" under the Hague Convention was the United States, when all or all but one of the Circuits to have considered the issue have held that such intent is relevant to that determination.

2. Whether it is proper for a court to consider a factual finding that two very young American children were not "acclimatized" to Switzerland in determining that their "habitual residence" is the United States, given that the children's connection to the forum was minimal, neither of the parents or their families reside in Switzerland, or have any continuing connection to that country, and that the parent seeking removal has no demonstrated ability to return to Switzerland.

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STATEMENT OF THE CASE

This case presents an entirely unremarkable question under the Hague Convention on the Civil Aspects of International Child Abduction, dated October 25, 1980 and 42 U.S.C §11601 *et seq.,* the International Child Abduction Remedies Act ("ICARA") (the "Hague Convention" or "Convention"): Can the "habitual residence" of two very young children (one and three for most of the time at issue) who lived abroad temporarily with their American parents during their father's graduate studies be determined with reference to the shared intent of the parents that the children would return to the United States. Virtually all of the Circuits have answered in the affirmative and have held that such parental intent is relevant, if not dispositive, because very young children are not generally capable of deciding their own residence or becoming meaningfully acclimatized to a foreign forum. The Sixth Circuit is the only Circuit to have suggested that parental intent is not a relevant factor, and it did so in a case very different from the one at bar (not least because it involved one parent who was a citizen of the foreign forum). That decision has been criticized by numerous other courts, and indeed in a subsequent decision, the Sixth Circuit has recognized that parental intent may be a relevant factor and a district court in that Circuit has so held. Thus, petitioner's claim that the Circuits are "intractably" split simply does not bear scrutiny. Not surprisingly,

many foreign jurisdictions that have considered the relevance of parental intent to the habitual residence determination have also reached decisions consistent with the Second Circuit's decision here.

Nor would this case be a good vehicle for certiorari even were there an outcome-determinative split among the Circuits (which there simply is not). Here, neither of the parents has any intent, desire or indeed ability to return to Switzerland or leave the United States. Apart from the federal action challenged here, the parties have been involved in a separate divorce proceeding since 2009 in New York State, the jurisdiction of which was recently affirmed by the New York Appellate Division on distinct grounds not at issue in this Petition. There is simply no reason to consider the almost hypothetical question of whether Switzerland could possibly determine the custody of these children - children who have at all times, at consent of Petitioner and pursuant to court order, remained in the custody of Respondent. [1]

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[1] We are in receipt of the motion and brief of Professors Linda D. Elrod and Robert G. Spector in support of the Petition and asking the Court to resolve the perceived conflict among the circuits. As discussed, *infra,* at 11-20, we submit that the degree of "conflict" among the circuits on the issue of parental intent is not meaningful, particularly as applied to the facts of this case, *amici*'s elaborate hypotheticals notwithstanding, there is nothing presented on the facts here that would lead to a different outcome in any jurisdiction.

A brief recitation of the facts is necessary to correct several misperceptions created by Petitioner's brief.

Petitioner, Ava Heydt-Benjamin, and Respondent, Thomas Heydt-Benjamin, are both American citizens who were raised, educated and married in the United States. (C.A. App. 65-66, C.A. App.127-128, Pet. 9a-Pet. 10a.)[2]. They have two children: I H-B, born December 30, 2005, and L H-B, born September 28, 2007 (C.A. App.132, C.A. App.66-67, Pet. 11a), both of whom are also American citizens (C.A. App. 66, C.A. App.132, Pet. 10a) (the "Children"). Neither the parents nor the Children have Swiss citizenship.

After graduating from Yale and spending a few years teaching high school in New York, Respondent attended the University of Massachusetts where, in 2007, he received his Masters Degree. While at the University of Massachusetts, Respondent was accepted to a three-month internship program at IBM in Zurich, Switzerland (C.A. App. 130, Pet. 11a). Petitioner, who was pregnant at the time with the couple's second child, was reluctant to travel to Switzerland, yet agreed to follow Respondent, along with I H-B (C.A. App. 66, C.A. App. 259). The parties agreed that their stay in Switzerland would last three months, following which they would return to the

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[2] References thus "C.A. App._" are to the Appendix filed with the Second Circuit and "Pet. __" are to Petitioner's Appendix to the Petition

United States (C.A. App. 67, C.A. App. 130, C.A. App. 131, Pet. 19a). The parties put much of their furniture in storage (C.A. App. 130, Pet. 20a. When they arrived in Switzerland, Petitioner entered the country on a tourist visa (C.A. App. 67, C.A. App. 132). L H-B was born during this brief stay in Switzerland (Pet. 11a).

While in Switzerland, Respondent was accepted to a three-year pre-doctoral program sponsored by IBM, to begin in 2008 in Zurich (C.A. App. 68, C.A. App. 133, Pet. 11a). The parties agreed to return to the United States as soon as possible after the conclusion of Respondent's program (C.A. App. 133). Prior to commencing the program, in November 2007, the family returned to the United States, to the home of Respondent's parents in New York, where they remained for the duration of the year (C.A. App. 132, Pet. 11a).

In January 2008, the parties and the Children returned to Switzerland for what was to be a three-year temporary stay (C.A. App. 264, C.A. App. 69, Pet. 11a). This time Petitioner and the Children held one-year renewable temporary residency permits (C.A. App. 134, C.A. App. 318).

In early July 2008, Petitioner and the Children again returned to the home of Respondent's parents in New York, where Respondent then joined them and the family remained through the end of August 2008 (C.A. App. 80, C.A. App. 136, C.A. App. 304, Pet. 12a).

Soon after the family returned to Switzerland in September (C.A. App. 138), Petitioner told Respondent of her intention to return to New York for a couple of months with the Children so that she could enroll in an art internship (C.A. App.138, C.A. App.-81). Petitioner intended once again that the Children would reside with Respondent's parents at their home in New York (C.A. App. 138). Respondent consented to the trip and purchased round-trip airline tickets for Petitioner and the Children, to be used in March 2009 (C.A. App. 138 - 139).

Soon after making these plans, however, Petitioner changed her stated intentions regarding the trip. She told Respondent that her plans were more "open ended" and that her stay in the United States would extend for several more months, into the summer of 2009 (C.A. App. 253). She declared her intention to leave the Children with Respondent's mother in New York while she traveled in the United States (C.A. App. 305, Pet. 20a).

Contrary to what she now contends in her Petition, Petitioner did not leave Switzerland in 2009 "to work temporarily in the United States." Petition, p. 4. Rather, as she disclosed to Respondent, Petitioner was involved in an online relationship with a former boyfriend of hers (C.A. App. 139), with whom she intended to meet up when she returned to the United States. Learning this, Respondent objected and withdrew his consent to the Children's participation in this trip (C.A. App. 141).

Petitioner then decided to leave the Children behind with respondent and nevertheless returned to the United States in February 2009, making Respondent the *de facto* custodial parent (C.A. App. 276, Pet. 20a). When she left, Petitioner took essentially all her belongings leaving very little in Switzerland (C.A. App. 143). She did, however, leave her wedding rings. (C.A. App. 143).

After arriving in the United States, Petitioner learned that the art installation project for which she purportedly returned to the United States had been canceled (C.A. App. 275). Nevertheless, she remained in the United States for the next seven months (C.A. App. 276, Pet. 12a). She did not contact the Children for approximately four months (C.A. App. 274, C.A. App. 148).

In August 2009, while Petitioner was living in the United States, Respondent commenced an action for divorce in New York Supreme Court, Putnam County, seeking, *inter alia*, custody of the Children (the "Matrimonial Action") (C.A. App. 149 –-150, Pet. 12a).

Petitioner then flew back to Switzerland in September, 2009 (C.A. App. 85, Pet. 12a), where she sublet a room in an apartment (C.A. App. 315, Pet. 12a). Respondent continued to have primary custodial responsibility for the Children (C.A. App. 315, Pet. 12a).

A month after returning to Switzerland, Petitioner announced that she had an "opportunity" to earn some money farm-sitting in California. As

before, she asked to bring the Children back with her to the United States (C.A. App. 315). Respondent, again, did not consent to the Children's involvement in this trip (C.A. App. 315). Again, Petitioner left the Children in Respondent's care and traveled to Texas, where her boyfriend resided, and later to California where, in November 2009, she was served with process in the New York Matrimonial Action (C.A. App. 315, Pet. 12a). Petitioner remained in the United States until December 2009 (Pet 12a), making her absent from Switzerland (and away from the Children) for a total of nine months in 2009.

After returning to Switzerland in December 2009, Petitioner saw the Children for four overnight visits and on a few other daytime visits (C.A. App. 318, Pet. 12a).

In December 2009, Petitioner appeared in the New York Matrimonial Action by interposing an answer and counterclaim in which she sought, *inter alia*, custody of the Children (C.A. App.15 –21).

On January 25, 2010, after his and the Children's temporary residency permits had expired, Respondent and the Children returned to New York, to the home of Respondent's parents (C.A. App. 318 - 319). Upon his return to New York, Respondent informed Petitioner of his whereabouts and offered to purchase her an airline ticket to come back to New York. Petitioner refused the offer, again ceding *de facto* custody of the Children to Respondent.

On January 28, 2011, Respondent filed an order to show cause in the New York Supreme Court

seeking, *inter alia*, temporary custody of the Children (Pet 10a). Respondent was granted an *ex parte* order of interim custody. On February 17, 2010, Petitioner's counsel consented, on the record, to an extension of the order of temporary custody to Respondent, and such was ordered by the court. Transcript of the N.Y. Sup. Ct., County of Putnam, *Heydt-Benjamin v. Heydt-Benjamin*, Index No. 002318/2009 (February 17, 2010)[3]

On February 4, 2010, Petitioner filed a petition in the Southern District of New York for the return of the Children to Petitioner pursuant to the Hague Convention (the "Hague Petition"). Petitioner also moved, by order to show cause, for an order staying the proceedings in the Matrimonial Action.

The district court (Rakoff, J.) scheduled a hearing on the Hague Petition and reserved ruling on Petitioner's stay motion. Following a four-day hearing, on March 15, 2010, the court issued a detailed decision from the bench, dismissing the Hague Petition on the ground that Petitioner had not

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[3] "The Court: Mr. Vanderwoude, you consent that Plaintiff herein Thomas Heydt-Benjamin will continue to have exclusive temporary, sole legal custody of I H-B...and L H-B...Do you consent? Mr. Vanderwoude: Yes."
Petitioner subsequently challenged jurisdiction of the New York Court. Following the decision in this proceeding dismissing petitioner's Hague petition, the New York State Court found that custody jurisdiction was proper in that court and that finding was recently affirmed on appeal. *Heydt-Benjamin v. Heydt-Benjamin, 2010-06133, slip op. 04420 (N.Y. App. Div. 2d Dep't May 24, 2011).*

met her burden to establish that the Children's habitual residence was in Switzerland. To the contrary, the court found unequivocally that the Children's habitual residence was the United States. The court also denied Petitioner's motion for a stay of the Matrimonial Action.

In making its determination, the district court properly applied the standard by the Second Circuit in *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005), and found that (i) the parties' last shared intent was to reside only temporarily in Switzerland and return with the Children to the United States, and (ii) these very young Children had not become so acclimatized to Switzerland as to countermand the last shared intent of the parents.

Indeed, the court found that it came through "loud and clear from the evidence" that Petitioner "saw not only her future but also [the Children's] as being in the United States." (Pet. 21a) The court further found "without any difficulty at all that the Petitioner never intended at any time relevant to this Court's determination to have Switzerland be her children's place of habitual residence." (Pet. 23a)

The Petition's claim that the court found no mutual intent to remain in Switzerland "because Petitioner had apparently expressed some dissatisfaction with the move" (Petition, p. 6) grossly misstates the facts as presented at trial and the district court's factual finding. In abandoning her two toddler-aged children for nine months in order to reside in the United States, Petitioner evidenced

much more than "some dissatisfaction" with the move, but rather her absolute unwillingness to remain in Switzerland and her unwavering desire to reside in the United States. Moreover, on both occasions when she returned to the United States, she expressed her wish to bring the Children with her, further demonstrating her desire to have the Children reside in the United States.

Contrary to the allegations in the petition to this Court, the district court specifically found the Children, who had just turned two and four years old when they returned to the United States, were not so acclimatized as to overcome the import of the parents' last shared intent. Given Respondent's role as primary caregiver and the Children's close attachment (both personal and financial) to their grandparents in New York, as contrasted with the family's complete lack of any ties to Switzerland, it would be contrary to the principles of the Convention, the interests of the Children, and common sense to find that the fleeting contact these Children had with Switzerland should override the clear attachment of the nuclear family to the United States, and the district court so found.[4]

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[4] Contrary to the Petition (Petition, p. 19, FN 9), the other Hague factors were and are still in dispute. However, since petitioner failed to meet her initial burden of establishing Switzerland as the Children's habitual residence, there was no need for the court to inquire further. It is not clear Petitioner had a right of custody that she was exercising, given her abandonment of the Children for such an extended period and her minimal contacts with them following her return.

Petitioner appealed to the Court of Appeals for the Second Circuit and the district court's decision was affirmed by Summary Order. Petitioner thereafter petitioned for rehearing, en banc. Her petition was denied.

REASONS FOR DENYING THE PETITION

A. THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRCUITS THAT WOULD AFFECT THE RESULT IN THIS CASE

1. The Balanced Approach of the Second Circuit

The threshold question in any case brought under the Hague Convention is the child's "habitual residence." This inquiry is premised on the notion that the country in which a child is habitually resident is in the best position to determine issues of custody and access. *Croll v. Croll*, 229 F.3d 133, 137 (2d Cir. 2000). The Hague Convention does not define the phrase "habitual residence."

The standard in the Second Circuit for determining habitual residence under the Hague Convention was first articulated in *Gitter*. *See also, Poliero v. Centenaro,* 373 Fed. Appx. 102 (2d Cir. 2010); *Halaf v. Halaf,* 372 Fed. Appx. 176 (2d Cir. 2010), as well as the opinion below in the case at bar. Under *Gitter*, to determine a child's habitual residence, the court should first "inquire into the shared intent of those entitled to fix the child's

residence (usually the parents)," and, second, to "inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence." 396 F.3d at 134

In reaching the appropriate standard for habitual residence, the Second Circuit was "[i]nformed . . . by the opinions of sister Circuits that have already considered the issue" and "also mindful that the Supreme Court has instructed the lower courts that when interpreting international conventions and treaties the opinions of our sister signatories [are] entitled to considerable weight." *Id.* at 131. After analyzing the relevant precedents, the Second Circuit recognized the "importance of intentions (normally the shared intentions of the parents or others entitled to fix the child's residence) in determining the child's habitual residence." *Id.*

Parental intent makes particular sense as a guiding principle since, as the Second Circuit noted, the Hague Convention provision at issue here does not apply to children over sixteen and, even as to children under sixteen, a court may ignore habitual residence and defer to the view of a child who "has attained an age and degree of maturity at which it is appropriate to take account of its views." *Id.* at 132 (n.7 citing Hague Convention arts. 4, 12, &13). Nor can one argue, as Petitioner implies, that the courts are incapable of or unreliable in determining intent because it may raise issues of credibility. This is, of course, the day-to-day business of the courts.

In addition, the Second Circuit agreed with the Ninth Circuit's recognition in *Mozes v. Mozes,* 239 F.3d 1067 (9th Cir. 2001) (Kozinski, J.), that simply looking to the child's location is flawed because it is unclear what the relevant time frame should be in which to conduct the inquiry. "A child who spends two months at Camp Chippewah, if observed only during that period, would appear to be habitually resident there. On the other hand, if we follow the same child through to adulthood, we might label a couple of years spent studying abroad a mere temporary absence of long duration. This indeterminacy is unavoidable..." *Mozes,* 239 F.3d at 1074 (internal quotations omitted). Nevertheless, the Second Circuit further recognized, consistent with its sister Circuits, that "analysis of the evidence of acclimatization" of the child to the new location should also factor into the inquiry. *Gitter*, 396 F.3d at 134.

2. The Second Circuit's Consideration of Intent is Consistent with Virtually All Other Circuits

Not surprisingly, given the sound analysis underlying the standard, the Second Circuit approach, which balances parental intent and the attachment of a child to a particular location is consistent with the approach of all the other Circuits, with the possible exception of the Sixth Circuit (which, as discussed below, is evolving toward the

more balanced approach shared by the other Circuits).

Although the various Circuits articulate the proper inquiry differently, all of them (save the Sixth which is discussed below) consider parental intent to be an important factor in determining the habitual residence of very young children. Six Circuits consider parental intent the dominant factor in determining habitual residence in all cases, although that intent can (as in the Second Circuit) be overcome by a showing of other relevant factors. *Nicolson v. Pappalardo,* 605 F.3d 100, 103-104 (1st Cir. 2010) ("The Hague Convention does not define 'habitual residence,' but the majority of federal circuits to consider it have adopted an approach that begins with the parents' shared intent or settled purpose regarding their child's residence"); *Gitter,* 396 F.3d at 134 (finding that to determine a child's habitual residence, the court should first "inquire into the shared intent of those entitled to fix the child's residence (usually the parents)," and, second, "inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence); *Maxwell v. Maxwell,* 588 F.3d 245, 251 (4th Cir. 2009) ("Federal courts have developed a two-part framework to assist in the habitual residence analysis. Under this framework, the first question is whether the parents shared a settled intention to abandon the former country of residence." (citing *Mozes*)); *Koch v. Koch,* 450 F.3d

703, 715 (7th Cir. 2006) (court finds "no reason to disavow the *Mozes* approach," which "asks the court to determine first whether the parents shared an intent to abandon the prior habitual residence..."); *Mozes v. Mozes,* 239 F.3d 1067, 1078 (9th Cir. 2001) ("the first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind"); *Ruiz v. Tenorio,* 392 F.3d 1247, 1252 (11th Cir. 2004) ("the first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind." (adopting *Mozes* standard)).

Three Circuits recognize the importance of parental intent among several factors. *Feder v. Evans-Feder,* 63 F.3d 217, 224 (3d Cir. 1995). ("[A] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there."); *Barzilay v. Barzilay,* 600 F.3d 912, 918 (8th Cir. 2010) ("The 'settled purpose' of a family's move to a new country is a central element of the habitual residence inquiry.'...Additionally, the settled purpose must be from the child's perspective, although parental intent is also taken into account." (citing *Feder*); *Kanth v. Kanth,* 2000 U.S. App. LEXIS 27383, *1, 3-4 (10th Cir. 2000) ("Although it is the child's habitual residence that the court must determine, in the case of a young child the conduct, intentions, and agreements of the parents during the

time preceding the abduction are important factors to be considered.")[5]

Finally, although the Fifth Circuit has not fixed a separate standard for determining habitual residence, at least one district court within the Circuit has followed the standard above. *Clausier v. Mueller,* No. 4:03-CV-1467-A, 2004 LEXIS 10367, *3 (N.D. Tex. Apr. 27, 2004) ("The conduct, intentions, and agreements of the parents during the time period preceding the retention are important factors to be considered, particularly where young children are involved.") Several state courts have also expressly adopted the Second Circuit's standard. *See In re S.J.O.B.G.,* 292 S.W.3d 764 (Tex. App. 2009); *In re J.G.,* 301 S.W. 3d 376, 381 (Tex. App. 2009) ("We conclude this two-pronged standard [adopted in *Gitter*] gives proper weight to the various interests of the parties").

Other state courts have likewise acknowledged the importance of parental intent in determining habitual residence. *See Courdin v. Courdin, 2010* Ark. App. 314 (2010) (court appliying standard adopted in *Mozes* in determining habitual residence); *In re Marriage of Forrest & Eaddy,* 51 Cal. Rptr. 3d 172, 179-180 (2006) ("Most frequently, the analysis of [the issue of habitual residence] begins with an examination of the intent of the person or persons entitled to determine where the child lives" (citing *Mozes*); *Ciotola v. Fiocca,* 86 Ohio Misc. 2d 24, 30 (Ohio Ct. Com. Pl. 1997) (finding that

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[5] The D.C. Circuit has not reached the issue.

in cases where the children are of "tender years," a court should consider the "'overtly stated intentions and agreements of the parents' during the period *preceding* the wrongful abduction or retention." citing *Feder*).[6]

Under the circumstances of this case, given the young ages of the Children who, as the district court found, were not acclimatized, the temporary nature of the stay in Switzerland, the lack of any ties to Switzerland by their parents (both American citizens only) and their minimal ties to Switzerland, the factor of parental intent would have dictated the same result as reached by the Second Circuit here in each of the other Circuits.

The Sixth Circuit, then, is the only federal jurisdiction that requires closer scrutiny. However, here too it is not apparent that the result in the case at bar would have been any different in that jurisdiction.

The Sixth Circuit jurisprudence on habitual residence began with the 1993 case of *Friedrich v. Friedrich,* 983 F.2d 1396 (6th Cir. 1993). In that case, the Sixth Circuit stated that to determine

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[6] Petitioner also relies on the nearly ten-year-old case of *Vaile v. Eighth Judicial District Court,* 44 P.3d 506 (Nev. 2002), which, in light of intervening decisions in other jurisdictions, is certainly an outlier to the extent it was ever persuasive. Further, the children there were older (the eldest daughter was nine and attended school in Norway) and, unlike here, were registered under Norwegian law as residents of that country, giving them the "degree of settled purpose" that the Children here lacked.

habitual residence, "the court must focus on the child, not the parents, and examine past experience, not future intentions." 983 F.2d at 1401. *Friedrich* was the first case that set a standard for determining habitual residence, and, as has been noted in several subsequent cases, was a "simple case" (*see, e.g., Robert v. Tesson*, 507 F.3d 981, 989 (6th Cir. 2007); *Jenkins v. Jenkins,* 569 F.3d 549, 560 (6th Cir. 2008)) in which the facts would have led any court, using any standard, to reach the same outcome.

In *Friedrich,* the parents were of different citizenships. Mr. Friedrich was a German citizen, resided in Germany, worked in Germany, and was married in Germany. The couple's two-year-old child, who was born in Germany and held dual citizenship, had only been to the United States on one ten-day trip. Although Mrs. Friedrich had testified as to *her* intent to return to the United States when she was discharged from the military, there was no evidence that Mr. Friedrich ever intended to leave Germany. Thus, even under the *Gitter* standard, given the absence of any demonstrated *shared* intent, Mrs. Friedrich would not have sustained her burden to prove that the child's habitual residence was in the United States.

Friedrich's inflexible standard has been criticized by the other circuits,[7] and courts within the

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[7] See, *Mozes,* 239 F.3d at 1080: "The facts of *Friedrich* thus provided no legitimate occasion for a broad pronouncement that parental intent is irrelevant to the question of habitual residence."

Sixth Circuit have steadily chipped away at its apparently rigid holding and have questioned the appropriateness of any standard that completely disregards parental intent. For example, in *Maynard v. Maynard,* 484 F. Supp. 2d 654 (E.D. Mich. 2007), the court, in ruling that the children's habitual residence was not the United States, made specific reference to the temporary nature of the family's residence in the United States, thereby bringing the parties' intentions into consideration. The court further noted that "from the day the children were born, it was clearly the intent of the parties that their stay in the United States would end when Mr. Maynard's five-year employment contract expired." *Id.* at 660 n.9.

The Sixth Circuit itself acknowledged that in cases involving very young children like those here, who "may lack the cognizance of their surroundings sufficient to become acclimatized to a particular country or to develop a sense of settled purpose," an investigation into the "subjective intentions" of such child's parents could potentially be considered, although the court did not reach the question. *Robert v. Tesson,* 507 F.3d 981.

Recently, in *McKie v. Jude,* No. 10-103-DLB, 2011 U.S. Dist. LEXIS 1834 (E.D. Ky. Jan 7, 2011), the court, citing *Robert v. Tesson*, questioned what it termed the "one-dimensional approach applied in *Friedrich*" and considered parental intent, reasoning:

> Parental intent is important because it provides context for the objective contacts a child has in a given country and should inform the habitual residence analysis when a child lacks the mental capacity to shape that context him or herself. *McKie,* 2011 U.S. Dist. LEXIS 1834 at *32.

Thus, it appears that to the extent the Sixth Circuit approach, at least as broadly articulated, may be seen as inconsistent with its sister Circuits, the actual jurisprudence has been shifting to more closely match the dominant view.

The approach Petitioner proposes is unmoored from both the existing law in any jurisdiction and the record in this case. It is indisputable that the question of a child's habitual residence, and indeed all issues surrounding child custody determinations, are fact specific inquiries that cannot be reduced to a single simplistic rule. *See Karkkainen v. Kovalchuk,* 445 F.3d 280, 291 (3d Cir. 2006), citing *Whiting v. Krassner,* 391 F.3d 540, 546 (3d Cir. 2004). Petitioner would have it that the court look only to where the children were during a very discrete portion of time. This is because the examination of any other factors leads to the ineluctable conclusion that these children belong in the United States.

It makes little sense to look only at the location of the Children while Petitioner, herself, was in the United States with the intent to reside there

permanently. The Children, having just turned two and four at the time of their return to the United States, did not have the capacity to select their own habitual residence.

Petitioner's approach would result in the return of the Children to a country where neither party lives (or had any expectation of living), works, has family, or has any current connection. Their removal from the parent to whom Petitioner concededly ceded primary care when she abandoned them to return to the United States in 2009, is an outcome clearly contrary to the letter and spirit of the Hague Convention. The only link to Switzerland either party ever had was through Respondent's work/study program – a temporary situation by design which was to terminate upon Respondent attaining his Ph.D. Petitioner, an American citizen, has never demonstrated an independent ability to reside in Switzerland with children who are also American citizens only. Petitioner's proposed standard also disregards her own conduct in rejecting Switzerland as her, and the Children's, habitual residence. As the district court commented in its bench decision, "[t]here is therefore an irony, that would be humorous were the stakes not so serious, in Petitioner now taking the position that Switzerland is her children's habitual residence as well as her own." (Pet. 18a)

3. Contrary to the Assertions in the Petition, as the District Court Found and the Second

Circuit Affirmed, the Children Here Were Not Acclimatized to Switzerland.

Recognizing that the Children "had not even reached the stage where their interactions with peers and things like years of schooling, close relationships with other school children, language considerations and many other factors could fairly warrant a finding that they had somehow become more Swiss than American," (Pet. 25a) the district court found that despite their time in Switzerland, their habitual residence "unquestionably" remained in the United States.

In examining acclimatization, courts look to whether a child "has become 'firmly rooted' in her new surroundings, not merely whether she acculturated to a country's language or customs." *Karkkainen v. Kovalchuk,* 445 F.3d 280, 292, citing *Holder v. Holder*, 392 F.3d 1009, 1019 (9th Cir. 2004). Academic activities have been held to be one of the most central to a child from his or her perspective. *Feder,* 63 F.3d at 224. Here, the Children had just turned two and four when they returned to the United States, and were only one and three during the majority of their time in Switzerland. Neither was enrolled in any academic activities, although they attended daycare for a short while (Pet. 20a, Pet. 22a). Given the Children's very young ages and their limited abilities to interact with other children, there could be no longstanding "friends" in Switzerland and, as referred to above,

they had no other family there. Their excursions to the park and museums, which at their ages they could little comprehend or remember, provide no basis for a finding that these Children had become so "firmly rooted" in Switzerland as to override the intentions of their parents. One may be "'acclimatized' in the sense of being well-adjusted in one's present environment, yet not regard that environment as one's habitual residence." *Mozes,* 239 F.3d at 1079.

Acclimatization involves more than just physical presence in a particular place. Parental intent, especially in cases involving such young children as these, must be considered in determining whether they have become acclimatized. As the Third Circuit has observed:

> Though we examine acclimatization and settled purpose "from the child's perspective," *Feder,* 63 F.3d at 224, we consider parental intent as part of this inquiry "because the child's knowledge of these intentions is likely to color its attitude to the contacts it is making," *Mozes,* 239 F.3d at 1079-80. *See also, Silverman v. Silverman,* 338 F.3d 886, 898 (8th Cir. 2003) (noting that, although courts must focus on the child, "parental intent is also taken into account"). As the Court of Appeals for the Ninth Circuit noted, the intentions

> of a child's parents may affect the length of time necessary for a child to become habitually resident or otherwise influence a child's ability to acclimatize. *Mozes,* 239 F.3d at 1079-80.

Karkkainen, 445 F.3d at 292.

Here, while Respondent and the Children were in Switzerland, Petitioner was residing in the United States for the better part of 2009. There could not have been a "settled purpose" to remain in Switzerland from the Children's perspective when their mother was residing in the United States. Nor could it be argued that the Children abandoned the United States as their habitual residence when their mother continued to reside here and their father, as the district court found, also intended to return to the United States at the conclusion of his studies.

B. DECISIONS IN FOREIGN JURISDICTIONS DO NOT MILITATE IN FAVOR OF GRANTING THE PETITION

In addition to being consistent with the other Circuit Courts of Appeal, the Second Circuit standard for the determination of habitual residence is consistent with, and indeed cited by, courts in other countries. Parental intent is generally deemed an important factor in determining residence. Thus, for example, in *S.C. v. L.W.H.,* 2010 N.B.J No. 257 (Can. N.B. Q.B.)(LEXIS), the

Canadian court considered the intent of the child's parents, finding that although the parties had moved to Ireland, the child's habitual residence was in Canada given the lack of any shared intent of the parents to make Ireland their home. Significantly, in reviewing the applicable standards for determining habitual residence, the court looked to the Second Circuit's decision in *Gitter* and the Third Circuit's decision in *Whiting*. The court perceived no conflict between these circuits and instead correctly noted the consistent finding of these courts that "in determining the habitual residence of the child, the court must consider the intent of the child's parents..." *Id. at *17.*

Courts of other countries have also consistently looked to the intent of the parents, especially in cases as here involving young children, in determining habitual residence under the Hague Convention. Many of the foreign country cases cited by Petitioner acknowledge that, consistent with the Second Circuit, parental intent is a factor in determining habitual residence. *Cameron v. Cameron, [1995] CSIH 17; (1996) S.C. *1, 3 (Scot.)* ("A person can, we think, have only one habitual residence at any one time and in the case of a child, who can form no intention of his own, it is the residence which is chosen for him by his parents"); *L.K. v. Director-General, (2009) 237 CLR 582, *8 (Austl.)* ("[E]xamination of a person's intentions will usually be relevant to a consideration of where that person habitually resides"). Additional cases in

foreign jurisdictions further reinforce this approach. *In re Bates, (1989), CA 122/89 (High Ct. of Justice, Family Div. Ct., Royal Cts. of Justice)* ("Overtly stated intentions and agreements of the parties ... are bound to be important factors."); *Dickson v. Dickson, [1990] CSIH 692; (1990) S.C.L.R. *1 (Scot.)* (intention of the parents of a young child determines habitual residence); *Cooper v. Casey, (1995) 18 Fam. L.R. 433 (Austl.)* (settled purpose of the parents determined habitual residence).

It is nonetheless clear, however, that foreign jurisdictions are receiving a consistent, and not a conflicted, message from the decisions of the Circuits in this country; parental intent is an important factor in the determination of habitual residence under the Hague Convention, particularly in cases involving young children. A grant of certiorari in this case is unnecessary to further inform the United States' sister signatories.

C. THE SECOND CIRCUIT'S STANDARD AND ITS FOCUS ON PARENTAL INTENT FURTHERS THE GOALS OF THE HAGUE CONVENTION, ESPECIALLY IN CASES, AS HERE, INVOLVING VERY YOUNG CHILDREN

The standard Petitioner seeks to employ effectively ignores Respondent's role as the children's primary custodial parent – indeed, their *sole* custodial parent for most of 2009 – and would result in the Children returning to Switzerland with the

parent who abandoned them for nine months to reside, herself, in the United States.

For most of 2009, Respondent was the *only* family the Children had in Switzerland. Their "family environment," therefore, was with Respondent – wherever that was. *See Pielage v. McConnell,* 516 F.3d 1282, 1289 (11th Cir. 2008). Their mother and their paternal grandparents, with whom they resided each time they returned to the United States and upon whom both parties relied to help care for the Children, were all in this country. The district court took specific note of the close bond the family had to Respondent's parents in finding that they had not abandoned the United States as their habitual residence (Pet. 23a).

It would be contrary to the goals of the Convention as well as to the best interests of the Children to invoke a standard that gave no consideration to such factors as the parents' intentions regarding where (and with whom) their children would be raised. Indeed, one of the goals of the Convention is to prevent "the possibility of individuals establishing legal and jurisdictional links which are more or less artificial." Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention, in* ACTES ET DOCUMENTS DE LA QUATRORZIÈME SESSION, TOME III (1980), ("Pérez-Vera Report"), 429. One could not imagine a more "artificial" jurisdictional link than Petitioner's to Switzerland.

Petitioner's reference to the 2006 Special Commission Report on the Child Abduction Convention (Petition, p. 29), mischaracterizes the Commission's findings, which in fact, stated that "[m]any experts agreed that the use of a strict definition for habitual residence would go against the spirit of the Convention, noting that habitual residence was above all a question of fact to be decided on a case-by-case basis, and should be distinguished from the more subjective concept of domicile." HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, REPORT ON THE FIFTH MEETING OF THE SPECIAL COMMISSION 45 (2006). Significantly, the Report goes on to point out that "Several experts indicated that this factual evaluation should include, to a certain extent, an examination of the common intent of the parents in establishing their residence." *Id.* at 45.

Here, the standard used to determine the habitual residence of the Children properly considered the parties' intentions as manifested by their actions. While it is the habitual residence of the child that the court is required to determine, it defies logic to assert, as Petitioner seems to, that the habitual residence of a young child can be different than that of *both* of its parents. Here, the district court properly rejected Petitioner's claim that *her* habitual residence was Switzerland, when she not only acknowledged her unhappiness there but repeatedly left that country (and the Children) to reside in the United States. Similarly, the district court properly rejected Petitioner's assertion that the

United States was Respondent's habitual residence, given his strong family ties in the United States, the temporary status of his residence in Switzerland and his stated intention to return here upon the completion of his Ph.D.

Thus, the goals of the Hague Convention are not contravened in any way by either the approach of the Second Circuit or the result reached in this case.

D. THIS IS NOT AN APPROPRIATE CASE FOR CERTIORARI SINCE NEITHER PARTY RESIDES IN SWITZERLAND OR INTENDS TO RESIDE THERE

Respondent and the Children have been residing in the United States since January, 2010, when their temporary residency permits expired. Petitioner has been residing in the United States since March 2010 and, like Respondent, no longer has a valid Swiss residency permit. Neither party has a job in Switzerland, owns property in Switzerland, has family in Switzerland or has any other ties to Switzerland. Moreover, as Petitioner has made clear (and as her counsel affirmatively represented to the Second Circuit), she lives here in the United States and has never wanted to reside in Switzerland. [8]

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[8] At oral argument before the Second Circuit, Petitioner's counsel, Neil VanderWoude, stated on the record (recorded in video by the court): "The [Petitioner] is living here. She never

Further, there is nothing in the record to suggest that Petitioner or the Children would be *able* to return to Switzerland should Petitioner in any subsequent proceeding be granted the relief she seeks in the Petition. Accordingly, there is no "live" case or controversy for the Court to resolve.

Moreover, the Appellate Division in New York recently held that the New York Supreme Court in which the Matrimonial Action has been pending for more than a year has custody jurisdiction, for reasons independent and apart from the district court's findings on habitual residence. *Heydt-Benjamin v. Heydt-Benjamin,* 2010-06133, slip op. 04420 (N.Y. App. Div. 2d Dep't May 24, 2011). This ruling by a court, which has entered interim custody and visitation orders, further complicates Petitioner's ability to get the result she seeks, even with this Court's intervention. *See Navani v. Shahani,* 496 F.3d 1121 (10th Cir. 2007) (finding appeal from order dismissing Hague petition rendered moot in light of order entered in court having jurisdiction over the custody case).

Here, it is not clear Petitioner could obtain the result she seeks even with the intervention of this Court, making this case an improper one for certiorari. *See Ticor Title Ins. Co. v. Brown,* 511 U.S.117, 122 (1994) (dismissing a writ of certiorari as having been improvidently granted where, *inter alia,* it was "not clear that [the Court's] resolution of the

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wanted to live there [Switzerland], but that is not a requirement."

constitutional question will make any difference even to these litigants").

CONCLUSION

For all of the reasons set forth herein, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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