No. 12-820

IN THE

Supreme Court of the United States

MANUEL JOSE LOZANO,

Petitioner,

v.

DIANA LUCIA MONTOYA ALVAREZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

LAUREN A. MOSKOWITZ
Counsel of Record
RACHEL G. SKAISTIS
CARRIE R. BIERMAN
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000
lmoskowitz@cravath.com

Counsel for Respondent
Diana Lucia Montoya Alvarez

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QUESTIONS PRESENTED

Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (Mar. 26, 1986) (the "Hague Convention" or "Convention"), allows a district court to deny repatriation of a child if a parent files a petition for return more than one year after the child's removal and the child is found to be "now settled" in his or her new environment.

The questions presented are:

1. Whether the Second Circuit correctly held that the doctrine of equitable tolling does not apply to the one-year period set forth in Article 12, after which a parent may invoke the "now settled" defense to repatriation, where equitable tolling is contrary to the text, history and purpose of the Hague Convention, and where the court otherwise retains equitable discretion under Article 12 to return the child even if the defense is satisfied.

2. Whether the Second Circuit correctly held, consistent with the uniform approach of the federal courts, including the Ninth Circuit, that a child's immigration status is only one of many factors that a court can take into account when determining whether a child is "now settled" within the meaning of Article 12 and is not dispositive as a matter of law.

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STATEMENT OF THE CASE

In July 2009, Respondent Diana Lucia Montoya Alvarez and her now seven-year-old daughter fled the United Kingdom to escape an abusive relationship with Petitioner Manuel Jose Lozano, the child's father. Ms. Montoya Alvarez sought refuge in New York at the home of her sister and her sister's family. More than sixteen months later, Petitioner filed a petition pursuant to the Hague Convention to return the child to the United Kingdom for a custody determination ("Petition for Return"). After a two-day evidentiary hearing, the District Court denied the Petition for Return pursuant to Article 12 of the Convention, an exception that allows a court to deny repatriation if a parent files a petition more than one year after the child's removal and the child is found to be "now settled" in his or her new environment. Hague Convention, art. 12. The District Court rejected Petitioner's arguments that the one-year period should be equitably tolled during the time when he was attempting to locate the child, and that the child's lack of legal immigration status should, as a matter of law, preclude application of the Article 12 settled defense. On appeal, the Second Circuit unanimously affirmed the District Court's decision on all grounds.

Petitioner's alarmist claim that the decisions of both lower courts "undermin[e] the fundamental purpose of the treaty", Pet. 3, not only is unsupported, but cannot obscure the fact that his questions presented do not warrant this Court's review. Certiorari should be denied because neither question presents a developed circuit split or an issue of broad importance. Furthermore, the Second

Circuit's decision on both issues was decided correctly and, contrary to Petitioner's claims, is consistent with the text, history and purpose of the Convention.

First, with regard to the question of whether equitable tolling applies to the one-year period in Article 12, Petitioner overstates the extent of any split among the circuits. Pet. 13. In fact, only the Ninth and Eleventh Circuits have ruled on the issue of equitable tolling, *Duarte v. Bardales*, 526 F.3d 563 (9th Cir. 2008); *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), whereas the Fifth Circuit, in the case cited by Petitioner, *Dietz v. Dietz*, 349 F. App'x 930 (5th Cir. 2009), assumed it applied without deciding the issue because the issue was not contested. Of these circuit decisions, only the Second Circuit has thoroughly examined the text, history and purpose of Article 12. The more cursory analyses of the Ninth and Eleventh Circuits do not address any part of the Second Circuit's rationale. Because no circuit court has yet considered—let alone disagreed with—the Second Circuit's reasoning, Petitioner's alleged split is undeveloped and review would be premature.

Petitioner also fails to raise any question of broad importance because all three circuit courts of appeals whose decisions Petitioner cites agree that courts should have power in equity to avoid rewarding a parent's misconduct in abducting and concealing his or her child. The only point of departure among these circuits is how this equity should be exercised. Petitioner cites no authority to support his argument that this difference merits Supreme Court review.

Even if this Court were to review the question of equitable tolling, its ruling would not change the outcome of the case because the District Court found, in the alternative, that the application of equitable tolling was not warranted on the facts. App. 101a. Petitioner does not challenge this conclusion.

Moreover, the Second Circuit's decision does not warrant review because it is correct. The court properly relied on the best available evidence of the purposes underlying the Convention—the text of Article 12 in the context of the whole Convention, and its drafting history—to conclude that applying equitable tolling to the one-year period would be inconsistent with the Convention's purpose.

Second, with regard to the question of whether a child's immigration status should be dispositive in determining if the child is now settled, Petitioner can offer no disagreement among any courts. Petitioner even admits that "most courts" that have considered whether a child is settled under Article 12 "have utilized the same multi-factor test employed by the Second Circuit", Pet. 26, which allows immigration status to be considered as one of many factors. In fact, no court agrees with Petitioner: The Ninth Circuit, the only other court of appeals to address the question presented here, also held that a child's immigration status is not dispositive. *In re B. Del C.S.B.*, 559 F.3d 999 (9th Cir. 2009). Likewise, the district courts uniformly have held that a child's immigration status is merely one of the various factors a court may take into account when deciding if a child is settled. App. 31a n.14.

In addition, Petitioner's second question—as he presents it—was not argued below. Departing from the issues he raised before the Second Circuit, Petitioner now phrases the question presented as turning on the assumption that "the abducting parent presents no evidence of a legitimate pending application or basis under existing law for seeking a change in [the abducting parent's and child's] immigration status". Pet. at ii. The question presented should not be reviewed by this Court in the first instance.

As with the first question presented, even if the Court were to find this second question reviewable, the Court's decision would not change the outcome. The Second Circuit affirmed the factual findings of the District Court, App. 33a-34a, which acknowledged "unrefuted testimony from Respondent" that she has a legal basis to seek a change in her and her daughter's immigration status, *id.* at 109a.

The Second Circuit's decision, along with the decisions of every other court to consider the issue, is also correct. The Second Circuit's reasoning accords with the text and purpose of Article 12, as well as with the Convention's overall focus on a child's well-being. *Id.* at 30a. Further, consistent with the Convention's limited purpose of determining the location of custody proceedings, the Second Circuit properly focused on factors that impact a child's current living arrangement.

A. Factual Background

Ms. Montoya Alvarez and Petitioner met and began dating in London in early 2004. App. 4a-5a. Their relationship was happy at first, but deteriorated when Petitioner began to verbally abuse Ms. Montoya Alvarez on a daily basis, repeatedly calling her "stupid", "crazy" and a "prostitute". App. 45a; A322, A330, A331, A342.[1] Ms. Montoya Alvarez testified that Petitioner also physically abused her and raped her on four occasions. App. 45a.[2]

In October 2005, Ms. Montoya Alvarez gave birth to the couple's child, who lived with Ms. Montoya Alvarez and Petitioner in London. *Id.* at 5a. In October 2008, Ms. Montoya Alvarez became concerned with the child's behavior and spoke with the child's doctor about a variety of issues, including the child's silence at her nursery, frequent crying, nightmares and bed-wetting. App. 5a. The child's nursery manager also noticed the child's behavior and concluded that the home "environment obviously had a negative effect upon [the child] and [she] became an elective mute at the nursery . . . and became very withdrawn." *Id.* at 52a. Accordingly, the District Court found that "the child had been exposed to, and negatively affected by, the problems in the couple's relationship". *Id.* at 5a-6a.

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[1] In this brief, "A" refers to the Special Appendix filed with the United States Court of Appeals for the Second Circuit.

[2] The District Court determined that it did not need to make findings of fact regarding physical abuse under the settled defense. App. 50a-51a.

In November 2008, Ms. Montoya Alvarez went to New York for a week to visit her sister, Maria. *Id.* at 55a. During that time, the child stayed in London with Petitioner and his mother. *Id.* Petitioner testified that before Ms. Montoya Alvarez left, she gave Petitioner her sister's address and telephone number in case he needed to reach her. *Id.* at 59a-60a n.10.

Ms. Montoya Alvarez testified that when she returned, Petitioner and his mother were acting very suspiciously and the child was acting very fearful. *Id.* at 55a. Ms. Montoya Alvarez demanded that Petitioner and his mother leave her house immediately. *Id.* When they did not, Ms. Montoya Alvarez decided to leave. *Id.*

On November 19, 2008, Ms. Montoya Alvarez left her home with the child and went to the police station to report Petitioner's abuse. *Id.* at 55a-56a.[3] The police ultimately referred her to a women's shelter for victims of domestic violence, where she and the child resided for several months. App. 56a-57a. On July 3, 2009, Ms. Montoya Alvarez and the child left the shelter, and, on July 8, 2009, after spending a few days in Paris, traveled to New York to live with Maria—the very sister Ms. Montoya Alvarez had visited one week before she moved out. *Id.* at 58a, 103a. Ms. Montoya Alvarez "enrolled the

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[3] Contrary to Petitioner's claim that Ms. Montoya Alvarez "claimed falsely" that she contacted the police, Pet. 4, 6, a letter from the Metropolitan Police included in Petitioner's own Application to the Central Authority reflects that in 2008, Ms. Montoya Alvarez told the police of Petitioner's abuse. A156.

child in school, [and] did not change either her or the child's names". *Id.* at 103a. She did not "move the child from one location to another or take other steps to remain hidden". *Id.* She remained in her sister's home.

When the parties separated in November 2008, Petitioner suspected that Ms. Montoya Alvarez would go back to New York to live with her sister. As the District Court found, Petitioner explicitly stated in the papers he filed in July 2009 that "'when the Parties separated in November 2008, the Respondent threatened to take the child to the USA permanently' because she had siblings in the United States who would be able to support her". *Id.* at 59a n.10. At the evidentiary hearing, Petitioner again admitted that when Ms. Montoya Alvarez and the child left him in November 2008, he knew that "Ms. Montoya Alvarez had the ability and the intention to go to the United States to live with her sister", and he believed that "in [the] long term, she will take my daughter to United States". A310.

Not only did Petitioner anticipate from the moment Ms. Montoya Alvarez left that she would go to live with Maria in New York, but he also had Maria's contact information. As the District Court found, Petitioner stated in his Application to the Central Authority that he had not one, but two contact numbers for Maria in New York—her home number and her mobile telephone number. App. 59a-60a n.10. The District Court further found that Petitioner's statement in his Application that he did not have an address for Maria was contradicted directly by his admission at the evidentiary hearing that "when Respondent visited Maria in November

2008, Respondent left Maria's name, address, and phone number in writing with Petitioner". *Id.*

Despite Petitioner's belief from day one that Ms. Montoya Alvarez intended to and had the ability to go to New York to live with her sister, the District Court found that Petitioner never called Maria to determine whether Ms. Montoya Alvarez had taken the child there. *Id.* at 102a. Furthermore, Petitioner never asked his solicitors to contact Maria to see if Ms. Montoya Alvarez had followed through on her plan to move to New York to live with Maria. *Id.* at 102a. Finally, Ms. Montoya Alvarez did not conceal her or her child's whereabouts or their identities such that these efforts would have been futile; they were living under their own names exactly where she told Petitioner she would go and where Petitioner suspected she would go. *Id.* at 103a.

In New York, Ms. Montoya Alvarez and the child live with Maria, along with Maria's partner, daughter and granddaughter. *Id.* at 6a. Ms. Montoya Alvarez and her daughter are supported by Maria, who, at the time of trial, had been employed as a nanny for the same family for the previous four years, and Maria's partner, who owns a grocery. *Id.*

After arriving in New York, Ms. Montoya Alvarez and her daughter began receiving therapy. *Id.* at 7a. Their therapist testified that "when she first met the child, the child was unable to speak, make eye contact, or play in the therapist's office, which the therapist characterized as 'very unusual for a normally developed three-year-old child'; in addition, the child would wet herself, was hypervigilant, and had a very heightened startle

response." *Id.* at 62a (quoting A453). By February 2010, the therapist diagnosed the child with post-traumatic stress disorder ("PTSD"). *Id.*

Since her arrival in New York, the child has attended the same school. *Id.* at 6a. According to her report cards from 2009 and 2010, she has been progressing both academically and socially. *Id.* at 6a. Outside of school, the child spends time with her extended family, meets friends at the library and the park, takes ballet classes and attends church with her mother. *Id.* at 6a-7a. The therapist testified that the child is "'a completely different child now,' who has stopped wetting herself, has made friends at school, is excited to play, and is able to speak very freely about how she is feeling and talks about being happy." *Id.* at 63a (quoting A455-56); *see also id.* at 7a. Despite her recovery, the District Court found that the child is "more fragile than other children" such that removing her from her stable environment could be traumatic. *Id.* at 113a.

The District Court also found that although Ms. Montoya Alvarez and her daughter have overstayed their visas, there was no evidence that they face any threat of deportation. *Id.* at 108-09a. The District Court also found that Ms. Montoya Alvarez presented "unrefuted testimony" that she is in the process of determining whether she can be sponsored for citizenship by Maria, a United States citizen. *Id.* at 6a, 109a. Thus, the District Court found nothing in the record to suggest that "the immigration status of the child and Respondent is likely to upset the stability of the child's life here in New York." *Id.* at 12a.

B. District Court Decision

On November 10, 2010, more than sixteen months after Ms. Montoya Alvarez and her daughter left the United Kingdom to escape Petitioner's domestic abuse, Petitioner filed a Petition for Return pursuant to the Hague Convention and the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610, in the United States District Court for the Southern District of New York, requesting an order requiring that the child be returned to London to have a British court make a custody determination. App. 9a.

The District Court held an evidentiary hearing on February 2 and 3, 2011, at which it received exhibits and heard testimony from the parties, two experts retained by the parties, and the therapist who had treated Ms. Montoya Alvarez and the child in New York. On February 18, 2011, the parties submitted post-trial memoranda of law and proposed findings of fact and conclusions of law upon which oral argument was held on April 28, 2011. At the conclusion of arguments, the District Court denied the Petition for Return. On August 22, 2011, the District Court issued a written opinion further setting forth its findings of fact and conclusions of law.

Although the District Court acknowledged that Petitioner had made out a *prima facie* case of wrongful removal under the Hague Convention, the court denied the Petition for Return, holding that Ms. Montoya Alvarez had established by a preponderance of the evidence that the child was "now settled" in New York, and satisfied the

Convention's Article 12 exception to return. Petitioner argued that the one-year period between the date of the child's wrongful removal and the filing of the petition should be tolled because Petitioner did not know the child's whereabouts during that time. The court disagreed, concluding that the "one-year period is not a statute of limitations and, therefore, it is not subject to equitable tolling". App. 99a. The court reasoned that "[a] petitioner is not barred from bringing a petition after the one-year period has lapsed; rather, after that point, a court must consider the countervailing consideration that the child may now be better served remaining where he or she is currently located." *Id.* Citing the Convention's text, history and purpose, the District Court ruled that the "settled defense is not [intended] to give petitioners a reasonable amount of time in which to bring their claims", but "to take into account that if the child has become settled, its interests have to be weighed." *Id.*

In the alternative, the District Court held that "even if equitable tolling could apply to convention petitions", it was not "warranted in this case". *Id.* at 101a. Despite Petitioner's efforts to locate his child in the United Kingdom, the District Court found that he never attempted to contact Ms. Montoya Alvarez's sister in New York, even though he had her contact information. *Id.* at 102a. In rejecting Petitioner's argument that his diligence should excuse his delay in filing, the District Court found that "Petitioner had reason to believe that this very location might be one of the places to which Respondent would bring the child and had contact information; accordingly,

his failure to file the Petition until November 2010 is not excused." *Id.* The District Court further found that Ms. Montoya Alvarez "did not conceal the child to an extent that would warrant equitable tolling". *Id.* at 103a. The court found that Ms. Montoya Alvarez did not go to a location unknown to Petitioner and did not move the child from one location to another to conceal her whereabouts. *Id.*

Having rejected Petitioner's arguments regarding the application of equitable tolling, the District Court found that the now settled defense was available and further found that Ms. Montoya Alvarez established that the child is settled. In reaching that conclusion, the District Court considered all the evidence presented at the hearing, including that the child lives with family in a stable home, is progressing well at school and is supported financially by her family. *Id.* at 105a-07a. The court also considered the fact that Ms. Montoya Alvarez and her daughter have overstayed their visas and do not have legal immigration status in the United States. *Id.* at 108a-09a. However, the court rejected Petitioner's argument that the child's immigration status precluded her from being settled, as a matter of law, and concluded that "[t]here is nothing to suggest that, at this moment, or in the near future, the immigration status of the child and Respondent is likely to upset the stability of the child's life here in New York." *Id.* at 109a.

The District Court also considered whether to exercise the discretion granted by the Convention to order the child's return to the United Kingdom despite finding that she is settled. *Id.* at 112a-13a. The court declined to do so, concluding that

uprooting the fragile child could be "traumatic enough that, in the exercise of discretion, it outweighs Petitioner's arguments regarding the equities". *Id.* at 113a.

C. Second Circuit Decision

In May 2011, Petitioner filed an appeal of the District Court's denial of his Petition for Return. He argued that the court erred in not equitably tolling the one-year period in Article 12, that the court erred in finding that the child was now settled despite her lack of legal immigration status, and that even if the lack of immigration status did not preclude a now settled finding as a matter of law, the District Court erred in finding that Ms. Montoya Alvarez had satisfied the now settled defense by a preponderance of the evidence. App. 13a-14a. The Second Circuit, in a well-reasoned and thorough decision, unanimously affirmed the District Court's decision to deny the Petition for Return on all grounds.

First, the Second Circuit rejected Petitioner's argument that equitable tolling applies to the one-year period in the now settled defense. The Court consulted the text of the Convention and noted that the language of Article 12 "expressly starts the running of the one-year period 'from the date of the wrongful removal or retention'"—not from when the petitioning parent discovers the child's whereabouts. *Id.* at 17a n.8 (quoting Convention, art. 12). The court also recognized that Article 12, considered within the full framework of the Convention, renders equitable relief in the form of tolling "unnecessary", since Article 12 allows "but does not . . . require" a judicial or administrative authority to refuse to order

the return of a child even if the child is settled in her new environment. *Id.* at 18a-19a (quoting *Blondin v. Dubois*, 238 F.3d 153, 164 (2d Cir. 2001)). The Second Circuit explained that unlike a statute of limitations which would prevent a parent from filing a petition after the one-year period has passed, the now settled defense "merely permits courts to consider the interests of a child who has been in a new environment for more than a year before ordering that child to be returned to her country of habitual residency". *Id.* at 19a.

The Second Circuit also examined the drafting history of the Convention and concluded that equitable tolling was inconsistent with the purposes of the Convention. Consulting the report prepared by the official Hague Convention reporter, Elisa Pérez-Vera ("Pérez-Vera Report"),[4] the court recognized that while the Convention aims to deter child abduction, "a concern for children's 'true interests' was the primary reason the signatory states 'drew up the Convention'". App. 21a (quoting Pérez-Vera Report ¶¶ 23-24). Accordingly, the drafters included certain exceptions to return, including Article 12's now settled defense, to allow for the recognition of "situations where 'the removal of the child can . . . be justified by objective reasons which have to do either with [the child's] person, or

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[4] Pérez-Vera was "the official Hague Conference reporter for the Convention", and her explanatory report is recognized to be "the official history and commentary on the Convention". Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,503 (Mar. 26, 1986); *see also Gitter v. Gitter*, 396 F.3d 124, 129 & n.4 (2d Cir. 2005).

with the environment with which [the child] is most closely connected'". *Id.* at 21a-22a (quoting Pérez-Vera Report ¶ 25). In addition, the court recognized that the drafters of Article 12 saw value in agreeing to a "single time-limit of one year" despite awareness of "the difficulties encountered in establishing the child's whereabouts". *Id.* at 23a (quoting Pérez-Vera Report ¶ 108). Specifically, the drafters expressly considered including two time-periods in Article 12, depending on whether the child had been concealed—six months if the child's location were known and one year if the child's location were unknown—and rejected that proposal in favor of the longer period. *Id.* at 23a (citing Merle H. Weiner, *Uprooting Children in the Name of Equity*, 33 Fordham Int'l L.J. 409, 434 (2010)). Thus, the court concluded that "the Convention's drafting history strongly supports Alvarez's position that the one-year period in Article 12 was designed to allow courts to take into account a child's interest in remaining in the country to which she has been abducted after a certain amount of time has passed." *Id.* at 23a-24a.

The Second Circuit's conclusions were supported by the Government's *amicus* brief, which the court had solicited. The court noted that the Government's brief applied "an interpretive process entirely in line with our own" and "reached the same conclusion" that equitable tolling does not apply to the one-year period. *Id.* at 25a.

Second, the Second Circuit rejected Petitioner's argument that a child's lack of legal immigration status precludes, as a matter of law, a finding that a child is now settled. Citing the text and purpose of the Convention, the court determined that

immigration status should be considered only as one of the many factors courts may take into account when deciding whether a child is now settled, which "is in line with the Convention's overarching focus on a child's practical well-being". *Id.* at 28a, 30a. The court noted that this fact-specific multi-factor test is consistent with the approach applied by district courts across the country. *Id.* at 31a n.14. The court also noted that its refusal to hold that immigration status is dispositive also is consistent with the Ninth Circuit, which is the only other circuit to have addressed the question of whether lack of immigration status should be dispositive. *Id.*

Third, the Second Circuit held that the District Court's factual findings regarding whether the child is now settled were not clearly erroneous. *Id.* at 33a-34a. The court noted that the District Court did not gloss over factual inconsistencies, but fully engaged with all the information before making its determination. *Id.*

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT'S DETERMINATION THAT THE "NOW SETTLED" DEFENSE IS NOT SUBJECT TO EQUITABLE TOLLING DOES NOT WARRANT THIS COURT'S REVIEW.

A. Review of the Second Circuit's Decision Now Would Be Premature.

Circuit law on the question whether the "now settled" defense is subject to equitable tolling remains undeveloped and is not well suited for this

Court's review. Given the state of the law, as well as this Court's recent discussion of equitable tolling in *Sebelius v. Auburn Regional Medical Center*, 568 U.S. ___, ___ (2013) (slip op., at 11-14), this Court should decline review and permit the lower courts to further consider this question.

1. No Other Circuit Court Has Addressed the Second Circuit's Rationale.

Petitioner misstates the extent of any split among the circuit courts of appeals. Contrary to Petitioner's contentions, Pet. 13, aside from the Second Circuit, only the Ninth and Eleventh Circuits have considered whether equitable tolling can be applied to the one-year period in Article 12. *See Duarte v. Bardales*, 526 F.3d 563, 569-70 (9th Cir. 2008); *Furnes v. Reeves*, 362 F.3d 702, 723-24 (11th Cir. 2004). The nine remaining circuit courts of appeals have had no opportunity to consider this question.[5]

Petitioner attempts to avoid this scarcity of circuit law by citing various district court cases "within the jurisdiction of at least ten circuit courts

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[5] The question presented here was not considered by the Fifth Circuit in *Dietz v. Dietz*, 349 F. App'x 930 (5th Cir. 2009). As the Second Circuit noted, App. 27a-28a n.13, the Fifth Circuit expressly stated that the appellant in *Dietz* "[did] not attack the use of equitable tolling as such" and did "not appear to question the court's application of tolling". *Dietz*, 349 F. App'x at 933. Thus, the Fifth Circuit assumed that equitable tolling applied to the one-year period, without analyzing the issue.

of appeal[s]" that have found equitable tolling to be available. Pet. 19. But none of those cases provided any court of appeals with an opportunity to develop the law, primarily because an appeal either was withdrawn or never was taken.[6] Nor do those cases evince well-developed law, because they do not bind any court that may consider this question in the future. *See United States v. Ensminger*, 567 F.3d 587, 591 (9th Cir. 2009) ("[A] district court opinion does not have binding precedential effect." (internal quotation marks omitted)); *see also McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004) (noting that "a district judge's decision neither binds another district judge nor binds him"). Thus, the proper focus of whether there is a split in authority is on the decisions of circuit courts.

Although the Second Circuit squarely has rejected the reasoning of the Ninth and Eleventh

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[6] Of the 17 cases cited by Petitioner, *see* Pet. 19-20, no appeal was taken in 10 of them. Of the remaining seven, the appeal voluntarily was dismissed in four cases. *See* Judgment of U.S. Court of Appeals, *Sita-Mambwene v. Keeton*, No. 09-cv-913 (E.D. Mo. Dec. 22, 2009), ECF No. 68; Order from the U.S. Court of Appeals, *Wasniewski v. Grzelak-Johannsen*, No. 06-cv-2548 (N.D. Ohio Oct. 26, 2007), ECF No. 108; Order, *Belay v. Getachew*, No. 03-1928 (4th Cir. Nov. 24, 2003), Entry No. 61; Notice of Withdrawal of Appeal, *In re Wojcik*, No. 96-cv-71392 (E.D. Mich. Mar. 20, 1997), Entry No. 20. In two cases, the appeal was dismissed for lack of prosecution. *See* Order, *Garza-Castillo v. Guajardo-Ochoa*, No. 12-15568 (9th Cir. Sept. 7, 2012), ECF No. 9; Mandate from the Court of Appeals, *In re Robinson*, No. 97-cv-994 (D. Colo. Apr. 28, 1998), Entry No. 30. One case was dismissed as moot. *See* Order of Dismissal from U.S. Court of Appeals, *Bocquet v. Ouzid*, No. 02-cv-21819 (S.D. Fla. Sept. 17, 2002), ECF No. 31.

Circuits, the converse is not true: The Ninth and Eleventh Circuits' decisions in *Duarte v. Bardales*, 526 F.3d 563 (9th Cir. 2008), and *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), did not consider any part of the Second Circuit's rationale.[7]

First, in addressing whether the "now settled" defense is subject to equitable tolling, neither the Eleventh Circuit's decision nor the Ninth Circuit's decision examines the drafting history of the Convention to ascertain its purposes. *Duarte*, 526 F.3d at 569-70; *Furnes*, 362 F.3d at 723. The relevant analyses of both decisions, for example, fail to cite the Pérez-Vera Report, which makes clear that the Convention holds "the interests of children [to be] of paramount importance in matters relating to their custody", Pérez-Vera Report ¶ 23, that "the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained", *id.* ¶ 25, and that the now settled exception is a "concrete illustration[]" of the Convention's intent of guarding the best interests of children, *id.*

Second, neither decision addressed the view that the one-year period is not a statute of limitations, since the now settled defense by its terms does not "prohibit[] a parent from filing a return petition after a year has expired" but "merely permits courts to

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[7] Indeed, the Eleventh Circuit's discussion of this question is little more than a string cite that cobbles together cases without explaining how their reasoning is sound or applicable to this context. *See Furnes*, 362 F.3d at 723.

consider the interests of a child who has been in a new environment for more than a year before ordering that child to be returned to her country of habitual residency". App. 19a. The Ninth and Eleventh Circuits simply equated the one-year period in Article 12 to a statute of limitations to which tolling ordinarily applies. *Duarte*, 526 F.3d at 570 (reasoning "that *limitations periods* are customarily subject to equitable tolling" (internal quotation marks omitted, emphasis added)); *Furnes*, 362 F.3d at 723 ("Unless Congress states otherwise, equitable tolling should be read into every federal *statute of limitations*." (internal quotation marks omitted, emphasis added)).[8]

Third, neither decision considered, as the Second Circuit did, App. 18a-19a, that a court retains equitable discretion to order a return of a child, even where the conditions of the "now settled" defense are met. Instead, both decisions implicitly assumed that tolling is the only form of equitable relief available (or appropriate) under the Hague Convention. *Duarte*, 526 F.3d at 569-70 (concluding that equitable tolling applies because "equitable principles" and "logic and equity" counsel against rewarding a parent that conceals a child); *Furnes*,

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[8] Petitioner's reliance on *Lops v. Lops*, 140 F.3d 927 (11th Cir. 1998), to suggest that the Eleventh Circuit supports equitable tolling despite recognizing that the one-year period is not a statute of limitations is baseless. Pet. 17. The passage on which Petitioner relies merely describes the district court's decision. In the very next sentence following Petitioner's quotation, the court expressly declined to reach the issue of whether equitable tolling applied. *Lops*, 140 F.3d at 946.

362 F.3d at 723 (concluding that equitable tolling should apply because otherwise a parent's misconduct in concealing his or her child would be rewarded).

In sum, the Ninth and Eleventh Circuits' decisions cannot be said to be truly in conflict with that of the Second Circuit.

The Second Circuit's decision is thorough and strongly supported by both the Convention's statutory text and drafting history, *see* section I.C, *infra*, and its reasoning very well could persuade the nine circuits yet to consider the question. Moreover, the Ninth and Eleventh Circuits, which have never considered the Second Circuit's analysis, might be persuaded to revisit the question and adopt the Second Circuit's rationale. Indeed, the Second Circuit observed that the Ninth Circuit already has indicated its reconsideration of its reasoning in *Duarte*. App. 27a-28a n.13; *In re B. Del C.S.B.*, 559 F.3d 999, 1014 (9th Cir. 2009). In declining to apply equitable tolling to the facts at issue in *In re B. Del C.S.B.*, the Ninth Circuit noted the "serious concerns" with *Duarte* and its desire to "adhere closely to the parameters set by *Duarte* so as to ensure that the Convention's concern over uprooting children is not sacrificed to its aim of deterring child abductions". *In re B. Del C.S.B.*, 559 F.3d at 1014. Consistent with the Second Circuit's approach, and in contrast to its decision in *Duarte*, the Ninth Circuit cited the Pérez-Vera Report when explaining its desire to limit the application of equitable tolling. *Id.* (citing Pérez-Vera Report ¶ 107).

Guidance from this Court's recent decision in *Auburn Regional* provides additional reason to permit circuit courts to visit (or revisit) the question. In holding that equitable tolling does not apply to certain administrative appeal deadlines, the Court reasoned that the presumption of equitable tolling "was adopted in part on the premise that such a principle is likely to be a realistic assessment of legislative intent", and that this premise was "inapt" in the context of the statute at issue. *Auburn Regional*, 568 U.S. at ___ (slip op., at 12) (internal quotation marks and brackets omitted). Here, no other circuit court (other than the Second Circuit) has made a "realistic assessment" of the intent underlying Article 12. Those circuits should be permitted the opportunity to do so.

Members of this Court have "in many instances recognized that . . . periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court". *Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting). As a consequence, this Court should decline to review this question as "a sound exercise of discretion" and allow lower courts "to serve as laboratories in which the issue receives further study before it is addressed by this Court". *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari). Thus, in contrast to the limited binding precedent available now, permitting these issues to "percolate" may yield the further study appropriate for the Court's possible review in the future—or it might obviate the need for such review altogether.

2. All the Circuits That Have Considered This Question Agree That Courts May Sanction a Parent's Misconduct.

Petitioner overstates the impact of the question he presents, primarily because he misapprehends the nature of any disagreement among the Second, Ninth and Eleventh Circuits.

All three courts of appeals agree that a court should have power in equity to avoid rewarding a parent's misconduct. *See* App. 27a ("[T]he Convention expressly provides a mechanism . . . to avoid rewarding a parent's misconduct—a Central Authority's discretion to order the return of a child, even when a defense is satisfied."); *Duarte*, 526 F.3d at 570 (noting that "equitable principles" and "[l]ogic and equity" should apply to prevent encouraging child abductions and concealment); *Furnes*, 362 F.3d at 723 (noting that a parent who abducts and conceals children for more than a year should not be rewarded for that misconduct). The sole point of departure among these circuits is whether such equitable power should come in the form of the court's existing equitable discretion under Article 12, or by an engraftment of equitable tolling principles.

Petitioner's argument that this point of departure nevertheless presents an "important issue" is meritless. Pet. 21. Petitioner threatens that relying solely on equitable discretion will encourage further abductions. According to Petitioner, equitable tolling "sends a clear message" that a parent concealing his or her child's whereabouts "will not benefit from [that] wrongful

action", *id.* at 21-22, whereas equitable discretion reassures such a parent that "there is a reasonable chance you will benefit from your actions" and that he or she should take "a gamble they are likely to win", *id.* at 22. Petitioner fails, however, to cite any authority—and Respondent is aware of none—to support such a distinction, or to support his contention that the purported distinction reflects a present and urgent disparity in incentives requiring resolution.[9]

Petitioner instead notes that only two courts have invoked equitable discretion to order the return of a child after finding that child to be settled, and argues that equitable discretion is insufficient to deter the abduction and concealment of children. Pet. 22; *see F.H.U. v. A.C.U.*, 48 A.3d 1130, 1146-47 (N.J. Super. Ct. App. Div. 2012); *Antunez-Fernandes v. Connors-Fernandes*, 259 F. Supp. 2d 800, 815 (N.D. Iowa 2003). But Petitioner's contention remains unfounded. The mere fact that courts have more often applied equitable tolling to address the concealment of a child says nothing about what those courts would have done if equitable tolling were unavailable as a matter of law and equitable discretion were the only vehicle for such considerations. If anything, the circuit courts' broad focus on "equity" and "equitable principles" generally

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[9] Notably, Petitioner does not even attempt to argue that the drafters of the Convention were concerned that equitable discretion would be insufficient to deter child abduction and concealment. As the Second Circuit correctly noted, *see* section I.C, *infra*, the text and history of the Convention does not reflect such a concern.

suggests that if tolling were unavailable, courts would use equitable discretion to address a parent's concealment of his or her child. *See, e.g.*, *Duarte*, 526 F.3d at 570; *see also* App. 27a. And equitable discretion, being in harmony with the intent underlying the Convention, provides a far more natural fit than Petitioner's proffered square peg of equitable tolling.

Thus, courts already have at their disposal a vehicle to take into account the equities and policy considerations that Petitioner incorrectly asserts only equitable tolling can protect.

B. A Decision by This Court Would Not Change the Outcome of This Case.

This case is a poor vehicle for review because a decision by this Court would not change the outcome. Petitioner's question asks whether a district court may equitably toll Article 12's one-year period when the abducting parent has concealed the whereabouts of the child. Pet. at ii. But the District Court expressly held, in the alternative, that, even if equitable tolling were available, such tolling would be unwarranted on the facts of the case. App. 101a-03a ("In any event, even if equitable tolling could apply to Convention petitions, the Court does not believe that tolling would be warranted in this case."). The Second Circuit affirmed this determination. App. 34a. Thus, even if this Court decided that Article 12's now settled exception is subject to equitable tolling, it would not change the outcome of this case. *See* Eugene Gressman et al., *Supreme Court Practice* 248 (9th ed. 2007) (citing *Somerville v. United States*, 376 U.S. 909 (1964)) ("If

the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied."). Moreover, the District Court also determined that it would not exercise equitable discretion under Article 12 to order the return of the child despite finding that the child was settled. App. 112a-14a.

Petitioner has not presented any question regarding equitable tolling that would change the outcome. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151 n.3 (1976) ("[W]e consider only the questions set forth in the petition or fairly comprised therein" (internal quotation marks and brackets omitted).). Nowhere in the petition does the Petitioner challenge in any way the District Court's conclusion that equitable tolling was unwarranted under the facts of this case. Nor would such a challenge warrant this Court's review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Powell v. Nevada*, 511 U.S. 79, 87-88 (1994) (Thomas, J., dissenting).

C. The Second Circuit's Decision Is Correct on the Merits.

Permitting the Second Circuit's decision to stand raises no concerns because it is correct. Consistent with this Court's focus on the "statutory text, structure, and purpose" in determining whether the drafters "did *not* want the equitable tolling doctrine to apply", *Auburn Regional*, 568 U.S. at ___ (slip op.,

at 12) (quoting *United States v. Brockamp*, 519 U.S. 347, 350 (1997)), the Second Circuit appropriately held that the one-year period in the Article 12 now settled defense is not subject to equitable tolling.

The Second Circuit properly interpreted the text of the Convention and noted that the language of Article 12 "expressly starts the running of the one-year period 'from the date of the wrongful removal or retention'"—not from when the petitioning parent discovers the child's whereabouts. App. 17a n.8 (quoting Convention, art. 12). The court also recognized that Article 12, considered within the full framework of the Convention, rendered equitable relief in the form of tolling unnecessary because courts retain equitable discretion to return a child even after finding her to be now settled. *Id.* at 18a-19a. Rather than force a square peg into a round hole, the Second Circuit's interpretation accords with Article 12 and other parts of the Convention. *Id.* at 19a & n.10.

The Second Circuit carefully examined the drafting history of the Convention and appropriately concluded that equitable tolling was inconsistent with the purposes of the Convention. The court recognized that that the drafters of the Convention saw value in agreeing to a "single time-limit of one year" despite awareness of "the difficulties encountered in establishing the child's whereabouts". *Id.* at 23a (quoting Pérez-Vera Report ¶ 108). Moreover, the drafters expressly considered—and rejected—a proposal that provided for two time periods in Article 12, depending on whether the child had been hidden: (1) A period of six months from the child's removal if the child's whereabouts were

known; and (2) where the child's whereabouts were unknown, a period of six months that ran from the date of discovery of the child, provided that the total duration did not exceed a year from the child's removal. *Id.* at 23a (citing Merle H. Weiner, *Uprooting Children in the Name of Equity*, 33 Fordham Int'l L.J. 409, 434 (2010)). Instead, the drafters settled on a single time frame of one year—which was the maximum time contemplated even in the proposal that took concealment into account—regardless of whether the child was concealed. *Id.*

The Second Circuit directly addressed and properly rejected Petitioner's central contention here, namely that prohibiting equitable tolling would undermine the primary purpose of the Convention. The court recognized that the signatories "drew up the Convention" to account for children's "true interests" and that the Convention thus "recognizes the need for certain exceptions" to the "general obligation[] . . . to secure the prompt return of children who have been unlawfully removed or retained". *Id.* at 21a-22a (quoting Pérez-Vera Report ¶¶ 23-25). And Article 12 is precisely such an "exception[]" that "concrete[ly] illustrat[es] . . . the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area". *Id.* at 22a (quoting Pérez-Vera Report ¶ 25). Thus, far from undermining the purposes of the Convention, reading Article 12 according to its text and drafting history fulfills its purposes. Likewise, the Government in its *amicus* brief undertook an analysis of the text, history, and purposes of the Convention, as well as case law from other signatory countries, and reached the same conclusion. *Id.* at

177a-88a.[10] Soundly reasoned, the Second Circuit's decision needs no review.

II. THE SECOND CIRCUIT'S DECISION THAT A CHILD'S IMMIGRATION STATUS IS NOT DISPOSITIVE WHEN DETERMINING WHETHER THE CHILD IS SETTLED UNDER ARTICLE 12 DOES NOT WARRANT THIS COURT'S REVIEW.

A. There Is No Conflict in the Circuits.

Petitioner concedes—as he must—that "most courts" that have considered whether a child is settled under Article 12 "have utilized the same multi-factor test employed by the Second Circuit". Pet. 26. Petitioner cites to no precedent—and Respondent is aware of none—to support his novel proposition that a child's unlawful immigration status categorically precludes a finding that the child is settled. Not only is there no split among the circuits, there is not even a single reported case that has ruled contrary to the Second Circuit.[11]

In fact, the Second Circuit's refusal to find immigration status dispositive is consistent with the

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[10] Petitioner's grievances with the Government's position are a non-sequitur. Far from giving inappropriate weight to the Government's position in its *amicus* brief, the Second Circuit provided an independent analysis and merely noted that the Government applied "an interpretive process entirely in line with our own" and "reached the same conclusion". App. 25a.

[11] The only reported case holding to the contrary is no longer good law. *See In re B. Del. C.S.B.*, 525 F. Supp. 2d 1182 (C.D. Cal. 2007), *rev'd*, 559 F.3d 999 (9th Cir. 2009).

position adopted by the Ninth Circuit—the only other circuit court to have squarely addressed this issue. *See* App. 28a ("Given the Convention's text and purpose, immigration status should only be one of many factors courts take into account when deciding if a child is settled within the meaning of Article 12."); *In re B. Del C.S.B.*, 559 F.3d at 1009-10 ("[I]t makes little sense to permit immigration status to serve as a determinative factor in the Article 12 'settled' analysis."). In its *amicus* brief, the Government reached the same conclusion as the Second Circuit and the Ninth Circuit, finding that a "child's immigration status should not be dispositive standing alone, but may be one factor in a court's determination of whether the child is now settled in her new environment". App. 172a. Moreover, as the Petitioner acknowledges, district courts uniformly have considered immigration status as only one of several factors when deciding whether a child is settled. *See, e.g.*, *Etienne v. Zuniga*, No. C10-5061, 2010 WL 4918791, at *3 (W.D. Wash. Nov. 24, 2010); *Edoho v. Edoho*, No. H-10-1881, 2010 WL 3257480, at *4, *6 (S.D. Tex. Aug. 17, 2010); *Castillo v. Castillo*, 597 F. Supp. 2d 432, 439-40 (D. Del. 2009); *In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004); *In re Koc*, 181 F. Supp. 2d 136, 152-54 (E.D.N.Y 2001).[12]

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[12] Foreign courts have also "given varying weight to immigration status, depending on the circumstances of the case". App. 190a-91a (citing *A. v. M.* (2002), 209 N.S.R. 2d 248, ¶¶ 79-85 (Nova Scotia Ct. App. 2002); *In Re C (A Child)*, [2006] EWHC (Fam) 1229, [2006] 2 F.L.R. 797 [54]-[57] (Eng.)).

Given that there is no split in authority whatsoever on the second issue presented, no review by this Court is warranted.

B. The Second Question Presented, as Framed by Petitioner, Was Not Resolved by the Courts Below and in Any Event, Would Not Change the Outcome of This Case.

Petitioner's second question presented is not appropriate for this Court's review for the independent reason that it was not argued before the lower courts. Petitioner's proposed question presented asks "[w]hether an abducted child can be 'settled' in the United States . . . where it is undisputed that both the abducting parent and the child are residing illegally in the United States, *and the abducting parent presents no evidence of a legitimate pending application or basis under existing law for seeking a change in their immigration status.*" Pet. at ii (emphasis added). The second half of the question was not raised by Petitioner in his briefs below. *See* Brief and Special Appendix for Petitioner-Appellant at 2, *Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012) (No. 11-2224-cv), ECF No. 37 (posing in his Statement of Issues presented whether a child can be "well settled" where parent and child lack legal immigration status).[13] Accordingly, the Second Circuit did not

[13] Although in a footnote in his reply brief, Petitioner attempted to distinguish this case from those in which a child with a pending immigration application was found to be settled, he did not ask the Second Circuit to rule on this distinction.

address this issue in its opinion. App. 28a. Similarly, the Government's *amicus* brief did not speak to this question, concluding that a "child's immigration status should not be dispositive standing alone", *id.* at 172a. Thus, this Court should not accept the second question presented by Petitioner. *See Glover v. United States*, 531 U.S. 198, 205 (2001) (refusing to decide questions that "were neither raised in nor passed upon by the Court of Appeals" and noting that whether the questions have merit is for the "Court of Appeals or the District Court to consider and determine in the first instance").

Moreover, even if this Court were to endorse Petitioner's new formulation of the issue, the rephrasing renders this case an inappropriate vehicle for review because a decision by this Court would not change the outcome. Ms. Montoya Alvarez did, in fact, "present[] [a] basis under existing law for seeking a change in [her and her daughter's] immigration status". As the District Court found, "there is unrefuted testimony from Respondent that she is looking into methods to gain legal status, including having her sister Maria, who is a United States citizen, sponsor Respondent and the child for citizenship". App. 109a. The Second Circuit held that the District Court's factual findings were carefully considered, and not "clearly erroneous". *Id.* at 33a-34a.

Reply Brief for Petitioner-Appellant at 7 n.5, *Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012) (No. 11-2224-cv) ECF No. 63.

Accordingly, the Court should not review the second question presented because it was not resolved by the courts below and because this particular case is not an appropriate vehicle for Supreme Court review.

C. The Second Circuit's Decision That a Child's Immigration Status Is Not Dispositive Is Correct on the Merits.

The Second Circuit's conclusion that "a court may consider any factor relevant to a child's connection to his living arrangement", App. 30a (quoting *Duarte v. Bardales*, 526 F.3d at 576), is consistent with the text of Article 12, which is broad and endows courts with substantial discretion. It is also consistent with the purpose of Article 12, which "recognizes that there may come a point at which repatriation might not be in [the child's] best interest". *Id.* at 29a (internal quotation marks omitted). The Convention's focus on the child's well-being suggests that a child is settled if she has "significant emotional and physical connections demonstrating security, stability, and permanence in [her] new environment". *Id.* Petitioner's proposed categorical rule would undermine the text and purpose of Article 12 by preventing judges from carefully considering the extent to which a particular child's immigration status actually affects her emotional and physical connections to her new environment.

The Second Circuit's focus on factors that impact a child's current living arrangement is also consistent with the Convention's limited purpose of determining the location of the custody proceedings,

not the child's ultimate country of residence. Petitioner's attempts to frame this issue as "important" by conflating it with a larger discussion about United States immigration policy, Pet. 23-26, is misleading and distorts the narrow aim of a court tasked with making an inquiry under the Convention. *See* App. 32a n.16; *In re B. Del C.S.B.*, 559 F.3d at 1013 ("The determination of future well-being is left to the court conducting custody proceedings. A petition brought under the Hague Convention . . . merely seeks to establish in which country that custody proceeding may take place."); *accord Demaj v. Sakaj*, No. 3:09 CV 255, 2012 WL 476168, at *4 (D. Conn. Feb. 14, 2012); *Wojcik v. Wojcik*, 959 F. Supp. 413, 421 (E.D. Mich. 1997).

In an attempt to characterize the Second Circuit's treatment of immigration status as out of line with the approach courts have taken when considering other aspects of a child's living arrangement, Pet. 24, Petitioner mischaracterizes the Second Circuit's holding. Petitioner accuses the Second Circuit of adopting a "myopic focus on the 'present'", *id.*, and maintains that the Second Circuit endorsed the view that "a child's immigration status should be relevant to the settled analysis only to the extent that there is an imminent threat of removal", *id.* at 23 (internal quotation marks omitted). This is plainly incorrect. The Second Circuit explicitly rejected this approach, noting that "because we can imagine instances where immigration status may be important even if the threat of removal is negligible, we decline to impose a categorical rule that the weight to be given a child's immigration status varies only in accordance with the threat of

deportation". App. 32a n.16. By holding that "in any given case, the weight to be ascribed to a child's immigration status will necessarily vary", *id.* at 28a, the Second Circuit preserves the discretion of courts to consider all factors that are relevant to evaluating the extent to which a child's immigration status affects whether the child is settled. These factors may include the threat of deportation, the likelihood that the child will obtain lawful status, the child's age and the degree to which the child will be harmed by her inability to receive certain government benefits. *See id.* at 31a-32a. For these reasons, the Second Circuit's holding that a child's immigration status is not determinative under Article 12 does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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Respectfully Submitted,

LAUREN A. MOSKOWITZ
Counsel of Record
RACHEL G. SKAISTIS
CARRIE R. BIERMAN
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000
lmoskowitz@cravath.com

Counsel for Respondent
Diana Lucia Montoya Alvarez