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

REPLY BRIEF FOR PETITIONER

SHAWN PATRICK REGAN
Counsel of Record
JOHN R. HEIN
KRISTIN M. KRAMER
HUNTON & WILLIAMS LLP
200 Park Avenue
New York, New York 10166
(212) 309-1000
sregan@hunton.com

Counsel for Petitioner

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Respondent argues that the questions presented "do not warrant this Court's review . . . because neither question presents a developed circuit split or an issue of broad importance." Opp. 1. Respondent's arguments are unavailing.

The first question presents a plain circuit split. The Fifth, Ninth, and Eleventh Circuits, under a doctrine of "equitable tolling," bar an abducting parent from asserting the "settled" defense where the abducting parent's concealment of the child prevented the left-behind parent from filing a petition within the one-year period of Article 12. The Second Circuit held that equitable tolling cannot apply and thus allows abducting parents who have concealed the whereabouts of their child for the one-year period to avoid return of the child by showing that the child is now "settled" in the United States. The circuit courts thus are split over whether equitable tolling applies.

Respondent argues that this split is of no consequence because the district court generally possesses "equitable discretion under Article 12 to return the child even if the defense is satisfied." Opp. i.[1] While both approaches rely on equitable powers, there is a material difference between the two. Under the approach of the Fifth, Ninth, and Eleventh Circuits, where a left-behind parent shows that the abducting parent has prevented the timely

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[1] Respondent is mistaken in asserting that this discretion arises under Article 12. Article 18 states: "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time." Hague Convention, Art. 18. Article 12 says nothing in this respect.

filing of a proper petition, the abducting parent is barred from asserting the settled defense. Under the approach of the Second Circuit, the left-behind parent must defeat the abducting parent's settled defense or meet the considerably higher burden of convincing the court to use its general equitable power to return the child notwithstanding that court having found that the child is settled.

The second question presented involves the proper interpretation and application of a statute codifying an international treaty. It asks whether a child's lack of legal immigration status precludes a settled finding as a matter of law, where there is no evidence of a viable basis to change that status. The Petition presents issues of crucial importance to victims—parent and child alike—of international child abduction.

I. THE CONFLICT RAISED IN THE FIRST QUESTION MERITS THIS COURT'S REVIEW

A. The Circuit Split Cannot Be Denied.

The decision below conflicts with decisions of the Fifth, Ninth, and Eleventh Circuits. Pet. App. 26a ("At least three of our sister Circuits have permitted the one-year period in Article 12 to be equitably tolled."). Respondent's attempt to deny the existence of the circuit split—which the panel below expressly acknowledged it was creating—and to minimize its importance is unpersuasive.

The Second Circuit squarely has rejected the reasoning of the Ninth and Eleventh Circuits. Pet. App. 27a. Respondent admits as much, Opp. 18–19, but asserts that Petitioner "overstates the extent of

any split" and that the circuits are not truly in conflict because the Ninth and Eleventh Circuits "do not address any part of the Second Circuit's rationale." Opp. 2, 19–21. This amounts to sophistry.

First, Respondent's proposition that a conflict does not exist because earlier circuit court decisions did not "address the rationale" of the subsequent decision from another circuit asks for something that is chronologically impossible. And, insofar as Respondent is attempting to suggest that the question was not thoroughly considered by any of the three circuits with which the Second Circuit expressly disagreed, that assertion is belied by the facts. For example, Respondent omits from its discussion the Ninth Circuit decision *In re B. Del C.S.B.*, 589 F.3d 999 (9th Cir. 2009). There, the Ninth Circuit makes frequent reference to both the Convention and the Pérez-Vera Report in its equitable tolling analysis. *Id.* at 1014–15. Both the Ninth and Second Circuits examined the text of the Convention and the official commentary when re-affirming that equitable tolling applies to the settled defense. *Compare id.* at 1014 (citing *Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008)), *with* Pet. App. 17a–24a.

Second, contrary to Respondent's assertions, Opp. 19, the Ninth Circuit expressly addressed the view that the one-year period is not a statute of limitations. In concluding that equitable tolling is permitted under the Convention, the Ninth Circuit acknowledged that "'the evident import of [Article 12's one-year period] is not so much to provide a potential plaintiff with a reasonable time to assert any claims, as a statute of limitations does, but

rather to put some limit on the uprooting of a settled child.'" *In re B. Del C.S.B.*, 589 F.3d at 1014 (quoting *Toren v. Toren*, 26 F. Supp. 2d 240, 244 (D. Mass. 1998), *opinion vacated on other grounds*, 191 F.3d 23 (1st Cir. 1999); Pérez-Vera Report ¶ 107). Thus, Respondent is mistaken when claiming that the Ninth Circuit simply equated the one-year period in Article 12 to a statute of limitations to which tolling ordinarily applies. Opp. 20.

Third, Respondent incorrectly concludes that, because both the Ninth and the Eleventh Circuits apply equitable tolling principles to the settled defense, both courts implicitly assume that tolling is the only form of equitable relief available (or appropriate) under the Hague Convention. Opp. 20. The point each court makes—the point Respondent's argument misses—is that equitable tolling applies to the settled defense because "otherwise a parent who abducts and conceals children for more than one year will be rewarded for the misconduct by creating eligibility for an affirmative defense not otherwise available." *Furnes v. Reeves*, 363 F.3d 702, 723 (11th Cir. 2004) (internal quotations and citations omitted); *Duarte*, 526 F.3d at 569–70 (holding that "[l]ogic and equity" dictate against "awarding an abducting parent an affirmative defense if that parent hides the child from the parent seeking return"). As noted in Article 18 of the Convention, courts always retain equitable discretion, but only equitable tolling prevents an abducting parent who has concealed the whereabouts of the child for the one-year period from avoiding return of the child by showing that the child is now "settled" in the United States. Pet. 21.

B. The Petition Raises an Important and Recurring Conflict.

Respondent's effort to dismiss the importance of the conflict fares no better. Respondent argues that the issues raised in the Petition do not merit review because the circuits are split only on "whether . . . equitable power [to avoid rewarding an abducting parent's misconduct] should come in the form of the court's existing equitable discretion under Article 12, or by an engraftment of equitable tolling principles." Opp. 2.[2] The difference between judges' equitable discretion and equitable tolling in the context of the Hague Convention, however, is not a difference without distinction; it is a distinct difference that materially affects a parent's fundamental rights and implicates international relations and comity.[3]

First, as the law of the circuits currently stands, the same circumstances arising in different

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[2] *See supra* note 1.

[3] Respondent argues that the text and history of the Convention "does not reflect . . . a concern" that equitable discretion would be insufficient to deter child abduction and concealment. The drafters of the Convention, however, clearly intended for the Convention to operate in conjunction with other legal rules, such as equitable tolling, to repatriate abducted children:

> [E]ven within its own sphere of application, the Convention does not purport to be applied in an exclusive way. It seeks, above all, to carry into effect the aims of the Convention and so explicitly recognizes the possibility of a party invoking, along with the provisions of the Convention, *any other legal rule which may allow him to obtain the return of a child wrongfully removed* or retained . . . .

See Pérez-Vera Report ¶ 39 (emphasis added).

jurisdictions will lead to vastly different results. If a parent abducts a child from England and conceals that child's whereabouts for at least one year before the left-behind parent locates them in, by way of example, California, Florida, or Texas, parental custody rights will be determined under English law in England. In contrast, if the same child's whereabouts are concealed through the same actions and for the same duration but the child is ultimately taken to New York, parental custody rights will be determined in New York under New York law, so long as the abducting parent can make the unremarkable showing that, after more than a year, the child is now "settled" in New York.[4] The only exception to this outcome will be if the district court elects to return the "settled" child to England under its general powers of equity and discretion, an action which, in decades of jurisprudence on this issue and hundreds of petitions filed annually, a mere two courts have ever done so in publicly available decisions. Pet. 22. Such inconsistent results do not foster comity or the reciprocity needed to ensure the effective operation of the Hague Convention. Because the Petition presents a question of United States

[4] To determine whether a child is settled, courts look to a mostly common set of factors. *See In re Koc*, 181 F. Supp. 2d 136, 154 (E.D.N.Y. 2001). The modesty of meeting this burden is illustrated by this case, where the child was found settled despite evidence that she (1) was just five years old; (2) lacks lawful immigration status; (3) is dependent on a mother who cannot be employed legally; (4) is supported primarily by an aunt's live-in boyfriend in a home with past criminal associations; and (5) missed 14 days in just one semester at nursery school. Pet. App. 105a–110a. If this child is "settled," it is difficult to conceive of circumstances where a child would not be.

common law with respect to interpretation of an international treaty, the opinion of this Court is particularly appropriate and necessary.

Second, the practical operation of equitable tolling and equitable discretion affects the fundamental rights of parents and their ability to exercise those rights. This Court has long recognized the fundamental right of parents to be involved in their child's life barring extreme circumstances. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."). Equitable tolling ensures the prompt return of abducted children to their country of habitual residence so that both parents—not just the abducting parent—may exercise their rights relating to their child. In this case, if equitable tolling applied to the one-year filing period, Respondent would have been ordered to return to the United Kingdom with Petitioner's child within a reasonable time period and with appropriate undertakings, her custody would have been adjudicated with the participation of both parents, and Petitioner likely would have some type of custody or visitation rights, and a relationship with his daughter. To date, Respondent's unilateral and illegal actions have prevented Petitioner from playing any role in his daughter's life since her abduction.

Moreover, as a practical matter, ordering the adjudication of custody of foreign nationals and their children in the United States may preclude left-behind parents from meaningfully participating in custody proceedings or in exercising custody rights, as many left-behind parents lack legal immigration status, the financial ability, and other resources that

would enable them to come to the United States. Indeed, the district court below acknowledged that the outcome of this case "disadvantage[s]" and "is in many ways unfair to Petitioner" because he lacks the finances or immigration status necessary to travel between England and New York for a custody determination. Pet. App. 114a, n.21. Moreover, the lack of legal immigration status of the child and her mother substantially inhibits Petitioner's ability to have even visitation with his daughter. *See In re Koc*, 181 F. Supp. 2d 136, 154 (E.D.N.Y. 2001) (finding that respondent "has made it virtually impossible for [the child] to see her father if she remains in [the United States]" and noting that petitioning father had been denied a visa on four separate occasions "due to respondent's and child's uncertain immigration status").

Third, the issue raised in the first question presented represents a recurring conflict that arises and will continue to arise in almost every jurisdiction in the country. The issue has been percolating in the lower courts for well over a decade, having been considered by four circuit courts and innumerable district courts. Pet. 19–21. It is ripe for this Court's review.

C. Reversing the Court Below May Change the Outcome of This Case.

Respondent argues that certiorari is imprudent because a holding that equitable tolling applies "would not change the outcome of the case." Opp. 3. Respondent's argument, however, overlooks the fact that in asking the Court to determine whether equitable tolling is available under Article 12, Petitioner necessarily asks the Court to articulate the

standard for lower courts to determine whether it applies in a particular case. To the extent that this Court articulates a standard that is distinct from the exceptionally high standard adopted by the district court here, i.e., that the act(s) of concealment must be "egregious," Pet. App. 104a, a reversal may change the outcome of this case.[5] Accordingly, the Court may reverse and remand the case for consideration under the proper standard, as it has done innumerable times. *See, e.g., Tennant v. Jefferson County Commission*, 133 S. Ct. 3, 5–6 (2012) (reversing and remanding where lower court misapplied standard for evaluating challenges to Congressional redistricting plans).

II. THE ISSUE RAISED IN THE SECOND QUESTION MERITS THIS COURT'S REVIEW

A. Petitioner Properly Raised His Second Question to the Second Circuit.

Respondent claims that the second question presented is not appropriate for this Court's review because it was not argued before the lower courts. Opp. 31. Respondent is mistaken.

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[5] Other courts adopt a lenient view of what constitutes concealment, finding that equitable tolling applies where a respondent merely fails to "reveal her location" to the left-behind parent, since that "could have precluded" a petitioner from filing his application in a timely manner. *See Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 850 (S.D. Tex. 2006).

In the court below, Petitioner argued that "where an abducted child and the abducting parent are both residing in the United States illegally, that child cannot become well-settled in the United States as a matter of law." Brief and Special Appendix for Petitioner-Appellant at 40, *Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012) (No. 11-2224-cv), ECF No. 37. Petitioner further argued that when the "long-term interests and consequences of the child remaining in the United States . . . are taken into account, the destabilizing effects of the child's illegal immigration status preclude a well-settled finding." Reply Brief for Petitioner-Appellant at 5, *Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012) (No. 11-2224-cv), ECF No. 63. The only reason that the child's lack of legal immigration status would have such long-term consequences is where "the abducting parent presents no legitimate pending application or basis under existing law for seeking a change in their immigration status." Pet. ii. Petitioner also directly articulated the question as presented at oral argument and the issue was the subject of extensive argument. Indeed, in the decision below, the Second Circuit recognized the second question articulated in the Petition; however, the Second Circuit failed to resolve it. Pet. App. 31a–32a. ("The importance of a child's immigration status will inevitably vary for innumerable reasons, including: the likelihood that the child will be able to acquire legal status or otherwise remain in the United States . . . ."). The question was raised and considered below, and it merits this Court's review.

B. Contrary to Respondent's Claim, Respondent Failed to Present Any Legitimate Basis for Seeking a Change in Her Immigration Status.

Respondent further argues that a decision by this Court on the second question presented would not change the outcome of the case because the Second Circuit affirmed factual findings of the district court that "unrefuted testimony from Respondent [shows] that she has a legal basis to seek a change in her and her daughter's immigration status." Opp. 4.

But the district court actually never found this. It 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." Pet. App. 6a, 109a (emphasis added). The district court found that Respondent was "looking into it," and that this alone sufficed to overcome a presumption that a child lacking legal immigration status is not settled. Neither the district court, nor the Second Circuit, found that Respondent has a legitimate basis to seek a change in her and her daughter's immigration status, nor has Respondent ever presented such a basis. All Respondent ever presented was that she was "in the process of determining whether she can be sponsored for citizenship." Opp. 9.

Petitioner posits that, for purposes of the settled analysis, an abducting parent must at least bear a burden of presenting evidence of a legitimate pending application or basis under existing law for seeking a change in his or her immigration status. To hold, as the district court and Second Circuit did, that an abducting parent can overcome a presumption that

an illegal immigrant is unsettled merely by testimony that (s)he is "looking into" ways to obtain legal status renders immigration status irrelevant as a practical matter. "Looking into" whether something exists is not evidence of its existence.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SHAWN PATRICK REGAN
Counsel of Record
JOHN R. HEIN
KRISTIN M. KRAMER
HUNTON & WILLIAMS LLP
200 Park Ave.
New York, New York 10166
(212) 309-1000
sregan@hunton.com

Counsel for Petitioner
Manuel Jose Lozano

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