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

## SUPPLEMENTAL BRIEF FOR PETITIONER


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## SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, Petitioner respectfully submits this brief to address issues raised by the United States in its brief recommending the Court grant certiorari.

As to the first question presented, the government's brief agrees with Petitioner that certiorari review should be granted. The Second Circuit's decision on equitable tolling conflicts with the decisions of three other courts of appeals on an issue of great importance, that conflict likely will be outcome-determinative in many cases, and this case is a suitable vehicle for resolving the question presented.

With respect to the substantive merits of the first question presented, the crux of the government's argument appears to be that equitable tolling is available only with respect to statutes of limitations and that the one-year period under Article 12 is not a statute of limitations. This Court's decision in *Young v. United States*, 535 U.S. 43, 43 (2002), dispels that fallacy. *See* Pet. 17–18. And, contrary to the government's assertion, the Ninth Circuit's holding that equitable tolling is available was not premised on a conclusion that the one-year period is a statute of limitations. *C.f.*, U.S. Br. 15; Pet. 16–17; Reply Br. 3–4. In fact, the Ninth Circuit acknowledges that the import of the 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.*, 559 F.3d 999, 1014 (9th Cir. 2009) (citations omitted). The Ninth Circuit therefore finds equitable tolling available because "[l]ogic and equity" dictate against "awarding an

abducting parent an affirmative defense if that parent hides the child from the parent seeking return." *Duarte v. Bardales*, 526 F.3d 563, 569–70 (9th Cir. 2008).

Unlike the equitable discretion advocated by the United States, only equitable tolling fulfills the drafters' primary objective to deter child abduction by "depriv[ing] [the abducting parent's] actions of any practical or juridical consequences." Perez-Vera Report, ¶ 16. The United States properly acknowledges that the "important animating principles of the Convention" are:

> [d]eterring concealment and ensuring that abduction does not confer tactical advantages on the abducting parent . . . .

U.S. Br. 11. Yet the "equitable discretion" approach advanced by the United States grants a paramount "tactical advantage" to every abducting parent who is able to conceal the child's whereabouts for more than twelve months: It provides an affirmative defense that otherwise would not be available and allows an abducting parent to defeat a petition for return of the child by showing merely that the child is "settled" in the United States.

As statistics and precedent show, this defense is far beyond the "narrow exception" it was intended to be. *See* 42 U.S.C. § 11604(a)(4). *See also* Hague Conference on Private International Law, "A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction," Prel. Doc. No. 3, Part II, pp. 495–96 (2007 Update) (observing that 33% of all judicially denied applications in 2003 were so denied based on the

settled defense, a 100% increase from 1999). An examination of more recent published decisions from 2012 and 2013 reveals only one occasion where a court that substantively addressed and adjudicated the settled issue concluded that an abducting parent failed to meet the burden of establishing the settled defense, even though many such cases include facts that weigh against such findings. *Bernal v. Gonzalez*, 2012 U.S. Dist. LEXIS 186693, at *51 (W.D Tex. Nov. 29, 2012) (finding children not settled); c*ompare, e.g.*, *Broca v. Giron*, 2013 U.S. Dist. LEXIS 31708, at *18–25 (E.D.N.Y. Mar. 6, 2013) (finding children settled although they had spent majority of their lives in Mexico, they had moved four times in two years since leaving Mexico and the abducting parent and children lacked legal immigration status).

Moreover, subsequent to the filing of the *amicus* brief of the United States in the Second Circuit below, which endorsed "equitable discretion" under Article 18 in place of equitable tolling, at least one court has concluded from a review of the drafting history of the Convention that Article 18 "equitable discretion" does not grant federal courts the authority to order the return of a child if that child is found to be settled. *See* Transcript of Proceedings for Bench Trial at 13–16, *Yaman v. Yaman*, No. 12-cv-221-PB, 2013 U.S. Dist. LEXIS 10960 (D.N.H. Jan. 28, 2013), ECF No. 165.

Finally, contrary to the government's assertion, equitable tolling does not require a court to order the return of a child "no matter how long the child ha[s] lived" in her new environment. U.S. Br. 10. The courts that make equitable tolling available require left-behind parents to show that they have made continuous, diligent efforts to locate the child, making

the scenario raised by the government unrealistic. *See, e.g.*, *Van Driessche v. Ohio-Esezeobah*, 466 F. Supp. 2d 828, 850 (S.D. Tex. 2006) ("[I]n determining the application of equitable tolling, a petitioner's effort to seek the child's return are also considered."). It is thus unsurprising that the government points to no case giving plausibility to the circumstances it endeavors to conjure. Moreover, the government's example ignores that equitable tolling bars only the settled defense; other defenses relevant to such a scenario continue to remain available. For example, Article 13 provides that a court "may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." *See, e.g., Matovski v. Matovski*, 2007 WL 2600862, at *14–15 (S.D.N.Y. Aug, 31, 2007) (taking into account views of 12- and 13-year-old children opposing return); *c.f.*, *Blondin v. Dubois*, 238 F.3d 153, 166–67 (2d Cir. 2001) (concluding that "the District Court properly considered [the eight-year-old's] views" under Article 13 while expressing doubt that such testimony alone would be sufficient to establish a grave risk defense). Other defenses, such as the grave risk defense, also remain available and may prevent repatriation even if equitable tolling is available under Article 12. As such, equitable tolling plainly does not require return of the concealed child "no matter" other defenses.

Equitable tolling merely prevents abducting parents from gaining a "tactical advantage" from their affirmative wrongdoing by denying them the ability to raise an affirmative defense that otherwise would not be available: the ability to defeat the petition by making the modest showing that the child is settled.

The Court also should grant certiorari with respect to the second question presented because it is a question of great importance that recurs frequently. *See* Michael Singer, *Across the Border and Back Again: Immigration Status and the Article 12 "Well-Settled" Defense,* 81 FORDHAM L. REV. 3693, 3706 (2013) (surveying "the various approaches courts have taken in determining whether, and to what degree, immigration status should impact [the settled analysis]"); *id.* at 3728 (observing that "the issue . . . is not a theoretical procedural scenario or an arcane aspect of an obscure area of law, but a significant debate with far-reaching consequences" and concluding that "[t]he Supreme Court should grant certiorari to an Article 12 case to promulgate a bright-line rule . . . ."). *See also* Catherine Norris, *Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses Under the Hague Convention on International Child Abduction*, 98 CAL. L. REV. 159, 168–83 (2010) (detailing the different approaches courts have taken in considering immigration status).

That there is, as the government states, no pure split between the courts of appeals overlooks that courts are "frequently grappl[ing] with how immigration status . . . should impact the determination" of whether the child is settled and generally "have adopted one of three approaches to the issue . . . ." Singer, 81 FORDHAM L. REV. at 3693; *id.*at 3705–25 (surveying and categorizing the various cases and three approaches); *accord* Norris, 98 CAL. L. REV. at 175–183 (similarly digesting cases according to three distinct approaches). Even insofar as the two circuit courts have agreed that "the lack of lawful immigration status does not necessarily preclude a child from being settled," U.S. Br. 21,

those two opinions fail to resolve the specific, important, and recurring conflict that pervades courts as to the significance of an abducted child's lack of legal immigration status where there is no viable basis under existing law for seeking a change in that status. *C.f.*, U.S. Br. 28 (urging grant of certiorari with respect to the first question presented because, even if the Court were to decide equitable tolling does not apply, it "could offer guidance concerning how delay in commencing a proceeding might nonetheless be taken into account").

And the government's remaining arguments are not obstacles to the Court's proper consideration of this second question. For example, the United States argues that this case would not be an appropriate vehicle "because petitioner did not raise . . . in the court of appeals" that "respondent should have been required to submit 'evidence of a viable basis to change the child's status' before the child could be considered settled in the United States." U.S. Br. 21. But, because the "settled" question is an affirmative defense, the burden inherently falls on the proponent of the defense to present evidence to establish the defense.

Moreover, contrary to the argument of the United States that Petitioner failed to present these issues to the lower courts, no such waiver occurred. This second question—both generally and specifically with respect to the respondent's burden to produce affirmative evidence—was the subject of extensive briefing and oral argument before the court of appeals and district court. *See* Appellant Brief & Special Appendix at 54, *Lozano v. Alvarez*, No. 11-2224 (2d Cir. Sept. 30, 2011), ECF No. 37 ("Contrary to the District Court's conclusion, Appellee failed to

produce enough evidence in the aggregate to establish a well-settled finding in light of the child's and Appellee's illegal immigration statuses . . . ."); Appellant Reply Brief at 7 n.5, *Lozano v. Alvarez*, No. 11-2224 (2d Cir. Jan. 13, 2012), ECF No. 63 (distinguishing Respondent's immigration status from cases where abducting parents present evidence of ability to change lack of legal immigration status); Oral Argument Audio File Part 3 at 1:16, *Lozano v. Alvarez*, No. 11-2224 (2d Cir. Aug. 22, 2012) ("Our position is this: Where an abducting parent and child both lack legal immigration status, that status precludes a finding that the child is settled . . . for purposes of the Hague Convention unless the abducting [parent] can prove by a preponderance of the evidence the existence of a viable pending application or other legitimate basis to change that status.").[1] *See also* District Court Transcript at 21, Joint Appendix at A-641, *Lozano v. Alvarez*, No. 11-2224 (2d Cir. Sept. 30, 2011), ECF No. 41 (arguing that Respondent and child's immigration status precludes settled defense insofar as both are present illegally, cannot obtain employment, and Respondent failed to present evidence that viable grounds exist to change status in the future). That the Second Circuit elected not to squarely address this issue should be no obstacle to Petitioner and others obtaining clarity on this recurring and important issue.

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[1] The Second Circuit does not include an official oral argument transcript or audio recording on its docket, but makes such audio recordings available upon request. *See* Letter Requesting Oral Argument Audio Recording, *Lozano v. Alvarez*, No. 11-2224 (2d Cir.), ECF No. 106.

Similarly, insofar as the United States accepts and adopts the Second Circuit's statement that it declined to consider the long-term consequences of lacking lawful status because "petitioner[] fail[ed] to present the argument to the district court," U.S. Br. 20, respectfully, the record shows otherwise. Petitioner presented considerable evidence and argument as to "the long-term consequences of lacking lawful status." District Court Transcript, *supra*, at 21 (noting Respondent cannot become employed and noting the lack of evidence suggesting her status could change); Post-Hearing Mem. of Law in Support of Pet. at 19–20, Joint Appendix at A-564–65, *Lozano v. Alvarez*, No. 11-2224 (2d Cir. Sept. 30, 2011), ECF No. 40 (noting Respondent "cannot become employed due to her immigration status"). Indeed, in response to Petitioner's arguments, the district court explicitly acknowledged the *Koc* court's observation that the child's lack of lawful status would have the most profound of long-term consequences: it "would make it virtually impossible for the child to see her father if she remained in the country." Appx. 109a (citing *In re Koc*, 181 F. Supp. 2d 136, 154 (E.D.N.Y. 2001)). Petitioner unmistakably presented argument to the district court as to the long-term consequences of lacking lawful immigration status.

## CONCLUSION

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

Respectfully submitted,

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