No. 24-390

IN THE

Supreme Court of the United States

ANTHONY PATTERSON,

Petitioner,

v.

ASLI BAZ,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Monasky v. Taglieri*, 589 U.S. 68, 71, 78 (2020), this Court unanimously held that the determination of "habitual residence" under the Hague Convention on the Civil Aspects of International Child Abduction and its federal implementing legislation is inherently fact-bound. When a case seeking return of a child is brought under the Convention, a trial court determines a child's habitual residence by examining "the totality of the circumstances specific to the case," a test in which "[n]o single fact . . . is dispositive." *Id.* Trial courts apply this fact-bound totality-of-the-circumstances test uniformly, and appellate courts rightly review those determinations deferentially.

The question presented is:

Whether this Court should reconsider the question it resolved in *Monasky* that trial courts have discretion to consider all circumstances (including parental agreement) in adjudicating habitual residence—notwithstanding that the question is splitless and fact-bound—to instead hold that one factor must always trump all others, even when a trial court determines, based on the facts of a child's life, that it does not reflect the child's circumstances at the time when a return order is sought.

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INTRODUCTION

Petitioner, Dr. Asli Baz, and Respondent, Mr. Anthony Patterson, share a son, A.P., who is a minor child. The parties' relationship deteriorated when Mr. Patterson became physically and emotionally abusive; sharp litigation over custody ensued. Dr. Baz ultimately returned to Germany (where she is a citizen) and lived there with A.P., consistent with the parties' various custody agreements. Apparently dissatisfied with that arrangement (or perhaps just to continue his campaign of control), Mr. Patterson wrongfully retained A.P.'s American passport, flew to Germany, removed A.P. from school, drove him to the airport, flew him to the United States, and refused to return him to his mother (despite multiple consistent court orders requiring that). Dr. Baz sued, seeking the child's return under the Hague Convention. Mr. Patterson successfully forestalled A.P.'s rightful return to his mother for many excruciating months while a federal district court carefully weighed all facts, held a hearing, and resolved the question of A.P.'s habitual residence. The court concluded that before his wrongful retention, A.P.'s habitual residence was Germany.

The Seventh Circuit affirmed that decision in a lengthy and reasoned opinion that examined all relevant facts before deferring to the trial court's weighing of the evidence. One judge dissented, principally disagreeing with this weighing. The parties' son is now (finally) back in Germany with his mother, yet Mr. Patterson persists. He argues circuit-splits where none exist, and he paints the Seventh Circuit's well-reasoned and well-supported opinion as anything but. But not even the lone dissent in the

Seventh Circuit believed that the majority's opinion created a circuit split, and no judge called for a vote on Mr. Patterson's petition for rehearing *en banc*. And for good reason: This case is not worth further review. The district court here properly applied the law and exercised reasonable discretion to weigh all factors and reach a conclusion. This Court does not exist to reconsider fact-bound questions in splitless cases with little applicability outside the scope of the parties' dispute.

In *Monasky v. Taglieri*, 589 U.S. 68, 71, 78 (2020), this Court held that a trial court must determine a child's "habitual residence" by looking at the unique facts of a child's life and *rejected* the argument that a parental agreement should trump "a fact-driven inquiry" in which courts could be "sensitive to the unique circumstances of the case and informed by common sense." While one relevant fact can be parental intent or even parental agreement, no fact is dispositive, because each child's life is unique, and trial courts should not be hamstrung in examining all facts in these highly charged cases. *See id.* at 78 ("No single fact . . . is dispositive across all cases."). Trial courts are vested with broad discretion to determine where a child is "at home." *Id.* at 77.

The district court below cited to and applied *Monasky* in determining A.P.'s habitual residence. The court of appeals cited and followed *Monasky*, deferring to the district court's fact-bound conclusion, and affirmed. In doing so, it did not stray from this Court's mandate, and it certainly did not create a conflict with other circuits or with the Executive's view of post-*Monasky* cases. The Court should deny the petition.

COUNTERSTATEMENT

I. Legal Background

A. The Convention was promulgated in 1980 to combat international child abductions, prevent international forum-shopping in custody disputes, and secure the prompt return of children who have been wrongfully removed or retained. *Redmond v. Redmond*, 724 F.3d 729, 736–37 (7th Cir. 2013). Signatories to the Convention must return a child who has been wrongfully removed or retained from "their habitual residence"—their home—"in violation of the left-behind parent's custody rights under the law" of the child's home country. *Id.* at 737. "The Convention's central operating feature is the return remedy." *Abbott v. Abbott*, 560 U.S. 1, 9 (2010). The United States adopted the Convention in 1988, and Congress implemented it through ICARA. *See* 22 U.S.C. § 9001. Critically, a habitual residence determination is not a *custody* question. It is only a question where a child should reside while the proper jurisdiction resolves any custody dispute. *See Monasky*, 589 U.S. at 72 ("The Convention's return requirement is a 'provisional' remedy that fixes the forum for custody proceedings.").

B. Under the Convention and ICARA, a petitioner seeking return must prove by a preponderance of the evidence that the child at issue was wrongfully removed or retained away from his country of habitual residence. 22 U.S.C. § 9003(e)(1)(A). Every Hague Convention petition ultimately "turns on the threshold determination of the child's habitual residence; all other Hague determinations flow from that decision." *Redmond*, 724 F.3d at 742. This is because if the child is not outside his habitual residence, there is no wrongful removal or retention. *Id.* This Court has

affirmed that determining a child's habitual residence requires a totality-of-the-circumstances inquiry where no single fact, including parental agreement, can be dispositive. *Monasky*, 589 U.S. at 77–81.

II. Factual Background

A. Mr. Patterson and Dr. Baz share a child, A.P., who was born in Chicago in May 2017 while Dr. Baz, a German national, was studying in the United States. App. 1a, 3a.[1] Their relationship has been governed by a string of court orders compelled by Mr. Patterson's abusive behavior toward Dr. Baz. App. 3a; *see generally People v. Patterson*, No. 1-18-0607, 2022 WL 17496063 (Ill. App. Ct. Dec. 8, 2022). One such order was a custody order entered by an Illinois state court—the Illinois Allocation Judgment—at the parties' request in May 2022 after the court authorized Dr. Baz to move to Germany with A.P.[2] App. 3a–6a.

Generally, the Illinois Allocation Judgment recognized that A.P. would primarily reside and attend school in Germany with Dr. Baz, while Mr. Patterson would have parenting time over school breaks. App. 4a–5a. Relevant here, the Illinois Allocation Judgment provided that A.P.'s habitual residence was the United States, and that the Illinois state court had jurisdiction for litigating custody issues. App. 5a–6a.

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[1] Citations to Mr. Patterson's appendix are "App. __," and citations to his petition for a writ of certiorari are "Pet. __."

[2] As the Seventh Circuit recognized, the district court considered "evidence in the record that [Dr.] Baz procured permission to return to Germany under false pretenses" yet "did not find it persuasive," which "was a credibility determination" entitled to deference. App. 24a.

B. Mr. Patterson violated the Illinois Allocation Judgment by failing to provide Dr. Baz with A.P.'s American passport during a hand-off of A.P. in Germany in January 2023. App. 7a. Foreseeing that Mr. Patterson intended to retain their son, Dr. Baz initiated a German legal proceeding to prevent A.P.'s removal from Germany. App. 7a, 53a. Mr. Patterson then sought to modify the custody arrangement in the Illinois state court via an emergency motion, which the court continued because it did not believe an emergency existed. App. 7a–8a. At a May 2023 hearing in the German court, the parties, who were each represented by counsel, reached a global settlement agreement entered by the court—the German Consent Order. App. 8a.

The German Consent Order provided that the parties would continue to have joint custody, that A.P. would continue to live in Germany with Dr. Baz, and that the Illinois Allocation Judgment would otherwise remain in place. *Id.* It resolved all issues pending between Dr. Baz and Mr. Patterson relating to A.P. in both the American and German legal systems, and it specifically provided: (1) that the ongoing American and German custody proceedings would not be pursued further, (2) that the German attorneys would ask the court to stay the German proceeding, and (3) that Mr. Patterson would submit the settlement to the Illinois state court and ask that court to suspend the proceeding so the German attorneys could work on an out-of-court solution. App. 8a–9a.

Almost immediately after agreeing to the terms of the German Consent Order, however, Mr. Patterson reneged on his promises and violated it by failing to submit the order to the Illinois state court—instead submitting his own version of a "German Settlement

Notice"—and by continuing to litigate custody in the United States. *See* App. 9a. This duplicitous conduct led Dr. Baz to further fear that Mr. Patterson was plotting to retain A.P. after his summer parenting time rather than return the child as required by both the Illinois Allocation Judgment and the German Consent Order. App. 9a–10a. Accordingly, she did not send A.P. to the United States in June as provided by the German Consent Order. App. 10a. On July 3, Mr. Patterson appeared in Germany unannounced and took A.P. from his German kindergarten over the protests of staff. *Id.*

After absconding from Germany with A.P. and returning to Chicago, Mr. Patterson immediately sought full custody of A.P. in the Illinois state court, confirming Dr. Baz's fear that he did not intend to return A.P. to Germany as required by the German Consent Order and as forecast by Dr. Baz in June. App. 10a–11a.

III. Procedural History

A. Seeking the return of her child, Dr. Baz petitioned for a return order under the Convention and ICARA. App. 11a. After a two-day evidentiary hearing, the district court concluded that Mr. Patterson had wrongfully retained (and was still wrongfully retaining) A.P. away from his country of habitual residence, Germany, and ordered that A.P. be returned to Dr. Baz.[3] App. 57a–67a. Applying *Monasky*, the court considered all the evidence and determined that although the Illinois Allocation

[3] Although Mr. Patterson was *pro se* at the time of the evidentiary hearing, he was previously represented by counsel in the district court, *see* Dist. Ct. Dkt. 46, and he was (and continues to be) represented by counsel on appeal.

Judgment (among other factors) supported Mr. Patterson's claim that A.P.'s habitual residence was the United States, it was outweighed by evidence of A.P.'s subsequent acclimation to Germany. App. 61a–64a.

B. Mr. Patterson appealed, and the Seventh Circuit stayed the return order, allowing Mr. Patterson to continue to keep A.P. in the United States while the appeal proceeded. App. 12a. Following expedited briefing, the circuit affirmed in a lengthy and detailed opinion. It first rejected Mr. Patterson's argument that the jurisdictional language in the Illinois Allocation Judgment displaced the Convention. App. 12a–15a. The court then affirmed that Mr. Patterson was wrongfully retaining A.P. App. 15a–28a. Applying *Monasky* and analogous circuit precedent, *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013), the court concluded that any "stipulation" in the Illinois Allocation Judgment was not determinative of the question of A.P.'s habitual residence and the district court properly employed a totality-of-the-circumstances inquiry to find that Germany was A.P.'s habitual residence. App. 18a–26a.

Although Judge Hamilton dissented, he did not do so on the basis that the Seventh Circuit was creating or enforcing any circuit split. *Cf.* App. 30a–48a. Rather, when it came to A.P.'s habitual residence, he principally disagreed with how much weight the Illinois Allocation Judgment received. *See, e.g.*, App. 41a–42a ("We should instead adopt not a bright-line rule that such agreements are always controlling, but a strong presumption that such an agreement about habitual residence should be honored absent extraordinary circumstances requiring otherwise in order to serve the best interests of the child."). The

court subsequently denied Mr. Patterson's petition for rehearing *en banc*. App. 69a–70a.

C. On July 15, 2024, the district court entered an updated return order. Dist. Ct. Dkt. 157. The next day, Dr. Baz and her son tearfully touched down in Germany. Dist. Ct. Dkt. 158.

D. On October 4, Mr. Patterson filed the instant petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

The district court and the Seventh Circuit engaged in a straightforward application of *Monasky* by determining A.P.'s habitual residence based on the full circumstances of his life when Mr. Patterson wrongfully retained him in the United States, including, but not limited to, the parties' series of agreements. Because both courts followed this Court's rule—which rejected the bright-line approach the petition advocates—without creating any conflict in answering that fact-bound question of A.P.'s habitual residence, there is no cause for this Court to grant certiorari. There is no reason to reconsider the question *Monasky* answered, namely, whether parental agreements amount to a trump card in Hague Convention cases. "The bottom line" is that "[t]here are no categorical requirements for establishing a child's habitual residence—least of all an actual-agreement requirement[.]" *Monasky*, 589 U.S. at 80–81.

Accordingly, this Court should deny Mr. Patterson's petition.

I. THERE IS NO CONFLICT FOR THIS COURT TO RESOLVE.

Mr. Patterson tries and fails to identify a circuit split or another conflict that requires this Court's

resolution. That is because none exists. Indeed, not even Judge Hamilton, in his lengthy dissent, identified a split.

In feigning a circuit split, Mr. Patterson relies almost exclusively on pre-*Monasky* opinions. Pet. 11–15. But *Monasky* itself resolved a circuit split on the weight given to parental agreements in Hague Convention cases (Answer: It is one factor of many, but not dispositive for all cases.). *See* 589 U.S. at 76. And as the Seventh Circuit properly recognized, *Monasky* compelled the outcome below. *See, e.g.*, App. 16a, 18a–19a. Mr. Patterson's attempts to characterize the Executive's interpretation of ICARA are also wrong, as the United States explained in *Monasky* that a flexible, fact-bound approach that *rejects* any one factor as dispositive of a habitual residence determination is the appropriate test. *See Br. for the United States as Amicus Curiae Supporting Neither Party*, 2019 WL 3987632, at *10 (Aug. 22, 2019) ("Although a parental agreement might be relevant in some cases, it should not be dispositive; . . . Convention cases frequently arise when parents d[o] not see eye to eye on much of anything," and "[a] rigid requirement of a parental agreement would contravene the flexible and factbound nature of habitual residence and also in practice leave many young children with no habitual residence at all.") (internal quotation marks and citation omitted).

A. Mr. Patterson points to two relevant provisions of the Illinois Allocation Judgment—the jurisdictional

language[4] and the habitual residence language.[5] The Convention's aim is "to ensure that custody is adjudicated in what is presumptively the most appropriate forum—the country where the child is at home." *Monasky*, 589 U.S. at 79. Because the jurisdictional language gets Mr. Patterson back to his desired forum in Chicago by limiting custody decisions only to the Illinois state court, the language does no more than effectively determine A.P.'s habitual residence. *See id.* In other words, Mr. Patterson is using the jurisdictional language as an attempt to end-run *Monasky*'s mandate that trial courts determine habitual residence by looking at all the facts of a child's life. The Seventh Circuit rightly saw Mr. Patterson's arguments on the jurisdictional language for what they are—an improper attempt to displace the Convention, ICARA, and the factfinding role of trial courts—and the court properly rejected them. *See* App. 12a–15a. Indeed, *Monasky* ensures parental agreement on a child's habitual residence cannot be dispositive, which means that it forecloses both attempts to establish habitual residence directly (through the habitual residence language) and by proxy (through the jurisdictional language). Mr. Patterson's invocations of "waiver" and "forum

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[4] The jurisdictional language provided "that [s]o long as at least one parent resides in the State of Illinois, the Circuit Court of the State of Illinois shall retain exclusive and continuing jurisdiction over this cause to enforce or modify the terms and provisions of this Allocation Judgment." App. 5a–6a (quotation marks omitted).

[5] The habitual residence language provided "that [t]he Habitual Residence of the minor child is the United States of America, specifically the County of Cook, State of Illinois, United States of America." App. 5a (quotation marks omitted).

selection" are simply additional, creatively-labeled attempts to undermine *Monasky* and ensure an outdated agreement determines A.P.'s home.

Monasky affirmed the common-sense rule that a child's country of habitual residence can be determined only through a totality-of-the-circumstances inquiry into the child's life. *Monasky*, 589 U.S. at 77–81. Indeed, "[n]o single fact," including a prior parental agreement, "is dispositive across all cases." *Id.* at 78. *Monasky* relied on a Seventh Circuit case, *Redmond*, to recognize that "[b]ecause locating a child's home is a fact-driven inquiry, courts must be 'sensitive to the unique circumstances of the case and informed by common sense.'" *Id.* (quoting *Redmond*, 724 F.3d at 744); *see also* Ann Laquer Estin, *Where is the Child at Home? Determining Habitual Residence After* Monasky, 54 Fam. L.Q. 127, 137 (2020) (recognizing that *Monasky* "aligns most closely with the approach taken by the Seventh Circuit in *Redmond*").

The Seventh Circuit (and the district court) followed *Monasky* and *Redmond* to a T. The district court considered all the evidence, which included testimony from several witnesses (the parties, German attorneys, Mr. Patterson's sister, and the state-court guardian ad litem) and dozens of exhibits, including the Illinois Allocation Judgment. Although the court found that the Illinois Allocation Judgment was one factor that weighed in favor of finding the United States to be A.P.'s country of habitual residence, the court ultimately determined that A.P.'s subsequent acclimation to Germany (*i.e.*, his life, schooling, friends, doctors) carried the day. App. 61a–64a. And the Seventh Circuit appropriately deferred to the district court's fact-based findings. App. 18a–26a. In

other words, both courts did exactly what this Court instructed them to do in *Monasky*. *See* 589 U.S. at 84 ("The habitual-residence determination thus presents a task for factfinding courts, not appellate courts, and should be judged on appeal by a clear-error review standard deferential to the factfinding court.").

Mr. Patterson has not identified any post-*Monasky* circuit split created by the Seventh Circuit's opinion. Indeed, the only post-*Monasky* case he bothers to cite is *Tereshchenko v. Karimi*, which is not on point. *Tereshchenko* involved one party's failure to timely plead an affirmative defense, not a parental agreement that purports to determine a child's habitual residence. 102 F.4th 111, 127–29 (2d Cir. 2024). The case stands for the wholly unremarkable proposition that the Federal Rules of Civil Procedure apply to civil proceedings in federal district courts.

After *Monasky*, federal and state courts have consistently recognized that parental intent, agreement, and desire—which are effectively the same because each is a wish that does not necessarily reflect reality—cannot control a child's habitual residence.[6]

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[6] *See, e.g.*, *Tsuruta v. Tsuruta*, 76 F.4th 1107, 1111 (8th Cir. 2023) (concluding the mother's intent could not overcome where the child "was 'at home' on the relevant date"); *Smith v. Smith*, 976 F.3d 558, 561 n.1 (5th Cir. 2020) (overruling circuit precedent that "prioritized the parents' shared intent over other factors"); *Goldstein v. Simon*, No. 24-12098, 2024 WL 4284921, at *3 (11th Cir. Sept. 25, 2024) (recognizing that "[s]hared intent is not 'dispositive'" (quoting *Monasky*, 589 U.S. at 78)); *Rodrigues Dos Santos Argueta v. Argueta-Ugalde*, No. 23-1107, 2023 WL 4635901, at *3 (6th Cir. July 20, 2023) (disavowing circuit precedent that "determined a young child's place of habitual residence by assessing whether the parents had made an agreement about where to raise the child"); *Rosasen v. Rosasen*, No. 20-55459, 2023 WL 128617, at *1 (9th Cir. Jan. 9, 2023)
(continued . . .)

Far from creating a circuit split, the Seventh Circuit's opinion aligns with decisions nationwide that apply *Monasky* consistently to consider parental agreements in Hague Convention cases without giving an agreement standing alone dispositive weight. Here, the circuit court correctly deferred to the district court, which correctly gave the Illinois Allocation Judgment some—but not controlling—weight.

(citing *Monasky* to conclude that "[a]ny agreement between the parents to raise the children in the United States was not dispositive"), *cert. denied*, 144 S. Ct. 302 (2023); *Kenny v. Davis*, No. 21-35417, 2022 WL 501625, at *1, 2 (9th Cir. Feb. 18, 2022) (recognizing that post-*Monasky*, a "narrow focus on mutual intent misstates and unduly restricts the law" and that "parents need not actually agree to move a child's habitual residence"); *Pope ex rel. T.H.L-P v. Lunday*, 835 F. App'x 968, 971 (10th Cir. 2020) (rejecting post-*Monasky* argument that the parents' last agreement determined the child's habitual residence); *Int. of A.Y.S.*, No. 12-21-00074-CV, 2022 WL 868046, at *9 (Tex. App. Mar. 23, 2022) (concluding court orders that captured a custody agreement did "not, in isolation, establish habitual residence, but [were] simply a relevant circumstance to be considered"); *Nowlan v. Nowlan*, 543 F. Supp. 3d 324, 359 (W.D. Va. 2021) (giving little weight to 2017 stipulation when determining a child's habitual residence in 2020), *aff'd*, No. 21-1965, 2022 WL 34141 (4th Cir. Jan. 4, 2022) (per curiam); *Grano v. Martin*, 443 F. Supp. 3d 510, 535 (S.D.N.Y. 2020) ("[T]he parents' last shared intent is a relevant consideration, but it is by no means dispositive of the habitual residence inquiry."), *aff'd*, 821 F. App'x 26 (2d Cir. 2020); *Royal Borough of Kensington & Chelsea v. Bafna-Louis*, No. 22-cv-8303 (PKC), 2023 WL 2387385, at *13 (S.D.N.Y. Mar. 7, 2023) (finding other facts outweighed the mother's intent), *aff'd*, No. 23-470, 2023 WL 6867135 (2d Cir. Oct. 18, 2023); *Dumitrascu ex rel. A.M.B.D. v. Dumitrascu*, No. 21-cv-01813-PAB, 2021 WL 4197378, at *4–5 (D. Colo. Sept. 15, 2021) (recognizing that "shared intent is relevant, [but] it is not dispositive"), *aff'd*, No. 21-1341, 2022 WL 1529624 (10th Cir. May 16, 2022).

The other cases upon which Mr. Patterson relies have either been expressly rejected by later appellate authority or address ancillary Hague Convention questions not at issue in this case:

- *Von Kennel Gaudin v. Remis (Gaudin I)*, 282 F.3d 1178 (9th Cir. 2002): This Court "effectively rejected" *Gaudin I* in *Chafin v. Chafin*. *See Neumann v. Neumann*, 310 F. Supp. 3d 823, 834 (E.D. Mich. 2018) (citing *Chafin v. Chafin*, 568 U.S. 165, 173 (2013)). It repudiated *Gaudin I*'s reasoning and concluded that a Hague Convention dispute was not moot even though the child had been returned to her habitual residence pursuant to a return order. *Chafin*, 568 U.S. at 168, 173.

  Mr. Patterson claims that Dr. Baz initially "cast her lot" with the Illinois state court through the Allocation Judgment, but that judgment provided that A.P. would live most of his life in Germany with Dr. Baz. And both parties subsequently relied on a German court to resolve their parenting disputes and entered into the German Consent Order, which expressly reaffirmed that A.P. would continue to live in Germany. Mr. Patterson thus agreed in both the Illinois and German orders that A.P. would live primarily in Germany with Dr. Baz and that he would return A.P. to Germany at the end of his designated parenting time. The German Consent Order also makes clear that Mr. Patterson agreed that German attorneys in the German legal system would continue to

work together on any outstanding custody disputes.

- *Nicolson v. Pappalardo*, 605 F.3d 100 (1st Cir. 2010): Mr. Patterson concedes that the relevant discussion was *dictum*. Pet. 12. And even worse for him, it is about the consent (or acquiescence) defense to a petition for a return order, not about stipulating to a child's habitual residence. *See Nicolson*, 605 F.3d at 105.

  Consent or acquiescence is an affirmative defense whereby the parent accused of wrongful removal or retention may establish that the petitioning parent "consented to or subsequently acquiesced in" the removal or retention. *Id.* (internal quotation marks omitted). Dr. Baz certainly did not consent or acquiesce to Mr. Patterson wrongfully retaining A.P. Regardless, Mr. Patterson did not invoke this affirmative defense below, even though he was represented by counsel when he filed his answer. *Cf.* App. 66a; Dist. Ct. Dkt. 33. *Nicolson* is irrelevant.

- *Larbie v. Larbie*, 690 F.3d 295 (5th Cir. 2012): The Fifth Circuit has repudiated *Larbie* in light of *Monasky*. *See Smith v. Smith*, 976 F.3d 558, 561 n.1 (5th Cir. 2020) ("In light of the Supreme Court's holding in *Monasky* that a child's habitual residence should be determined by looking to the totality of the circumstances, to the extent that our circuit's prior caselaw in *Larbie* and other cases has prioritized the parents'

shared intent over other factors, we overrule that emphasis.").

- *Karkkainen v. Kovalchuk*, 445 F.3d 280 (3d Cir. 2006): The stipulation at issue was never filed. *Id.* at 285. And if anything, the changed circumstances here of A.P. becoming acclimated to Germany and the parties agreeing to the German Consent Order (which shifted custody matters to the German legal system) supported limiting the weight given to the Illinois Allocation Judgment. *See id.* at 293.

Simply put: There is no circuit split. The Seventh Circuit faithfully applied *Monsasky* (and *Redmond*, which *Monasky* cited approvingly). There is nothing for this Court to resolve.

B. Sensing the case law does not support him, Mr. Patterson turns from Article III to Article II. But (1) he waived this argument by failing to develop it below, and (2) he is wrong about the Executive's views in any event.

Mr. Patterson faults the Seventh Circuit for not "follow[ing] the considered views of the federal Government" in this matter. Pet. 16. But the court cannot be faulted for failing to address an argument Mr. Patterson did not raise. Only in his reply brief before the Seventh Circuit did he briefly mention that a footnote in *Holder v. Holder*, 305 F.3d 854 (9th Cir. 2002), referenced an amicus brief from the Executive. *See Reply Br. of Resp't-Appellant Anthony Patterson*, No. 23-3407, 2024 WL 1097637, at *10–11 (7th Cir. Mar. 4, 2024) (also 7th Cir. Dkt. 36 at 10–11). And he *minimized* this point—relying only on a parenthetical citation—in his petition for rehearing *en banc*. *See* 7th

Cir. Dkt. 50 at 4. He did not expound on the Executive's views or ask the Seventh Circuit to give "great weight" to them, so he has waived any argument that it erred by not doing so. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (finding an argument waived that "was not raised below").

Worse, his characterization of the Executive's views is, at best, misguided. He relies on a 2002 Ninth Circuit footnote discussing an amicus brief submitted to another court (not even the brief itself) and mid-1990s documents related to a Swedish court proceeding, which are hardly determinative.[7] And he ignores what is likely the most probative evidence of the United States' views: the Solicitor General's brief in *Monsaky* itself.[8] *See Yaman v. Yaman*, 730 F.3d 1, 14–15 (1st Cir. 2013) (discussing Executive's amicus brief filed in another ICARA case before this Court).

In *Monasky*, the Executive recognized (and this Court later agreed) that determining a child's habitual residence requires a "flexible and factbound inquiry," meaning that "the existence of a subjective parental agreement is neither necessary *nor sufficient* to determine a child's habitual residence." *Br. for Amicus*

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[7] This Court should take any documents related to the Swedish proceeding with a grain of salt, as both nations had a unique interest in that dispute: "Father [was] an attorney with the United States Department of State, and [M]other [was] an attorney with the Swedish Ministry of Foreign Affairs." *Johnson v. Johnson*, 493 S.E.2d 668, 669 (Va. Ct. App. 1997).

[8] The Executive also filed an amicus brief with this Court in *Golan v. Saada*, No. 20-1034, in which it emphasized *Monasky*'s fact-specific approach. *See, e.g.*, *Br. for the United States as Amicus Curiae Supporting Vacatur*, 2022 WL 280132, at *16, 29 (Jan. 26, 2022).

United States, 2019 WL 3987632, at *10 (emphasis added). The Executive left no doubt that while a trial court can (and should) consider "an actual agreement" on habitual residency, *id.* at *10–11, "subjective parental agreement . . . should not be dispositive," *id.* at *24; *see also id.* at *13 ("[N]o single piece of evidence can . . . be deemed either necessary *or dispositive* to determining habitual residence.") (emphasis added). That line could have been included verbatim in the decision below. If anything, the Executive's views support the Seventh Circuit's opinion.[9]

Regardless, the Executive Branch has no special role in determining a child's habitual residence in a case brought under ICARA. The Legislative Branch enacted ICARA without defining "habitual residence." Accordingly, the Judicial Branch had to interpret (and thereby provide the governing procedure for) this term. *See* U.S. Const. art. III; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").[10] This Court squarely addressed the

[9] The Executive also recognized that "[t]he Seventh Circuit's decision in *Redmond v. Redmond*, 724 F.3d 729 (2013), illustrates the correct approach to determining habitual residence under the Convention." *Br. for Amicus United States*, 2019 WL 3987632, at *26.

[10] This Court has indicated that it may reconsider its practice of giving weight to the Executive's interpretation of a treaty. *See GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432, 444 (2020) (recognizing that the Court has "never provided a full explanation of the basis for [its] practice of giving weight to the Executive's interpretation of a treaty" nor "delineated the limitations of this practice, if any," but declining to do so because its "textual analysis align[ed] with the Executive's interpretation").

question in *Monasky* when it held that a child's habitual residence is determined by looking at the child's life. The Seventh Circuit likewise exercised core judicial power when it affirmed the trial court's weighing of the evidence and conclusion that the Illinois Allocation Judgment did not alone resolve A.P.'s habitual residence.

Mr. Patterson is 0-3 on this argument. *First*, he never meaningfully presented the Executive's views to the Seventh Circuit (or the district court). *Second*, the Executive's views align with the Seventh Circuit's opinion, not with Mr. Patterson's flawed view. *Finally*, at the end of the day, the courts had to (and did) make the call on A.P.'s habitual residence.

* * *

Mr. Patterson has failed to identify any circuit split or disagreement with the Executive. The Seventh Circuit's opinion is consistent with *Monasky* and every other court of appeals decision to consider parental agreements after *Monasky*.

II. THIS COURT SHOULD NOT GRANT REVIEW ON THE FACT-BOUND QUESTION OF A.P.'S HABITUAL RESIDENCE, WHICH THE TRIAL COURT ABLY RESOLVED.

The Seventh Circuit correctly declined to allow an outdated written agreement to trump contrary factors and alone determine where a child is at home. Instead, it followed *Monasky* and ensured that the facts of A.P.'s life determined his habitual residence.

A. Mr. Patterson continually harps on "ordinary rules of procedures," Pet. 18, as if the central issue is whether the district court correctly allowed a complaint to be amended or made a proper discovery ruling. But cases brought for the return of a *child*

under the Hague Convention and ICARA are "unique." *See Monasky*, 589 U.S. at 78 (quoting *Redmond*, 724 F.3d at 744). And that is why this Court mandated a commonsense approach to evaluating habitual residence that examines the child's life, not just a written agreement between parents. *See id.*

A child's habitual residence is "[t]he place where a child is at home, *at the time of removal or retention*." *Id.* at 77 (emphasis added). Accordingly, a court must determine the habitual residence by looking at all the facts when the removal or retention occurred: schooling, languages, extracurricular activities, family ties, community bonds, and—yes—parental intent. *See id.* at 78 n.3. But a preexisting agreement (formalized or not) cannot be determinative because it necessarily will not reflect the most up-to-date information about the child's life that can (and should) shift over time. Allowing prior parental agreement—which may or may not reflect reality at a certain moment in time—to govern a child's habitual residence would defy common sense and undermine the purpose behind the Convention and ICARA, which is to ensure "that custody is adjudicated in what is presumptively the most appropriate forum—the country where the child is at home." *See id.* at 78–79. A child's life cannot be relegated to his parents' one-sentence agreement.

Regardless, even the "ordinary rules" go against Mr. Patterson. As the Seventh Circuit recognized, stipulations generally do not bind a factfinder. App. 20a–21a. Mr. Patterson tries to discount the Seventh Circuit's recognition that any "stipulation" on A.P.'s habitual residence was not binding on the district court. Pet. 19 n.4. But the case with which he takes issue (because it involved sentencing) discusses

elementary principles that govern stipulations across proceedings. *See United States v. Barnes*, 602 F.3d 790, 796 (7th Cir. 2010) (recognizing that "[g]enerally, stipulations are not binding on the fact-finder" because "[a] stipulation is a contract between two parties to agree that a certain fact is true"). Leaving no doubt, *Barnes* relied on a civil case: *Analytical Eng'g, Inc. v. Baldwin Filters, Inc.*, 425 F.3d 443 (7th Cir. 2005). And the Seventh Circuit did not rest solely on those cases, instead also citing relevant sections from *Corpus Juris Secundum* and *American Jurisprudence*, which similarly recognized that proposition. *See* App. 21a.

Stipulations generally do not bind a factfinder, and that is doubly true when this Court has expressly vested factfinders with the task of determining a child's home. Trial courts adjudicating Hague Convention cases step into highly charged, emotionally fraught disputes. Discretion to consider all factors, weigh all evidence, and listen to all witnesses is paramount in these cases to ensure the child's life—rather than a piece of paper—resolves the question where the child is at home.

B. That is why parental agreements can be evidence of habitual residence—maybe even, in some cases, powerful evidence—but they cannot be dispositive. No law supports the contention that an agreement on habitual residence in another case is binding on a court adjudicating a return order. Instead, the petition relies on generic cases involving stipulations *in the same proceeding*. Pet. 18. It is uncontroversial that, generally, parties (though not courts) are bound by the stipulations they make in a case. That is standard fare in standard litigation. But this case does not involve a stipulation in any traditional sense because no stipulation was made

during the return-order proceeding. And even if it had been, *Monasky* tasked trial courts with conducting a fact-intensive inquiry into a child's life. *See Monasky*, 589 U.S. at 84; *see also Vieira v. De Souza*, 22 F.4th 304, 310 (1st Cir. 2022) ("The role of the district court in Hague Convention cases is one of factfinder."). A trial court would abdicate its duty (and run afoul of *Monasky*) by allowing a preexisting agreement to determine this question. And an appellate court would err by not stepping in if that happened.

It is not until page 19 of the petition that Mr. Patterson meaningfully acknowledges *Monasky*, at which point he quickly misstates its importance. *Monasky* imposed a straightforward, commonsense rule (based on Seventh Circuit precedent): Determine a child's habitual residence by looking at the child's life. *See* 589 U.S. at 77–81. While parental agreement is relevant, it cannot be dispositive no matter how much Mr. Patterson wants it to be. That is what the district court and the Seventh Circuit appropriately recognized, and they acted accordingly. He offers this Court no reason to reconsider that recent and unanimous holding.

* * *

Mr. Patterson's generic cases and arguments cannot overcome this Court's on-point opinion in *Monasky*. The Seventh Circuit correctly affirmed.

III. THERE IS NO REASON TO RECONSIDER *MONASKY*, AND THIS CASE DOES NOT IMPLICATE ANY BROADER CONCERN.

Monasky already effectively answered the question presented here, and there is no conflict for this Court to resolve. This case is also a poor vehicle for further

considering the meaning of "habitual residence" under ICARA and the Convention.

The proper application and interpretation of ICARA is important. That is why this Court granted certiorari in *Monasky*: to establish "the standard for habitual residence" under ICARA. 589 U.S. at 76. This Court was well aware of the existence of parental agreements—that issue was central to *Monasky*—yet it still held that "[n]o single fact . . . is dispositive" on the question of habitual residence. *Id.* at 78.

Although this case does not mirror *Monasky* exactly, it does not call for a different result. *Monasky* addressed infant agreements (and A.P. is a slightly older child), but that distinction is not legally relevant. Because *Monasky* answers the determinative question (Can parental agreement alone determine a child's habitual residence? No.), there is no need for this Court to grant certiorari here and again answer that same question. *See* Estin, *supra*, at 137 ("[T]he Court [in *Monasky*] has made clear that parental intentions may be relevant to the determination of habitual residence but should not be dispositive."); Joseph N. Sotile, Note, *Newly Born Issues for Habitual Residence: Determining a U.S.-Born Infant's Habitual Residence Under the Hague Abduction Convention Post-*Monasky, 62 Colum. J. of Transnat'l L. 415, 442 (2024) ("*Monasky* ultimately decided that last shared agreements do not control a child's habitual residence[.]"). The courts have had no trouble uniformly applying *Monasky* in the few years since it was decided, and the petition does not ask the Court to reconsider that case (nor give any good reason to do so). Indeed, the petition's failure to engage in any significant way with the controlling precedent—*Monasky*—makes this a poor vehicle in which to

reconsider the decision in that case. The juice of addressing a case slightly different than *Monsaky* is not worth the squeeze of this Court's consideration. *Monasky* provides the path in Hague Convention cases, a path the Seventh Circuit followed.

Monasky is four years old. There is no rush or need for this Court to further expound on the habitual residence standard. Even if this Court were inclined to consider this issue again, it should allow further percolation so an actual conflict (and thus a much better vehicle) can arise—if one ever does. *See Calvert v. Texas*, 141 S. Ct. 1605, 1606 (2021) (Sotomayor, J., respecting denial of certiorari) (recognizing the benefits of allowing "further percolation" of issues "in the lower courts prior to this Court granting review"); *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 496 (2019) (Thomas, J., concurring) (same).

Mr. Patterson cites a plethora of cases to assert that parties regularly stipulate to a child's habitual residence. But once again, he fails to isolate a single on-point case that supports his position. It is unremarkable that parties might try to stipulate to a fact during an ongoing proceeding.[11] It is an entirely

[11] And even when parents try to stipulate to a child's habitual residence during the proceeding, courts often ensure, before blindly following the stipulation, that the evidence *actually supports it*. *See, e.g.*, *Castang v. Kim*, No. 1:22-CV-05136-SCJ, 2023 WL 1927027, at *7 (N.D. Ga. Feb. 9, 2023) ("Defendant stipulates—and the Court agrees that the evidence supports—the Child's habitual residence was France prior to the June 2022 removal of the Child to the United States."), *aff'd*, No. 23-10426, 2023 WL 3317983, at *2–3 (11th Cir. May 9, 2023) (recognizing that *Monasky* rejected categorical rules on habitual residence); *Antunez-Fernandes v. Connors-Fernandes*, 259 F. Supp. 2d 800, 810–11 (N.D. Iowa 2003) (determining the evidence supported

(continued . . .)

different thing for a prior agreement on a child's habitual residence to govern a later Hague Convention proceeding.

* * *

Ultimately, the Seventh Circuit correctly applied *Monasky*; certainly its opinion was not an out-of-the-mainstream application that would in any way justify this Court's review. Certiorari should be denied altogether.

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stipulation). As previously noted, *Monasky* imposed a nondelegable duty to trial courts to determine a child's habitual residence based on the totality of the circumstances. *See also Taglieri v. Monasky*, 907 F.3d 404, 408 (6th Cir. 2018) (*en banc*) ("In answering that question [of habitual residence], we must let district courts do what district courts do best—make factual findings—and steel ourselves to respect what they find."), *aff'd*, 589 U.S. 68, 85–86 (2020).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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