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 COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

VINCENT LEVY
Counsel of Record
KEVIN D. BENISH
JACK L. MILLMAN
JONATHAN SCHAFFER-GODDARD
HOLWELL SHUSTER & GOLDBERG LLP
425 LEXINGTON AVENUE
14th Floor
New York, NY 10017
(646) 837-5120
vlevy@hsgllp.com

Counsel for Petitioner

December 2, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

Rules

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Seventh Circuit in the decision below recognized that an Illinois state court entered a consent decree memorializing a parental agreement under which Petitioner and Respondent stipulated to having all child-custody disputes resolved by that Illinois court. The decision below also recognized that, as part of that consent decree, Respondent stipulated to an element of any claim brought under the Hague Convention and ICARA: the location of the child's "habitual residence." Nonetheless, the court below declined to enforce the parents' agreement that was endorsed by order of the Illinois court.

In doing so, the Seventh Circuit departed from the holding of every other court of appeals to have considered these issues, the views of the U.S. Government, and precedents of this Court, all of which instruct that ordinary rules of civil procedure—including those governing waivers and stipulations—apply in Hague Convention cases. The decision below also undermines the validity of parental agreements, including those reached to resolve disputed child-custody proceedings, and principles of party autonomy that govern in every other civil case. And the decision below seriously undermines the important federal interest in uniform application of treaties.

Respondent tries to duck the questions presented by literally rewriting them and by acting as though Petitioner were seeking fact-bound error correction

concerning the application of this Court's decision in *Monasky* v. *Taglieri*, 589 U.S. 68, 71, 78 (2020). That is pure misdirection. The *Monasky* decision addressed a different question—how to determine a child's habitual residence under the Convention when, as in that case, there is *no* written parental agreement reflecting a shared intent about where to raise the child.

Monasky thus had no occasion to say anything about waivers or stipulations, and did not do so. It also did not, *sub silentio*, overrule decisions of this Court holding that treaty rights are subject to ordinary rules of procedure like waiver and forfeiture (*e.g.*, *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 360 (2006)), or circuit decisions holding that parents *may* waive rights or stipulate to facts in Hague Convention proceedings.

This petition implicates a circuit split on important questions that this Court has not addressed, and it is an ideal vehicle to consider those questions. The Court should grant the petition.

I. The Decision Below Creates A Circuit Split

The Seventh Circuit split with every other court of appeals to consider if parents may forego their right to seek a "return" of their child under the Hague Convention, whether that right is viewed through the lens of waiver or stipulation. Pet. 11–17. Respondent asserts that this divide is "feign[ed]" because the Court's decision in *Monasky* somehow abrogated all those appellate decisions (BIO 9), leaving no division among the courts of appeals. *Id.* 8–16. That is wrong.

A. Contrary to what Respondent suggests, *Monasky* did not consider whether the parties to a Hague Convention case may forgo their rights and remedies—just like any other party may do in any civil case filed in U.S. federal court—by waiving or forfeiting them, or by stipulating elements of their claims away. Rather, as explained (Pet. 19–20), there was no agreement at all in *Monasky*, and the Court addressed the question whether "an actual agreement between the parents on where to raise their child [was] categorically necessary to establish an infant's habitual residence." 589 U.S. at 76; see also Int'l Acad. of Fam. Lawyers Amicus Br. 8 (discussing *Monasky*). The Court's answer to that question in the negative says nothing about whether parents—as parties to civil cases—should be held to their agreements waiving or forfeiting rights, or to their factual stipulations.

The entire premise of Respondent's opposition brief thus not only ignores what *Monasky* actually held, but commits a classic error of logic. A parental agreement can be both *un*necessary (as *Monasky* held) *and* sufficient (depending on the particular agreement—for instance, if the parents' agreement amounted to a waiver). Arguing otherwise is specious. Cf. *Reed* v. *Town of Gilbert, Ariz.*, 576 U.S. 155, 165 (2015) ("Although a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." (quotation marks omitted)); *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 111 (2012) ("The entry of a compensation order is a sufficient but not necessary condition for membership in the former."); *Bryan* v. *United States*,

524 U.S. 184, 198–99 (1998) ("[W]hile disregard of a known legal obligation is certainly sufficient to establish a willful violation, it is not necessary."). *Monasky* thus plainly did not, by addressing whether a parental agreement as to where to raise a child is necessary, resolve the questions presented here, *i.e.*, whether parents may stipulate to facts or waive rights.

B. Respondent also fails in her effort to explain away Petitioner's appellate decisions. BIO 12, 14–16. As explained, multiple circuits hold that parents can waive rights and remedies under the Convention—the opposite of what the Seventh Circuit held here. In each case, the circuit courts held that parents can waive rights and remedies otherwise available to them under the Hague Convention.

To begin, the Ninth Circuit in *Von Kennel Gaudin* v. *Remis* did hold that a parent cannot press a claim for "return" if the parent moved to the country where the petition was filed, because that indicated the parent "cast[] her lot with the judicial system of th[at] country," and thus made that country's courts "the proper forum to determine custody matters." 282 F.3d 1178, 1183 (9th Cir. 2002); see also *Holder* v. *Holder*, 305 F.3d 854, 873 & n.7 (9th Cir. 2002) (waiver of rights is possible under the Convention and ICARA). Seeking to avoid *Gaudin* and its obvious conflict with the decision below, Respondent cites a district-court decision that takes issue with *Gaudin* on the basis that *Gaudin* found the parent's conduct to have "mooted" the case. BIO 14 (citing *Neumann* v. *Neumann*, 310 F. Supp. 3d 823, 834 (E.D. Mich. 2018),

which in turn cited *Chafin* v. *Chafin*, 568 U.S. 165 (2013)). *Gaudin* was perhaps imprecise in characterizing the reason for dismissal as "mootness," but this Court's holding in *Chafin* that the return of a child ordered by a district court does not moot an appeal of that return order does not detract from the Ninth Circuit's holding in *Gaudin* that parents can waive Hague Convention rights. *Chafin* has nothing to do with the questions presented here.

Moreover, the Fifth Circuit applies the same rule as the Ninth Circuit. *Larbie* v. *Larbie*, 690 F.3d 295 (5th Cir. 2012), *cert denied*, 568 U.S. 1192 (2013). Unable to distinguish *Larbie*, Respondent asserts the Fifth Circuit later repudiated *Larbie*'s holding enforcing parental waivers, but that is wrong. There were two parts to *Larbie*: In the first, the court held that parental "consent for a particular tribunal to make a final custody determination" amounted to "'acquiescence or, alternatively, a waiver of Hague Convention rights.'" *Id.* at 309 (quoting *Nicholson* v. *Pappalardo*, 605 F.3d 100 (1st Cir. 2010)). This is exactly the opposite of what the court below held. In the second part, the *Larbie* court explained—in the alternative—that the petition failed based on the location of the child's habitual residence. *Id.* at 310–311. In a post-*Monasky* case that Respondent cites, the Fifth Circuit drew attention to that second part of *Larbie* (the part contained at 690 F.3d at 310–11 and applying a pre-*Monasky* test for evaluating habitual residence); it stated that, "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." *Smith* v. *Smith*, 976 F.3d 558, 561 n.1 (5th Cir. 2020) (citing *Larbie*, 690 F.3d at 310–11). But *Smith* said nothing about the first part of *Larbie* and in no way suggested that it was abrogated. *Smith* did not even involve or address a parental waiver.

Finally, Respondent tries to avoid *Tereshchenko* v. *Karimi*, 102 F.4th 111 (2d Cir. 2024), by stating that the case "involved one party's failure to timely plead an affirmative defense" and "stands for the wholly unremarkable proposition that the Federal Rules of Civil Procedure apply." BIO 12. That is exactly the point. Ordinary rules of procedure (including waiver and forfeiture) apply to Hague Convention cases in the Second Circuit, but not in the Seventh Circuit.

C. There is also a split with the Third Circuit on the related question whether a court should enforce a parental stipulation as to facts that may be contested in a Hague Convention case. See *Karkkainen* v. *Kovalchuk*, 445 F.3d 280 (3d Cir. 2006). Respondent does not dispute that, as Petitioner explained, the Third Circuit there *did* enforce a parental agreement, and that the Third Circuit's decision reflected the approach that the dissenting judge would have followed in this case below. Pet. 14 & n.3. Instead, Respondent again levels distractions, asserting that this case is different because the stipulation in *Karkkainen* was "never filed" and the facts of acclimatization were different. BIO 16. So what? None of that says anything about the key point, which is that the Third Circuit enforced a parental agreement in line with domestic law, but the Seventh Circuit did not.

In sum, the decision below departed from the view of every court of appeals to have considered the questions presented, and *Monasky* does not answer either question. In other circuits, parents may waive their rights and remedies, and may stipulate facts away, but in the Seventh Circuit they may not.

II. The Seventh Circuit's Decision Also Conflicts With The Executive's Views

The Court should also grant the petition because the decision below deviates from the views of the Executive, and "[i]t is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010) (citation omitted); see generally Restatement (Fourth) of Foreign Relations Law § 306 cmt. g (Am. L. Inst. 2018) (collecting cases).

Respondent seeks to avoid the import of the views of the Executive by claiming the issue was not properly presented below. BIO 16. This again misses the mark because it conflates the petition's cert-worthiness with the merits. Petitioner is entitled to invoke the Executive's views to explain why the Court should grant the petition without having to make the same argument to the court below. Cf. *BG Grp., PLC* v. *Republic of Argentina*, 572 U.S. 25, 32 (2014) ("grant[ing] the petition" due to "the importance of the matter for international commercial arbitration," even though the petitioner did not argue about the issue's importance before the circuit court). In any event, this is a purely legal point, and Petitioner *did*

raise the Executive's views before the Seventh Circuit, as Respondent acknowledges. BIO 16–17.

Although Respondent separately seeks to avoid the import of the Executive's statements in *Holder*, 305 F.3d at 873 n.7, and *Johnson* (Pet. 15–16) by citing the Government's amicus brief in *Monasky* (BIO 17–18), she again improperly conflates the questions presented here with the distinct question *Monasky* addressed. Again, the question in *Monasky* was whether a shared "subjective parental agreement" about where to raise a child (lacking in that case) was necessary to find habitual residence, and the Government's amicus brief addressed that issue. *Br. for the United States as Amicus Curiae Supporting Neither Party*, 2019 WL 3987632, at *12–28 (Aug. 22, 2019). Whatever message Respondent would draw from looser language in the amicus filing, the Government in *Monasky* did *not* implicitly or explicitly address the questions in this case—whether parents may forego rights or remedies by waiver or stipulate to facts—and indeed the Government never addressed this Court's precedents addressing the availability of those common-place defenses in treaty cases. *Sanchez-Llamas*, 548 U.S. at 337, 333–35. Of course, the Executive *did* address these questions in *Holder* and *Johnson*, and its views in those cases support granting certiorari.[1]

[1] If the Court has concerns about the clarity of the Executive's position, it should still grant the petition, or else call for the views of the Solicitor General.

III. The Decision Below Is Wrong

Petitioner also explained why, in multiple respects, the decision below departed from this Court's precedents. Although this alone is a reason to grant certiorari (Sup. Ct. R. 10(c)), Respondent ignores the point and instead tries to paint Petitioner as seeking fact-bound error correction and/or requesting reconsideration of *Monasky*. BIO 19–25. Respondent is wrong.

Petitioner will not repeat what he stated above or in his petition. But in brief, this petition raises pure questions of law, and the answers given by the decision below depart from this Court's precedents in important respects and are not fact-bound.

Indeed, the import of the parents' agreements was taken as a given below, and it appears to be common ground in this Court that there was a parental agreement, endorsed by an Illinois court, that, if enforced, would have defeated Respondent's return petition. Should this Court grant review, the sole issue will be whether parents can be bound by the sorts of agreements entered into here—one agreement stipulating that Illinois would be the exclusive jurisdiction for child-custody disputes (thus waiving the right to sue for return to another forum), and another agreement stipulating away an element of any Hague Convention case. *Monasky* does not answer this.

IV. Respondent Concedes The Questions Presented Are Important, And There Are No Vehicle Problems

Respondent agrees with Petitioner that "[t]he proper application and interpretation of ICARA is important." BIO 23. Respondent thus concedes that the questions presented are important. Given the nature of the questions presented—which implicate an international treaty and foreign-affairs concerns—Respondent's concession is understandable: The Court frequently considers cases implicating ICARA, the Hague Convention, and other treaties. *E.g.*, *Monasky*, 589 U.S. at 70–71; *Golan* v. *Saada*, 596 U.S. 666 (2022); *Lozano* v. *Montoya Alvarez*, 572 U.S. 1 (2014); *Chafin*, 568 U.S. at 168; *Abbott*, 560 U.S. at 5.[2]

This case is in the same vein, and the petition should be granted to resolve the important questions implicated by it, as indeed the sort of agreements at issue in this case are commonly reflected in family-court orders resolving custody disputes. See State Bar Ass'ns Amici Br. 7 ("The Seventh Circuit precedent drives a wedge directly into the core of authority relied upon by family law practitioners regularly, significantly eroding the confidence counsel and clients will have to settle these matters."). Absent review, the decision below will call into question these agreements and orders, and will encourage forum shopping. Cf.

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[2] See also *GE Energy Power Conversion France SAS, Corp.* v. *Outokumpu Stainless USA, LLC*, 590 U.S. 432, 435 (2020) (New York Convention); *Water Splash, Inc.* v. *Menon*, 581 U.S. 271, 273 (2017) (Service Convention); Stephen M. Shapiro, et al., Supreme Court Practice § 4.13 (11th ed. 2019) (collecting cases).

Great Lakes Ins. SE v. *Raiders Retreat Realty Co., LLC*, 601 U.S. 65, 72 (2024) (noting benefits of contract provisions that "discourage forum shopping").

Finally, this case is an ideal vehicle to resolve the circuit splits presented by this petition. Tellingly, Respondent never suggests that the decision below is a poor vehicle for the first question presented, arguing only that this case is a poor vehicle to address the second question. *Compare* Pet. i, *with* BIO 22–24. But she is wrong, because her sole argument relies on her misbegotten view that *Monasky* is supposedly "controlling." BIO 23. But *Monasky* is inapposite.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

December 2, 2024

VINCENT LEVY
Counsel of Record
KEVIN D. BENISH
JACK L. MILLMAN
JONATHAN SCHAFFER-GODDARD
HOLWELL SHUSTER & GOLDBERG LLP
425 LEXINGTON AVENUE
14th Floor
New York, NY 10017
(646) 837-5120
vlevy@hsgllp.com

Counsel for Petitioner