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ISSUES PRESENTED

1. Whether the district court erred in finding that more than one year had elapsed from the date of Ms. Agbelusi's retention of the Children to the date of Mr. Lomanto's commencement of the proceedings.
2. Whether the district court erred in holding that the Children are well settled in New York based on a balance of the factors, including, among other things, the age of the Children and their regular school, church, and extracurricular attendance in New York.
3. Whether the district court erred in finding that R.A.L. objected to being returned to Spain.
4. Whether the district court erred in declining to accord international comity to orders for the return of the Children issued by a Spanish court in a non-Hague proceeding where such Spanish court orders did not consider nor resolve Ms. Agbelusi's affirmative defenses under the Convention.
5. Whether the district court abused its discretion under the Convention by denying Mr. Lomanto's request for the return of the Children to Spain after finding that affirmative defenses under the Convention were applicable.
6. Whether the district court denied Mr. Lomanto due process when, after repeated warnings over the course of five months that he must obtain an interpreter, Mr. Lomanto failed to do so, and the court conducted 3.5 hours of

trial while it extemporaneously tried to find an interpreter using the pro bono fund designated for the attorneys for the Children.

STATEMENT OF THE CASE

A. Ms. Agbelusi's and the Children's lives in Spain were challenging.

Mr. Lomanto moved in with Ms. Agbelusi around 2006. (A-1236:7–9.) R.A.L. was born on December 5, 2008 (A-1234:15–16), and S.M.L. was born on September 27, 2016. (A-1234:17–18.) Mr. Lomanto, a Spanish citizen, never sought Spanish citizenship for the Children, despite Ms. Agbelusi's requests. (A-1431:8–25.)

The couple's relationship was tumultuous. Mr. Lomanto verbally abused Ms. Agbelusi, both in their home and in public. (A-1244:20–5; A-1281:20–1282:1.) He would scream in Ms. Agbelusi's face, calling her "a foolish black," insulting her "very small brain," and labeling her as inferior because she is African. (A-1282:1–14.) Mr. Lomanto told Ms. Agbelusi that she was "stupid," "craz[y]," and "not what you call [a] mother." (A-1292:15–18.) His verbal assaults occurred while the Children were in the home, sometimes while they were in the same room. (A-1282:15–19.) Mr. Lomanto admitted that he "would raise [his] voice" (A-1870:12–17) and that "sometimes, yes, sometimes [he had]" screamed at Ms. Agbelusi. (A-1732:20–21.)

Mr. Lomanto also physically assaulted Ms. Agbelusi while the Children were in the home, including wrapping his hands around Ms.

Agbelusi's neck while forcefully pushing her into the wall. (A-1287:8–23.) On another occasion, Mr. Lomanto punched a wall near where she was standing in the living room. (A-1288:18–1289:3.) R.A.L. reported to Dr. Fernandez that Mr. Lomanto "would raise his voice a lot" with Ms. Agbelusi, that "[i]t was always my father that would be yelling," and that he "hit the wall." (SA-177.)

Mr. Lomanto also sexually assaulted Ms. Agbelusi. (A-1283:4–12; A-1285:21–24.) The bedroom where Mr. Lomanto would sexually assault her was close in proximity to the Children's shared bedroom. (A-1285:21–1286:1.) In addition to forced penetration, Mr. Lomanto would breastfeed from Ms. Agbelusi for more than half an hour at a time, often until she no longer had enough milk for S.M.L. (A-1284:15–23; A-1285:7–14.) Dr. Charles Heller, an expert on intimate partner violence who interviewed and evaluated Ms. Agbelusi, reported and testified to Mr. Lomanto's pattern of sexual, physical, and emotional abuse of Ms. Agbelusi over many years. (*See* A-3640, identifying "a cycle of emotional abuse, sexual coercion and control, forced sex, physical abuse, as well as fear and intimidation.")

Dr. Fernandez testified that R.A.L. likewise reported, "my father treated my mother poorly—bad," and Dr. Fernandez believed that for

R.A.L., "[e]ven having to say those statements . . . was very difficult for him." (A-1102:21–1103:6.)

Mr. Lomanto also showered with the Children, especially R.A.L., until 2021, when R.A.L. was twelve. Mr. Lomanto only stopped showering with R.A.L. when his son refused. (A-1816:22–1817:1 (Mr. Lomanto testifying to showering with R.A.L. "[m]any times, many times" in Spain).) Dr. Fernandez testified that "in New York, if I were to hear this as a clinician, that there was a concern about showering practices or being nude in front of the children at an advanced age, that would be a call to ACS." (A-1209:6–13.)

Mr. Lomanto slept with R.A.L. and sometimes S.M.L. on a mattress in the living room. (A-1294:11–23; A-1826:21–1827:3; A-1050:6–1052:9.) Dr. Fernandez's notes reflect that R.A.L. told him that during these sleepovers, Mr. Lomanto "would have [S.M.L.] fall asleep first and then watch anime." (SA-177.)

Mr. Lomanto was not only verbally abusive to Ms. Agbelusi, but he was verbally abusive toward his children, especially during homework sessions. While still in Spain, the Children struggled to remain engaged in class and to keep up with their schoolwork. As a result, Mr. Lomanto would scream at R.A.L. and call him a "fool." R.A.L. sometimes grew panicked

and cried. (A-1138:8–12; A-1299:22–1300:3.) R.A.L. told Dr. Fernandez that Mr. Lomanto "would yell all the time," causing R.A.L.'s "brain [to] get blocked." (SA-177.) R.A.L. would beg his father to stop, but Mr. Lomanto would not listen. If anything, Mr. Lomanto became more controlling. (*Id.*) Mr. Lomanto acknowledged that he would yell at R.A.L. during these homework sessions: "[o]f course I would yell, sometimes I would get angry." (SA-217.)

Beginning in 2014, Ms. Agbelusi described finding unlabeled vials of liquid and bags of pills in the bathroom and in a cabinet. (A-1250:5–1251:17.) Ms. Agbelusi also discovered that Mr. Lomanto was storing the passport of a man named Paolo Bonatelli, approximately EUR 300,000, and several disposable mobile phones in their home. (A-1279:20–1280:17.) Mr. Lomanto denied knowing anyone by the name of Paolo Bonatelli, but he admitted that he has a friend named Paolo whose housing complex had a pool, where Mr. Lomanto would bring the Children on the weekends. He denied knowing his friend Paolo's last name. (A-1795:8–1796:24.)

Around the same time, Mr. Lomanto underwent dramatic physical changes. (*See* SA-10−12, 14.) He became extremely muscular with a disproportionally developed upper body, typical of heavy steroid users. (*See id.*; SA-209; A-2028:18–22.) Adding to concerns, Dr. Fernandez's notes

confirm that R.A.L. witnessed Mr. Lomanto administering injections at the gym where he worked. (SA-175.) R.A.L. also told Dr. Fernandez that he would accompany Mr. Lomanto when he would "[g]o to another gym and give pills to another guy," and that Mr. Lomanto would hide drugs in the car. (SA-176.) According to R.A.L., Mr. Lomanto would "leave me in the car to watch the car," and that when passing through police checkpoints, Mr. Lomanto would instruct R.A.L. to look "innocent." (SA-176; A-1067:1–15.)

Finally, Mr. Lomanto admitted that he made regular trips to purchase products from a gym called Nuevo Estilo, owned by a man named Paco Mula. (A-1788:21–24; 1791:2–11.) Nuevo Estilo was a known source for illegal steroids, and its owner, Paco Mula, was known to manufacture and deal in steroids. (SA-2.) It is undisputed that in 2017 when Nuevo Estilo was raided, authorities found a criminal operation manufacturing and distributing illicit substances (SA-5, SA-8.)

At trial, Mr. Lomanto denied using steroids (A-1807:3–11). However, Ms. Agbelusi testified that when she asked him about the injections he took, Mr. Lomanto said these were for his "cycle." (A-1241:12–18.) Dr. Pope, an expert on the psychiatric effects of anabolic steroids, testified that steroids are typically taken in courses, which "in the steroid underground are termed cycles." (A-2019:7–8.) Dr. Pope testified that photos of Mr. Lomanto from

2020 and 2021 prove "well beyond the threshold of reasonable medical certainty" and "virtually beyond doubt" that Mr. Lomanto had been taking "high doses [of steroids] over a prolonged period." (SA-209−210; A-2034:10–17; SA-10−12, 14.)

B. Ms. Agbelusi and the Children visit New York, and Ms. Agbelusi decides to remain there with the Children.

In 2021, Ms. Agbelusi told Mr. Lomanto that she wanted to bring the Children to New York to visit her mother, whom they had not seen for many years. (A-1300:19–23.) Ms. Agbelusi made all the arrangements, including successfully applying for a visa for Mr. Lomanto in the hopes that he would accompany them. (A-1301:2–9; A-1307:7–12.) Despite their troubled relationship, Ms. Agbelusi hoped that if Mr. Lomanto "[came] out from that life he lives, a life of drugs" and a life that includes the "friends he moves with, maybe he can change." (A-1307:9–12.) Mr. Lomanto did not travel with the family, nor did he ever visit them in New York until March 2023, during the trial. (A-1301:13–14.)

Mr. Lomanto signed a statement of consent to allow Ms. Agbelusi and the Children to travel to the United States for the summer. (A-1302:12–20; A-1683:9–11; *see also* SA-13.) This consent form did not include a return date. (A-1301:15–23; A-1303:1–15; A-1684:16–18; A-1851:9–13; SA-13.)

Ms. Agbelusi and the Children arrived in New York on July 12, 2021. (A-1300:25–1301:1; A-1303:14–23.)

Once in New York, little by little, Ms. Agbelusi revealed to her family for the first time the abuse she suffered at Mr. Lomanto's hands. (A-1313:5–9.) After receiving advice and support from her family, Ms. Agbelusi decided that it was in her and the Children's best interest not to return to Spain and instead to stay in New York. (A-1313:9–18; A-1314:7–8.)

On August 24, 2021, Ms. Agbelusi informed Mr. Lomanto of her decision to remain in New York with the Children. (A-1313:19–22; A-1314:7–9; A-1316:6–10; A-2439; A-515–516.) Mr. Lomanto acknowledged that he first heard of the decision to stay in New York when he spoke with R.A.L. on August 24. (A-1830:18–1831:7; *see also* SA-16, SA-72.) During that conversation, R.A.L. told Mr. Lomanto about their "project," which was for the Children to stay in New York, and for Mr. Lomanto to join them in six months. (A-1831:3–7.) Text messages between Mr. Lomanto and R.A.L. on August 24 show that an argument soon followed. (SA 133–135.)

After he spoke with R.A.L., Mr. Lomanto called Ms. Agbelusi on the evening of August 24, 2021 "to let her know that [he didn't] like" the plan "to stay and live in the United States." (SA-72.) Mr. Lomanto testified that he had a conversation with Ms. Agbelusi late on August 24 Eastern Standard

Time and early in the morning on August 25 in Spain, during which Ms. Agbelusi "told [him] about the plan to stay there with the Children." (A-1712:4–13; A-1409:20–1710:6.)

Mr. Lomanto was very upset. (A-1714:12–15.) In an August 24 audio message sent to Ms. Agbelusi, he said: "United States, very cool there you will live a fucking awesome life. . . . He tells me that you both are going to stay there." (SA-16.) In another message on the same day, Mr. Lomanto accused Ms. Agbelusi: "You left me [sic] everything pretty clear. . . . You took my children . . . and they say they are not coming back here. . . . You made your plan clear to me and I have nothing else to say." (SA-19; SA-32.)

Upon learning on August 24 of Ms. Agbelusi's decision not to return the Children, it is undisputed that Mr. Lomanto did not give his permission for the Children to remain. (A-1834:25–1835:3.)

C. Mr. Lomanto reports that the Children have been kidnapped.

After the aforementioned conversations and messages, Mr. Lomanto filed multiple police reports in Spain on August 25, alleging that Ms. Agbelusi kidnapped the Children and stating he opposed the plan for the Children to remain in New York. (A-515–516.) In these police reports, Mr. Lomanto asserted that he learned the prior day (on August 24) that his children would be remaining in New York and that they had disappeared as

of 12:01 a.m. on August 24, Central European Time. (A-515 ("The said disappearance occurred between 00:00 hours (midnight), on 8/24/2021 and 00:01 hours, on 08/24/2021, at Piso, New York, United States of America.").) He confirmed that there were "no measures or agreements . . . regulat[ing] the situation of the minors" and that "he ha[d] not given his consent for his children to stay" in the United States. (A-515.) Mr. Lomanto never withdrew those police reports.

Over the course of the next several weeks, Ms. Agbelusi and Mr. Lomanto exchanged affectionate and intimate messages and discussed that the Children had been enrolled in school in New York (SPA-77) and could visit Mr. Lomanto in Spain the following summer. (A-1325:17–1328:8; A-3406; SA-24; SA-26.) Despite the tenor of his messages, Mr. Lomanto testified that he "never intended to move to the United States to live" and "never gave permission for the Children to come stay—to live [in New York]. Never." (A-1717:2–10; A-1846:23–1847:2.) Mr. Lomanto sent affectionate messages to Ms. Agbelusi before she arrived in Spain because he "thought it would be the easiest way to get my children back, to make the report in Spain and to have the trial be in Spain." (A-1849:12–21; *see also* A-1849:22–1850:4.)

D. Mr. Lomanto sues Ms. Agbelusi in Spain to compel her to return to Spain with the Children.

On September 13, 2021, Ms. Agbelusi arrived in Marbella to discuss Mr. Lomanto joining her and the Children in New York. (*See* A-1327:6–12.) After exiting the plane, she was immediately stopped by immigration officials and told for the first time that Mr. Lomanto had filed a police report, accusing her of kidnapping the Children. (A-1323:6–20; A-1324:22–1325:14.) It was then that Ms. Agbelusi learned Mr. Lomanto had deceived her; he had no intention of relocating to New York, contrary to his affectionate messages in the weeks prior. (*Id*.)

Mr. Lomanto sent Ms. Agbelusi several audio messages after she arrived in Spain that confirmed he never intended to allow the Children to stay in the United States. For example, he told her that "[i]f I win this legal battle, I will go for the children and I will take everything away from you. . . . If I win this legal battle, I will go after everyone. . . . If I win that legal battle, I will go for the children, for the custody of the children. . . . I will take everything from you, all I can take from you, I will. I will take it away with the law. . . . You are nobody." (SA-31.)

During the Spanish court proceeding, Ms. Agbelusi did not disclose the domestic violence she had endured at the hands of Mr. Lomanto, nor her concerns about his treatment of R.A.L. and involvement in illicit activities,

out of fear for her life. (*See* A-1259:14–18.) However, when Ms. Agbelusi filed her appeal in April 2022, well prior to the initiation of Mr. Lomanto's current petition, Ms. Agbelusi wrote to the Spanish court to explain why she could not return, stating that "I am currently abroad after having suffered mistreatment with threats made by my ex partner Angelo Lomanto. . . . Fearing for my life and my children's life I left the house to save myself and my children and so that we would no longer suffer at Angelo Lomanto's hands." (SA-35.) She explained that "[m]y life and my children's li[ves] are in danger" but that previously she did "not have a voice" because Mr. Lomanto told her she would "suffer the consequences" for speaking out. (*Id*.)

The Spanish court issued an order on September 29, 2021, requiring Ms. Agbelusi to return the Children to Spain. (A-63−67.) When she first arrived back in New York from Spain, Ms. Agbelusi believed she had no choice but to return with the Children. (A-1335:1–3; A-1336:8–14.)

E. Mr. Lomanto pressures R.A.L.

During the time surrounding Ms. Agbelusi's trip to Spain, Mr. Lomanto encouraged R.A.L. to undermine his mother so he could return to Spain. Mr. Lomanto told R.A.L., "[d]on't listen to her," and instructed R.A.L. to "go to the office in [his] middle school and go there and tell them

my mother was abusing me, and [his] mother would send me back." (SA-175; *see also* A-1073:18–A-1074:12.) R.A.L. explained that Mr. Lomanto would "go inside my head and make me mad" and that "I didn't know what he was trying to do. I can't say I knew what I was doing. I was just listening." (SA-175.)

Mr. Lomanto spoke negatively about Ms. Agbelusi to R.A.L., saying "because I get angry, because I don't understand why she has to fuck me like that to talk to you;" "she sees the world upside down;" and "she wanted me not to fight for you and follow her there like a donkey." (A-1217:7–14; SA-142.) R.A.L. told Dr. Fernandez that Mr. Lomanto would try to "turn[ ] him or his brother against [Ms. Agbelusi];" would "make things up;" and "has also lied in court about things." When R.A.L. would confide in Mr. Lomanto about his challenges with his grandmother, Mr. Lomanto would use these discussions against him, making R.A.L. feel manipulated. (SA-173; SA-178.)

In the same timeframe, for the first and only time in their relationship, R.A.L. became physically aggressive with Ms. Agbelusi. (A-1312:2–3.) Ms. Agbelusi testified that this encounter "wasn't a discipline, it was a fight between a mother and a son who was rebelling." (A-1540:11–14.) Ms. Agbelusi testified that R.A.L. did not bleed at all during the interaction, and

she never choked him. (*Id.*; A-1312:7–8.) R.A.L. was remorseful afterwards, and a physical confrontation never happened again. (A-1312:9–11.) In his interviews with Dr. Fernandez, R.A.L. clarified that the allegations of abuse against Ms. Agbelusi were untrue. She never used physical punishment against him in New York. (A-1074:4–14.)

After Ms. Agbelusi returned to the United States, she explained to R.A.L. that he would have to return to Spain, showing him the police report filed by Mr. Lomanto and the court order demanding the Children's return. (A-1336:20–1337:21.) R.A.L. became upset, crying and saying over and over, "My father lied to me. He used me. Deceived me." (A-1337:3–11; SA-175; SA-175.)

In the months that followed, Ms. Agbelusi cut off contact between Mr. Lomanto and the Children because there was "a lot of pressure from [Mr. Lomanto]," including his sending "negative messages," and Ms. Agbelusi "was desperate as a mother" and "thought it was the right decision." (A-1368:16–23; A-1372:13–22.) As a result, Mr. Lomanto reached out to the Children's school. (A-1368:23–24.) Eventually, the school "flagged" Mr. Lomanto and informed Ms. Agbelusi about the frequency of his contact. (A-1368:24–1369:4.)

Mr. Lomanto continued to speak negatively about Ms. Agbelusi in his communications with the Children during this proceeding. R.A.L. told Dr. Fernandez that he stays on Zoom visitation calls with his father "so that it doesn't get out of hand." (SA-175.) R.A.L. explained that his father will say things about Ms. Agbelusi and try to turn R.A.L. and S.M.L. against her. (*Id.*) R.A.L. "added that his mother reinforces that she doesn't want them to 'hate my father. The problem my father has is with her and not with [us].'" (*Id*.)

F. The Children's lives have flourished in New York.

Since moving to New York, both children significantly improved academically. (*See* SA-164−172; SA-234−35.) In the 2021–2022 school year, R.A.L. and S.M.L. regularly attended school and saw marked improvement in their grades (A-1381:4–14; SA-162−71), with R.A.L. receiving an outstanding achievement award in mathematics. (SA-165.) In contrast to his academic troubles in Spain, in New York, R.A.L's teachers commended him, stating that he "stays on task with little supervision," "displays self-discipline," and that he "cooperated consistently with the teacher and other students." (SA-169; *cf.* SA-78 (noting that R.A.L. was "[e]asily distracted" at his school in Spain and "[n]eed[ed] to show more interest in class assignments," and that he "doesn't try hard enough" and

showed "[l]ittle contribution of ideas in group work"); SA-91.) R.A.L. was also named to the honor roll for the first quarter of the 2022–2023 school year. (SA-172.) R.A.L. and S.M.L. made new friends quickly at their school for the 2021–2022 year, with whom they continue to keep in touch. (A-1384:23–1385:25; SA-223; SA-239.)

Outside of school, R.A.L. and S.M.L. participate in various extracurricular activities. R.A.L. and S.M.L. attend church at Sunrise Spiritual Church in Brooklyn every week with Ms. Agbelusi. (A-796:19–24; A-810:23–811:3; SA-249.) At the time of trial, they had attended this same church for about a year and a half. (A-796:12–14; A-826:21–827:13.) R.A.L. and S.M.L. participate in various church activities and are doing "excellently" according to church leader Sakiru Odubiro. (A-799:8–17; SA-252.) Through these activities, R.A.L. and S.M.L. have made many friends in the church community with whom they socialize outside of church as well. (A-802:9–16; A-804:10–15; A-921:14–16; SA-250−51.)

R.A.L. and S.M.L. have strong family connections in New York. Ms. Agbelusi's mother, sister, and nephew all live in the Bronx. (A-1378:23–1379:7.) R.A.L. plays with his cousin (*see* SA-221−22; SA-242), goes to the gym with his aunt, and is friends with the other children who live in the same building as his grandmother. (A-1379:8–25; SA-223.) S.M.L. also

enjoys spending time with his cousin. (SA-236−37.) The Children spend holidays and birthdays with their family. (SA-222, SA-224−31.) R.A.L. and S.M.L have also visited Ms. Agbelusi's brother and his family who live in Maryland, including their first cousins. (A-1408:17–1409:17; SA-232−33.)

Ms. Agbelusi creates fun opportunities for her children, taking S.M.L. and R.A.L. on trips to explore New York City, including to places like Times Square or the beach. (*See* SA-240−241; SA-243−48.) R.A.L. and S.M.L. are very close and spend much of their time together. Dr. Fernandez noticed this close relationship. He observed that R.A.L. "was always aware of where [S.M.L.] was, assisting with redirecting, expressed a close bond with him and feeling that he must care for him." (A-3621.)

Ms. Agbelusi applied for her own legal status with the intention of applying for the Children after her application was granted. (A-1432:21–1433:1.) Neither Ms. Agbelusi nor her Children have been in removal proceedings in the United States. (A-1432:17–20.)

Ms. Agbelusi and the Children reside in a studio apartment within a shelter. (A-1374:2–9.) The apartment is private—no one other than Ms. Agbelusi, R.A.L., and S.M.L. reside there. (A-1374:17–20.) Ms. Agbelusi's husband, Mr. Dickerson, does not live with the family. (A-1378:4–5.) R.A.L. and S.M.L. have made friends with other children living at the

shelter (A-1376:22–23) and taken advantage of various programming offered by the shelter. For instance, during the summers, the shelter offers a free sleepaway camp. (A-1374:21–1375:15.) R.A.L. participated in the camp and loved it. (A-1374:16-18; SA-253.) The shelter also organizes an afterschool program for young children, in which the Children participate. (A-1375:1–3.)

Ms. Agbelusi provides her family with a stable source of income. Just a few days after arriving in New York in 2021, Ms. Agbelusi obtained employment as a home health aide, where she worked while her mother watched the Children. (A-1307:13–17; A-1308:2–9.) She worked three to four days a week for six-hour shifts. (A-1307:18–21.) Currently, Ms. Agbelusi works as a self-employed cleaner. (A-1429:16–19.) With flexible hours, Ms. Agbelusi works while R.A.L. and S.M.L. are in school. (A-1430:3–4, 16–18.) Ms. Agbelusi has provided for R.A.L. and S.M.L., building a safe and stable home life for the boys. This is confirmed by other witnesses in the case, including Ms. Adebayo-Olojo, who is a friend of the family from church. Ms. Adebayo-Olojo is a New York City policewoman and a mandated reporter. (A-912:12–18.) She confirmed that she has never observed anything that would cause her concern for the welfare of R.A.L. or

S.M.L. in Ms. Agbelusi's care. (A-923:1–7.) *See* N.Y. Soc. Serv. Law § 413(1); *see also* N.Y. Soc. Serv. Law § 415.

G. Proceedings transpired before the district court.

The district court held a six-day bench trial from March 20–28, 2023. Ms. Agbelusi conceded the *prime facie* case under the Hague Convention. Therefore, the trial centered on Ms. Agbelusi's affirmative defenses. During the trial, both parties testified, as well as several fact and expert witnesses. The court then conducted an *in camera* interview with the Children.

1. The district court provided a Spanish language interpreter for Mr. Lomanto.

Despite being advised several times by the district court to obtain a Spanish language interpreter for trial, including an Order requiring him to do so after briefing by both parties on the issue (SA-75), Mr. Lomanto failed to obtain an interpreter for trial. In response, the court offered to permit his friend to serve as an interpreter. (A-776:17–777:14.) The court then coordinated with the attorneys for the Children to secure pro bono interpreters, who were available for the remainder of the proceeding. (*See* A-768:03–769:13; A-999:2–8.) As a result, Mr. Lomanto had interpreters available to him for all but the first few hours of a six-day trial.

2. The court-appointed clinical psychologist, Edward Fernandez, testified to his findings, and the district court conducted an in camera review of the Children.

R.A.L. was examined by Dr. Edward Fernandez, a licensed clinical psychologist, who was appointed by the court to assess the "maturity of the [C]hildren and any objections the [C]hildren may have to repatriation." (A-3612.) R.A.L. met with Dr. Fernandez on three separate occasions. (A-3614.)

In a written report, Dr. Fernandez made the clinical determination that R.A.L. "possesses sufficient age and maturity to have his opinion considered for this case." (A-3621.) He opined that R.A.L. is "capable of making logical decisions based on circumstances that he believes he is presented with." (A-3622.) Dr. Fernandez wrote in his notes following a discussion with R.A.L. that "his mother reinforces that she doesn't want them to 'hate my father. The problem my father has is with her and not with [us].'" (SA-173.) By contrast, Dr. Fernandez's notes reflect that R.A.L. told him that Mr. Lomanto would "go inside my head and make me mad," and would tell him what he should do to make his mother get "tired of [him]" so that she would send him back to Spain. (SA-175.)

Dr. Fernandez testified about the emotional toll the legal proceedings have taken on R.A.L. but confirmed that "when I talk[ed] to him about

having the ability to discern and make up his own mind for what's important with him and what he desires, I still believe it's credible, I still believe he has the maturity to make those decisions." (A-1221:9–15.)

In addition to concluding that R.A.L. possessed sufficient age and maturity to have his views considered by the court, Dr. Fernandez noted that R.A.L. "had a strong objection to returning to Spain." (A-1084:12–17.) In Dr. Fernandez's notes, Dr. Fernandez indicated that R.A.L. communicated to him: "It would be the worst if I went back. I don't have nothing there." (SA-219.) R.A.L.'s strong objections are of a long-standing nature. As early as August 24, 2021, R.A.L. sent a text message to Mr. Lomanto, begging him not to "take this opportunity away from me" and writing that "BECAUSE OF YOU I WILL MISS OUT ON A LOT OF OPPORTUNITIES IN LIFE." (SA-133−134.)

Additionally, the attorneys for the Children stated that R.A.L. and S.M.L. did not wish to have overnights with Mr. Lomanto when he was in town for the trial. (*See* A-673:2–10.) Dr. Fernandez confirmed this. (A-1055:6–9.)

The court also met with the Children and their attorneys *in camera*. The parties and their counsel were not present. When R.A.L. was asked by the court how he would feel about returning to Spain, he said it would be

"hard for me because that means we'll never see my mom again until I'm 18, basically, because [Mr. Lomanto] wouldn't let me come here even to see her." (A-3122:17–21.) R.A.L. stated that he could not "choose one parent over the other" and that he loves them both. (A-3123:9–23.)

H. The district court issued an opinion and order denying Mr. Lomanto's petition.

The district court held that "Agbelusi has successfully proven that the [C]hildren are now settled, that the elder child is sufficiently mature and objects to return, and that the [C]hildren should not be separated." (SPA-74.) In finding for Ms. Agbelusi, the court stated that "[a]lthough Agbelusi has also asserted the defense of grave risk of harm, having concluded that Lomanto's petition should be denied on two independent grounds, the Court need not consider this final affirmative defense." (SPA-108, n.11.) However, the court did conclude that "separation of R.A.L. and S.M.L. would cause significant hardship and psychological harm, and ought to be avoided at all costs." (SPA-107.) The court also found that Ms Agbelusi's "allegations of intimate partner violence" against Mr. Lomanto were "credible," "detailed, consistent, and unique." (SPA-87.)

The district court recognized that it was within the court's discretion to grant the Petition, notwithstanding its finding for Ms. Agbelusi on two affirmative defenses. However, the court ultimately found that the Hague

Convention, in addition to its interest in deterrence, "holds at its center an interest in the welfare of the children and their interests in remaining settled," and that this was "such a case." (SPA-108.)

SUMMARY OF THE ARGUMENT

This Court should affirm the thorough and well-reasoned decision by the district court denying Mr. Lomanto's petition. As explained below, the district court correctly decided that the date of wrongful retention and revocation of consent was August 24, 2021. Because that date was more than one year prior to the date Mr. Lomanto brought this action, Ms. Agbelusi was entitled to assert an affirmative defense that the Children are well settled in New York. This Court should also affirm the district court's decision to adopt the well-settled and mature child affirmative defenses as a basis to deny Mr. Lomanto's demand to return the Children to Spain. The factual record demonstrates that the best interests of the children are served by remaining here, where they are fully integrated into their community, rather than returning them against their wishes to a country where they did not thrive. Finally, there is no reason for this Court to reverse the district court's denial of Mr. Lomanto's petition based on discretionary factors or due process. All the factors weigh strongly in favor of permitting the Children to remain in the United States.

ARGUMENT

I. The well-settled defense is available because the Petition was not filed within one year of wrongful retention.

Under Article 12, courts may deny a petition for return if a child is "now settled" in its new environment and the petition was filed more than a year after the date of wrongful removal or retention. Hague Convention, art. 12. The date of wrongful retention is the moment that "consent [is] revoked or when the petitioning parent learned the true nature of the situation." *Abou-Haidar v. Sanin Vazquez*, 945 F.3d 1208, 1216 (D.C. Cir. 2019). This date is singular and fixed and cannot be adjusted based on subsequent representations by or intentions of the parties. *Marks ex rel. SM v. Hochhauser*, 876 F.3d 416, 421–22 (2d Cir. 2017).

Determining the date on which Mr. Lomanto "learned of the true nature of the situation" and revoked his consent is an issue of fact, such that the clearly erroneous standard is the appropriate standard of review. *Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013) (explaining that the court "must accept the trial court's findings unless we have a definite and firm conviction that a mistake has been committed") (internal quotations omitted); *see also Taveras ex rel. L.A.H. v. Morales*, 604 F. App'x 55, 56–57 (2d Cir. 2015) (summary order) (concluding trial court's determination of the date of wrongful retention was "far from clearly erroneous"). The district

court's conclusion that the date of wrongful retention was August 24, 2021 was grounded in both testimony and written evidence and was "far from clearly erroneous." *Morales*, 604 F. App'x at 56–57.

A. Wrongful retention began on August 24, 2021, when Mr. Lomanto learned the Children would not be returning and revoked his consent for them to remain in the United States.

The date of "wrongful retention" is the date the petitioner learns that the children will not be returning and revokes consent for them to remain in the foreign state. *See Marks ex rel. SM v. Hochhauser*, 876 F.3d 416, 421–22 (2d Cir. 2017) (holding that the date of wrongful retention is the date on which the respondent told the petitioner that she would not return with the children); *see also Abou-Haidar v. Sanin Vazquez*, 945 F.3d 1208, 1216–17 (D.C. Cir. 2019) ("The circuits identify the date of retention as the date consent was revoked or when the petitioning parent learned the true nature of the situation.") (cleaned up).

The district court found that Mr. Lomanto revoked his consent on August 24, 2021, when R.A.L. and Ms. Agbelusi told him that they were staying in New York. (SPA-77.) In the police report he filed on August 25, Mr. Lomanto stated that the Children were kidnapped "yesterday" and "placed on record that he did not consent for his children to stay in the United States." (SPA-78 (internal quotations omitted).)

Likewise, the district court concluded that Mr. Lomanto learned the "true nature of the situation" on August 24, 2021, when R.A.L. texted Mr. Lomanto that he, S.M.L. and Ms. Agbelusi "would not be returning to Spain and would instead be staying in New York, where Agbelusi had already enrolled the [C]hildren in school." (SPA-77.) After his conversation with R.A.L., Mr. Lomanto spoke with Ms. Agbelusi, who made similar statements. (A-1712:4–13; 1709:20–1710:6.) Mr. Lomanto's statements to Ms. Agbelusi on August 24, the police report, and his testimony all support the district court's finding that Mr. Lomanto "learned of the true nature" of Ms. Agbelusi's plan on August 24 and revoked his consent for the Children to remain in the United States on that date.

B. Mr. Lomanto was unequivocally on notice that Ms. Agbelusi and the Children would not be returning to Spain as of August 24.

Mr. Lomanto contends that Ms. Agbelusi did not "unequivocally" tell him on August 24 that she would not be returning to Spain with the Children. (Br. 42.) That argument fails for several reasons. *First*, it incorrectly suggests that the standard is objective and focused on Ms. Agbelusi's actions. Not so. The test is subjective and focuses on Mr. Lomanto's understanding as the left-behind parent. *See Palencia v. Perez*, 921 F.3d 1333, 1342 (11th Cir. 2019) (describing the date of wrongful

retention as "the date the petitioning parent learned the true nature of the situation"); *Blackledge v. Blackledge*, 866 F.3d 169, 179 (3d Cir. 2017) ("[T]he retention date is the date beyond which the noncustodial parent no longer consents to the child's continued habitation with the custodial parent and instead seeks to reassert custody rights, as clearly and unequivocally communicated through words, actions, or some combination thereof."). The case Mr. Lomanto cites is not to the contrary. *See Miller v. Miller*, No. 1:18-CV-86, 2018 WL 4008779, at *13 (E.D. Tenn. Aug. 22, 2018) ("[T]he date of wrongful retention occurs when a *non-abducting* parent is *clearly or unequivocally on notice* that the abducting parent does not intend to return a child from his current country.") (emphasis added).

Second, the district court found that Mr. Lomanto was clearly on notice that Ms. Agbelusi and the Children would not be returning to Spain as of August 24, and that he unequivocally revoked his consent on that date. (SPA-78.) Abundant evidence supports that finding. For example, the court considered R.A.L.'s and Ms. Agbelusi's communications with Mr. Lomanto that the Children and Ms. Agbelusi would be staying in New York (SPA-77; A-1830:18–1831:7); Mr. Lomanto's testimony that Ms. Agbelusi told him on August 24 that she and the Children would not be returning to Spain, and that he "never gave permission for the Children . . . to live in New York"

(SPA-80; A-1712:4–13; A-1709:20–1710:6); messages from Mr. Lomanto to Ms. Agbelusi stating, "You left me [sic] everything pretty clear. . . . You took my children . . . and they say they are not coming back here. . . . You made your plan clear to me and I have nothing else to say." (SPA-77; SA-19; SA-32); Mr. Lomanto's sworn police report, which he never withdrew, stating that the Children were kidnapped on August 24 (SA-20); and testimony from Mr. Lomanto saying that his subsequent messages about Ms. Agbelusi convincing him of the "plan" to all live in New York was to trick her into coming to Spain, and that he "never intended to allow the [C]hildren to remain in New York." (SPA-80; A-1847:1–2.)

Finally, even if the standard for determining the date of wrongful retention were measured by whether Ms. Agbelusi unequivocally communicated that she would not return the Children to Spain, the district court found that she did so. *See Taveras v. Morales*, 604 F. App'x 55, 56 (2d Cir. 2015) (summary order) ("We need not decide here whether the formulation urged by [petitioner] is in fact the correct standard for determining when wrongful retention begins. Assuming arguendo that such a standard applies, the district court determined that it was met here.") (internal citations omitted). The court found that, "late on August 24, 2021 . . . Agbelusi herself told Lomanto over the phone that she planned to

stay in New York with R.A.L. and S.M.L." (SPA-77.) Mr. Lomanto's police report declared the same, stating that Ms. Agbelusi told Mr. Lomanto [on August 24] that "she will return on September 7 but without the [C]hildren, who are going to stay in New York." (SPA-78.)

C. Prior agreements and subsequent communications are legally irrelevant to the date of wrongful retention.

Mr. Lomanto's remaining arguments that the date of wrongful retention was not August 24 likewise fail. It is of no consequence that Mr. Lomanto originally agreed for the Children to stay in New York until August 26. *See Marks ex rel. SM v. Hochhauser*, 876 F.3d 416, 422 (2d Cir. 2017). In *Hochhauser*, this Court found that the date of wrongful retention was the date the respondent informed the petitioner that she made the decision to remain in the United States (October 7), not the date respondent originally booked flights to return to the children's state of habitual residence (October 10). *See Hochhauser*, 876 F.3d at 422. So too here. Regardless of the Children's original return flight dates, wrongful retention occurred on August 24, when Ms. Agbelusi informed Mr. Lomanto that the Children would not be returning to Spain and Mr. Lomanto revoked his consent.

As for Mr. Lomanto's "unilateral acceleration" argument, this theory can be found nowhere in the case law, and in fact conflicts with both

established precedent and Mr. Lomanto's own prior argument. Specifically, *Hochhauser*, in upholding the district court's finding that the date of wrongful retention was October 7, three days earlier than the date the children were originally scheduled to return, necessitates the conclusion that the taking parent can "accelerate" the date of wrongful retention. *Hochhauser*, 876 F.3d at 417−18, 422. In *Blackledge v. Blackledge*, the Third Circuit held that "a party may accelerate a retention date by withdraw[ing] his consent to have [the child] remain with the custodial parent." 866 F.3d 169, 179 (3d Cir. 2017) (internal quotations omitted). And in *Darin v. Olivero-Huffman*, the First Circuit likewise found that the date of wrongful retention was the date of the taking parent's "declaration that she would remain in the United States." 746 F.3d 1, 10 (1st Cir. 2014).[1]

Mr. Lomanto cannot simultaneously argue that, for the well-settled defense to apply, Ms. Agbelusi must have "unequivocally" told Mr. Lomanto that she would not return with the Children on the agreed-upon date (Br. 42), but also that Ms. Agbelusi could not have unilaterally accelerated the agreed-upon return date of August 28. (Br. 46.) To the

[1] Mr. Lomanto attempts to distinguish *Blackledge* and *Darin* by arguing that there, the court's wrongful retention analysis was tied to its determination of the child's habitual residence. (Br. 47.) But that the court's analysis of the date of wrongful retention was for the purpose of determining an element of the *prima facie* case, not an affirmative defense, does not matter; the courts were still determining the date of wrongful retention under the Convention. *See Blackledge*, 866 F.3d at 178−179; *Darin*, 746 F.3d at 11.

contrary, this Circuit and other courts have held that the taking parent can do just that: inform the left-behind parent that the children will not be returning, thereby marking the date of wrongful retention, so long as the left-behind parent does not acquiesce.[2] *See, e.g.*, *Hochhauser*, 876 F.3d at 422*; Ramirez v. Buyauskas*, No. 11-6411, 2012 WL 606746, at *10 (E.D. Pa. Feb. 24, 2012), *amended*, 2012 WL 699458 (E.D. Pa. Mar. 2, 2012) ("[W]rongful retention in this case began on the date . . . when respondent called petitioner from Houston, Texas, and told him that she intended to remain in the United States with the children permanently.").

The district court rejected Mr. Lomanto's arguments that August 28 was the date from which he "refused to agree to an extension," or that wrongful retention occurred on September 7, the date that Ms. Agbelusi returned to Spain without the Children. (SPA-97−98; Br. 47, 44.) Instead, the court found that, despite Mr. Lomanto's initial consent for the Children's stay in New York until August 28, he withdrew his consent on August 24, at which time he understood the Children to be "kidnapped" and reported that he "[had] not given his consent for his children to stay there." (SPA-78.)

[2] As discussed *infra*, Mr. Lomanto does not argue on appeal that he acquiesced to the Children's extended stay, and his concrete actions and subjective intent following his conversation with Ms. Agbelusi on August 24, as conveyed in his trial testimony, show that he never did. (*See* SA-20; A-1849:12-21, A-1717:2-10; A-1746:23-1747:2.)

These are factual findings that deserve "significant[] deferenc[e]." *Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013).

Finally, it is irrelevant whether Ms. Agbelusi's subsequent conduct "did not have or convey a definitive intent not to return the children." (Br. 44.) Mr. Lomanto does not argue on appeal that he ever acquiesced to the Children's extended stay, and the district court found this argument unavailing due to Mr. Lomanto's concrete actions and subjective intent. (SPA-99.) It is well established that the date of wrongful retention is measured from the actions of the *left-behind parent* after learning of the plan and withdrawing his consent—not the subsequent actions of the taking parent after this consent was withdrawn. *See Abou-Haidar v. Sanin Vazquez*, 945 F.3d 1208, 1216–17 (D.C. Cir. 2019). These actions "need not be particularly formal." *Id.* (discussing how consent can be revoked through emails, phone calls and in-person conversations), but here, not only did Mr. Lomanto communicate his revocation through text and voice messages to Ms. Agbelusi, but he filed a police report alleging she kidnapped the Children on August 24. *Cf. Blackledge v. Blackledge*, 866 F.3d 169, 179 (3d Cir. 2017) (wrongful retention occurred on the date the petitioner filed his Hague petition, absent "any earlier communication in which Petitioner clearly and unequivocally withdrew his prior consent"); *Kosewski v.*

Michalowska, No. 15-cv-928 (KAM), 2015 WL 5999389, at *8, *21 (E.D.N.Y. Oct. 14, 2015) (wrongful retention occurred on the date the petitioner alleged the taking parent kidnapped the child in his police report). Allowing Mr. Lomanto to file a police report claiming the Children were kidnapped on August 24 but later argue that he still consented to their stay in the United States at such time would allow for strategic post hoc behavior and undermine the Convention's purpose. It would also create a form of de facto equitable tolling, which the Court in *Lozano* held was inapplicable to the one-year period in Article 12. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 11−18 (2014).

Mr. Lomanto's claim of confusion about whether the Children would return contradicts his testimony and evidence at trial, which the district court found to constitute withdrawal of consent and subjective refusal to acquiesce to an extension. (SPA-98–99.) To the extent Mr. Lomanto suggested to Ms. Agbelusi that he was amenable to the Children remaining, he admitted those messages were intended to induce Ms. Agbelusi to return to Spain and face

the criminal complaint and court proceedings he had filed there. (SPA-99; A-1850:2–4.)[3]

II. The district court did not clearly err in holding that the Children are well settled in New York.

This Court should uphold the decision of the district court that—based on a balancing of the totality of the factors—the Children "are settled [in New York] such that repatriating them would be disruptive with likely harmful effects." (SPA-106 (internal quotation and citation omitted).) Clear evidence was presented at trial that the Children now have significant emotional and physical connections to the United States, and no evidence was presented to the contrary.

Mr. Lomanto perplexingly argues that the Children cannot be well settled *because* they were wrongfully retained. (Br. 50.) This argument is inapposite to the Hague Convention and established precedent—including a case cited by Mr. Lomanto—which only require the Court to consider affirmative defenses, such as the well-settled defense, *after* wrongful retention is established. *See Lozano v. Alvarez (Lozano II)*, 697 F.3d 41 (2d

[3] Given that the date of retention was August 24, 2021, Mr. Lomanto's argument differentiating venue and jurisdiction regarding his filing in the Eastern District of New York is a moot point. Even if Mr. Lomanto's filing in the Eastern District of New York on August 26, 2022 were jurisdictionally proper and constituted an initiation of the proceedings under the Convention, such filing was still after the one-year period, which ran no later than August 24, 2022.

Cir. 2012), *aff'd sub nom, Lozano v. Montoya Alvarez*, 572 U.S. 1 (2014) (finding that a child was settled after a wrongful retention analysis); *Blackledge v. Blackledge*, 866 F.3d 169 (3d Cir. 2017) (same); *Karkkainen v. Kovalchuk*, 445 F.3d 280 (3d Cir. 2006) (same).

A. Whether the Children are well settled is determined by a balancing of factors for which the district court's analysis should be given significant weight.

Article 12 of the Convention permits the Court to deny a petition for return of the child where more than one year has elapsed from the date of wrongful retention and "it is demonstrated that the child is now settled in its new environment." Hague Convention, art. 12. A child with "significant emotional and physical connections" to the new home country "demonstrating security, stability, and permanence" should be considered "settled" such that return would not be in the child's best interests. *Lozano II*, 697 F.3d at 56. An Appellee must only establish "by a preponderance of the evidence that [the well-settled defense] applies." 22 U.S.C. § 9003.

Courts generally consider the following factors in making a well-settled determination: (1) the age of the child; (2) the stability of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child regularly participates in community or extracurricular activities, such as regular church attendance;

(5) the respondent's employment and financial stability; (6) whether the child has friends and relatives in the new environment; and (7) the immigration status of the child and the respondent. *Lozano II*, 697 F.3d at 56–57. No single factor is dispositive; the Court must balance these factors to determine if the child is well settled. *Broca v. Giron*, 530 F. App'x 46, 47 (2d Cir. 2013) (summary order) (upholding the decision of the district court that the child was well settled upon a balance of factors, despite that "immigration status, lack of residential stability, . . . poor performance in school" and the "mother's lack of financial stability, counsel against" a well-settled finding); *Lozano II*, 697 F.3d at 57 (balancing factors and noting that some factors "may not support the same determination").

Because the well-settled analysis is a mixed question of fact and law, the district court's factual findings as to each of the relevant factors are reviewed for clear error, while its application of the Hague Convention based on those factual finding is reviewed *de novo*. *See Blondin v. Dubois*, 238 F.3d 153, 158 (2d Cir. 2001); *Ermini v. Vittori*, 758 F.3d 153, 165 n.11 (2d Cir. 2014) (reviewing the district court's decision to credit testimony, although "sweeping and strong," under the "significantly deferential" "clearly erroneous standard," while the court's interpretation of the Hague Convention was subject to *de novo* review) (citation omitted). This Circuit

has given great deference to the district court's balancing of the well-settled factors, even under *de novo* review. *See Lozano II*, 697 F.3d at 58 (according deference to the district court's well-settled finding, holding that "[e]ven on *de novo* review, we are not inclined to upset the district court's careful balancing of these many fact-based considerations").

B. The district court made factual findings that the Children have strong social and emotional connections to their home in New York.

The district court found, and Mr. Lomanto seemingly concedes (Br. 49–50), that the Children have meaningful attachments to New York, regularly attend school, and are integrated in their church community and extracurricular activities. (*See* SPA-83 ("R.A.L. and S.M.L. continue to see their grandmother, aunt, and cousins, and have visited Agbelusi's brother and their other cousins in Maryland."); SPA-84 ("After services, members of the church mingle and eat together, and the church community has organized several outings for its younger members" that the Children attended with other children from the church with whom they "frequently chat.").)

There was ample evidence in the record to support these factual findings. The Children's strong supportive relationship with their family in the United States is evident in the photographs entered into evidence (*see* SA-221−33) and Ms. Agbelusi's testimony that the Children spend quality

time baking and going to the gym with family members. *See* A-1379:15–19. Their regular attendance at church services, involvement in church activities involving other members, and close friendships with church members were likewise shown in both photographs (*see* SA-251−52) and in the testimony of Officer Adebayo-Olojo, a policewoman and church member, and Mr. Odubiro, the church pastor's husband and co-church leader. (A-802:9–16; 804:10–15; 921:14–16.)

Ample evidence was also introduced regarding the Children's academic improvement and engagement in their school community. This included testimony that the Children regularly attend school (*see* A-1381:4–14), along with copies of their report cards (*see* SA-171, SA-166, SA-169; *cf.* SA-78; SA-91), academic achievement awards (*see* SA-162−65, SA-168), and pictures from R.A.L.'s graduation. (*See* SA-234–35; SA-238.) Shortly before trial, R.A.L was named to the honor roll for the first quarter of his 2022–2023 school year. (SA-172.) Testimony was also presented that R.A.L. and S.M.L. both made new friends during the 2021–2022 year (A-1384:23–1385:25), and pictures showed those relationships continued to flourish in gatherings outside of school. (SA-223; SA-239; SA 250–51.)

C. The record also supports a well-settled finding with respect to the few factors that Mr. Lomanto challenges.

Mr. Lomanto only challenges the district court's factual findings, and ultimate balancing of factors, with respect to three of the *Lozano* well-settled factors: the stability of the Children's residence, their financial stability, and their immigration status. Mr. Lomanto likewise cites to the potential for his parental alienation as an additional factor. These conclusions are unsupported by the evidentiary record, upon which the district court concluded that living in government housing, having limited income, and lacking immigration status do not preclude a finding of well settled. The court explained that "[a] child's life does not have to be perfect for [him or her] to be settled." (SPA-106) (internal quotation omitted).) As in *Lozano II*, the Court should give significant deference to the district court's weighing of the various factors based on the evidence presented at trial.

1. The Children have a stable residence in New York.

The district court found that Ms. Agbelusi and the Children reside in a stable home "that provides [them] with their own apartment, and also provides community and resources." (SPA-85, 103.) The factual record amply supports this finding, and Mr. Lomanto has presented no evidence to the contrary. For example, R.A.L. and S.M.L. have friendships with other children at the shelter (A-1376:22–23) and participate in programming that

is offered through the shelter, such as afterschool activities (A-1375:1–3) and a sleepaway camp that R.A.L. has attended (A-1374:21–1375:15; *see also* SA-253.) Ms. Agbelusi's husband does not reside in the shelter, nor is he present in the Children's lives. (A-1378:6–13; SPA-85.) Mr. Lomanto presented no evidence that the Children are in danger of being moved from the shelter. (SPA-85.)

2. Ms. Agbelusi provides financial stability for the Children.

Mr. Lomanto's claim that Ms. Agbelusi "has no adequate means of support" (Br. 49) is contrary to the record. The district court found that Ms. Agbelusi's limited income "[did] not preclude a finding that [the Children] are settled," noting that Ms. Agbelusi "has been consistently employed while in New York," "is hardworking and resourceful," and "has available support from her mother, sister, and brother." (SPA-104.) The evidence supports this conclusion, with testimony showing that Ms. Agbelusi has provided the Children with a stable source of income since their arrival in New York in 2021. (A-1307:13–17; 1308:2–9.) She continues to work as a self-employed cleaner while the Children are in school, with flexible hours so she can spend time with them in the evenings and on weekends. (A-1429:16–19.) Officer Adebayo-Olojo—a mandated reporter—likewise testified that she has never had any concerns for the welfare of the Children. (A-912:12–18;

A-923:1–7.) Similarly-situated families have likewise been found to be financially stable and well settled. *Taveras v. Morales*, 22 F. Supp. 3d 219, 238 (S.D.N.Y. 2014), *aff'd sub nom. Taveras ex rel. L.A.H. v. Morales*, 604 F. App'x 55 (2d Cir. 2015) (finding that the child was well settled based on his "basic needs . . . being met, even if Respondent's family has less disposable income than other families" and based on "Respondent's consistent employment and relative financial stability—albeit with some reliance on public assistance").

3. The Children's immigration status does not preclude a well-settled finding.

Mr. Lomanto cites to no evidence with respect to the Children's immigration status that would compel a finding that they are not well settled. He points only to their lack of legal immigration status, which this Court has firmly held does not preclude a finding that children are settled. In *Lozano II*, the Second Circuit affirmed the district court's finding that an undocumented child whose mother was seeking immigration status for him was well settled, noting that "no court has held [immigration status] to be singularly dispositive." *Lozano v.* Alvarez, 697 F.3d 41, 57 (2d Cir. 2012).

In its opinion, the district court found, based on the evidence, that "there is no indication that Agbelusi, R.A.L., or S.M.L. are at risk of imminent deportation," that Ms. Agbelusi "is taking proactive steps to obtain

legal status," and that there is no indication that the Children are unable to obtain government benefits and support based on immigration status. (SPA-105–106; *see also* A-1432:17–1433:1.) Applying the *Lozano II* precedent to these facts, the Children's immigration status should not weigh against finding that they are well settled. Even if it does, their immigration status is only one of many factors this court considers, and "the weight to be ascribed to a child's immigration status will necessarily vary." *Lozano II*, 697 F.3d at 56. This Court should give significant deference to the district court's conclusion that the Children's lack of legal immigration status does not outweigh all of the factors in favor of a well-settled finding.

4. There is no danger of parental alienation of Mr. Lomanto to prevent a well-settled finding.

As a last-ditch effort, Mr. Lomanto argues that the Children should not be considered well settled because of the danger of his parental alienation. Not only does this argument ignore the purpose of the well-settled analysis—to consider the strength of a child's connection to his new home—but it is also clearly contrary to the evidence. Neither Dr. Fernandez nor the district court found evidence of parental alienation by Ms. Agbelusi, nor that she "regularly disparage[ed] the Children's habitual residence," as Mr. Lomanto claims. (Br. 50.) Instead, the court credited "evidence of Lomanto attempting to influence the [C]hildren against [Ms. Agbelusi],"

such as R.A.L.'s statement to Dr. Fernandez that "his father would try to influence them against Agbelusi" during Zoom visitations. (SPA-92.)

III. The mature child defense applies because R.A.L. objects to being returned to Spain and is of sufficient age and maturity.

Under the Convention, a court "may . . . 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." Hague hague con 13. Ms. Agbelusi must establish this by a preponderance of the evidence. *See Velozny v. Velozny*, 2021 WL 5567265, at *3 (2d Cir. Nov. 29, 2021) (summary order). The objection of a mature child defense under Article 13 is an independent basis upon which to decline repatriation. *Haimdas v. Haimdas*, 720 F. Supp. 2d 183, 204 (E.D.N.Y.), *aff'd*, 401 F. App'x 567 (2d Cir. 2010).

The parties agree that R.A.L. "is of sufficient age and maturity" for his views to be considered. (Br. 51.) The district court concluded that R.A.L. objected to returning to Spain based on an *in camera* conversation with R.A.L.; the expert opinion of Dr. Fernandez, which was based on extensive interviews with R.A.L.; and other facts in the record such as the Children's school attendance, extensive community involvement, and familial relationships in New York. (SPA-104–105.)

The district court's application of the Hague Convention to the facts is reviewed *de novo*. *Gitter v. Gitter*, 396 F.3d 124, 129 (2005). However, "[w]hether a child is mature enough to have its views considered is a factual finding" that a district court must make in light of the specific circumstances of each case, which is reviewed for clear error. *Haimdas v. Haimdas*, 720 F. Supp. 2d 183, 205 (E.D.N.Y.), *aff'd*, 401 F. App'x 567 (2d Cir. 2010) (quoting *Simcox v. Simcox*, 511 F.3d 594, 603 (6th Cir. 2007)).

After meeting with R.A.L. in chambers, the district court found that "[b]ased on its own interview with R.A.L. and S.M.L., and the expert evaluation of Dr. Fernandez . . . R.A.L. is of sufficient age and maturity to take account of his views" and further, that "[h]is articulation of his reasoning was rational, logical, and clear . . . the product of his own considered and independent thinking." (SPA-107.) Dr. Fernandez testified that R.A.L. has "a strong objection to returning to Spain" and did not want to have overnight visits with Mr. Lomanto during the pendency of this matter. (A-1084:12–17; A-1055:6–9.) Dr. Fernandez noted that R.A.L. expressed feelings of being manipulated by Mr. Lomanto, including being used by his father against Ms. Agbelusi. (SA-178.) On the other hand, Dr. Fernandez wrote that R.A.L. said Ms. Agbelusi "reinforces that she doesn't want them to 'hate [their] father. The problem [their] father has is with her and not with

[them].'" (SA-173.) When R.A.L. was asked directly during his *in camera* interview with the court how he would feel about going back to Spain, he said it would be "hard for me because that means we'll never see my mom again until I'm 18, basically, because [Mr. Lomanto] wouldn't let me come here even to see her." (A-3122:17–21.)

In relying on *Velozny* to assert that R.A.L. did not "object" to being returned to Spain (Br. 50 (citing *Velozny v. Velozny*, 550 F. Supp. 3d 4 (S.D.N.Y. 2021), *aff'd*, No. 21-1993-CV, 2021 WL 5567265 (2d Cir. Nov. 29, 2021)), Mr. Lomanto ignores *Velozny*'s admonition that "cases under the Hague Convention are 'not a matter of magic words or talismanic language'—neither an intentional use of the word 'objection' nor an inadvertent use of the word 'preference' is dispositive to determining whether the mature child defense applies." *Velozny*, 550 F. Supp. 23 (quoting *Rodriguez v. Yanez*, 817 F.3d 466, 477 (5th Cir. 2016)).

Consistent with that admonition, it does not matter that R.A.L. did not use the magic word "object." Rather, he clearly and repeatedly conveyed his opposition to return. R.A.L. expressed his objection to return from the moment Mr. Lomanto revoked his consent for the Children to remain in New York. R.A.L. sent a text message to Mr. Lomanto on August 24, 2021, pleading with Mr. Lomanto not to "take this opportunity away from [him]"

and told Mr. Lomanto that "BECAUSE OF YOU I WILL MISS OUT ON A LOT OF OPPORTUNITIES IN LIFE." (SA-133–34.)

Mr. Lomanto cites the "Pérez–Vera Report," "the official history and commentary on the Convention," (Br. 33) but he omits a crucial portion of the analysis that anticipates the mental and emotional toll exacted on children who believe they must choose one parent over the other in Hague proceedings:

> [T]he Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive. . . . In this way, the Convention gives children the possibility of interpreting their own interests. Of course, this provision could prove dangerous if it were applied by means of the direct questioning of young people who may admittedly have a clear grasp of the situation but **who may also suffer serious psychological harm if they think they are being forced to choose between two parents**. However, such a provision is absolutely necessary. . . the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will.

Elisa Pérez–Vera, Explanatory Report ¶ 30, in 3 *Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction* 1069 (1982) ("Pérez–Vera Report") (emphasis added).

As a result of the pressures of Hague Convention proceedings, it follows that a child's objection to return would be expressed in positive

language so as not to upset the petitioning parent. For instance, based on his conversation with R.A.L., Dr. Fernandez opined that "while [R.A.L.] stated that he would like to see his father if his father visited, he he [sic] would not tell his father that he does not want to return to Spain as he does not want to cause an argument with his father." (A-3423.) Likewise, in his *in camera* interview with the court, R.A.L. said that he could not "choose one parent over the other" and that he loves them both. (A-3123:9–23.) Given R.A.L.'s express desire to "keep [a] relationship with both [Mr. Lomanto and Ms. Agbelusi]," it was not clearly erroneous for the court to find that his statements voicing a desire to remain with his mother conveyed a strong objection to return. (A-3123:11–12.)

Rodriguez v. Yanez, on which Mr. Lomanto also relies (Br. 52), makes that very point. 817 F.3d 466 (5th Cir. 2016). The court explained that "whether the child *wants* to live with the abducting parent is very relevant to [the child's] interpretation of [his] immediate 'interests.' Indeed, it is likely the most important consideration." *Id.* at 476. This is because "wrongfully removed children are not inanimate objections—they are people with agency of their own," and the Perez-Vera Report acknowledges that the child "may think they are being forced to choose between two parents." *Ibid.* (internal quotation omitted).

Mr. Lomanto also relies on *Tsai-Yi Yang v. Fu-Chiang Tsi* to argue that R.A.L.'s objections are insufficient to establish a defense (Br. 52); however, in that case, the court explicitly recognized that a "child's wishes can be the sole reason that a court refuses to order the return of the child to his or her habitual residence." 499 F.3d 259, 278 (3d Cir. 2007). It merely observed that when "those wishes are the sole reason underlying a repatriation decision and not part of some broader analysis"— unlike in this case, which involves an additional, independent affirmative defense—a "court must apply a stricter standard in considering a child's wishes." *Id.* at 278 (quoting *de Silva v. Pitts*, 481 F.3d 1279, 1286 (10th Cir. 2007)). This case involves precisely such a "broader analysis," where the district court found multiple affirmative defenses to apply and that the Children are deeply rooted in their environment, and repatriation would not be in their best interest.

Lastly, the court concluded that while S.M.L. was not of sufficient age and maturity, the "separation of R.A.L. and S.M.L. would cause significant hardship and psychological harm, and ought to be avoided at all costs." (SPA-107.) The district court noted the precedent on this point, quoting a decision of the Second Circuit: "'Courts in this Circuit have frequently declined to separate siblings, finding that the sibling relationship should be

protected even if only one of the children can properly raise an affirmative defense under the Hague Convention.'" (SPA-107 (quoting *Ermini v. Vittori*, 2013 WL 1703590, at *17 (S.D.N.Y. Apr. 19, 2013), *aff'd as amended*, 758 F.3d 153 (2d Cir. 2014)).)

IV. Principles of comity do not require deference to the Spanish court proceedings or orders.

The Spanish court orders, including the "June 3, 2022 Order of the Marbella Court directing that Ms. Agbelusi return the Children to Spain" (Br. 13), are due no deference based on the principles of comity in a proceeding focused solely on adjudicating affirmative defenses to return. Mr. Lomanto provides no authority in which a court deferred to foreign court orders that did not themselves resolve the issues being considered in the district court's case to determine the applicability of affirmative defenses under the Convention. Furthermore, none of the Spanish court findings were in dispute in the petition before the district court; the Spanish court proceedings determined the Children's habitual residence, which Ms. Agbelusi conceded. There is therefore nothing in the Spanish court orders to which the district court could have accorded deference.

A. The district court performed its duty under the Convention by considering Ms. Agbelusi's affirmative defenses, which had not been and could not have been resolved by the Spanish court orders.

The Hague Convention permits the judicial authority of the Contracting State—here, the district court—to consider the affirmative defenses of the taking parent before ordering return. Hague Convention, art. 12, 13. The district court therefore evaluated Ms. Agbelusi's affirmative defenses based on the evidence presented. Those affirmative defenses were not evaluated or resolved in the Spanish court proceedings, which were not brought pursuant to the Hague Convention. (A-595; A-2335–2342; A-418 (describing the "original proceedings" as "protective measures for the exercise of inappropriate inadequate exercise of guardianship powers").) ICARA establishes that the only courts with jurisdiction over a petition under the Convention are those "authorized to exercise [their] jurisdiction in the place where the child is located at the time the petition is filed." 22 U.S.C. § 9003(b). Those courts are the state and federal courts in New York County, where the Children were located when Mr. Lomanto filed his Petition. (A-1374:4.)

It was therefore appropriate for the district court not to afford comity to the Spanish court orders on any issues related to Ms. Agbelusi's affirmative defenses.

B. Because habitual residence was not at issue in this case, there was nothing in the Spanish court orders to which the district court could accord comity.

While Articles 14 and 15 permit the judicial authority of the Contracting State to consider a foreign authority's determination of habitual residence when "ascertaining whether there has been wrongful removal or retention," habitual residence of the Children was not at issue in this case. Hague Convention, art. 14, 15. Ms. Agbelusi conceded Mr. Lomanto's *prima facie* case, including that the Children's habitual residence was Spain. (SPA-75; SPA-94.)

In arguing that the district court should have deferred to the Spanish court orders, Mr. Lomanto only cites cases in which courts deferred to either: (1) decisions in other Hague Convention cases[4] or (2) determinations in foreign proceedings that resolved elements of the *prima facie* case.[5] But

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[4] *See, e.g.*, *Diorinou v. Mezitis*, 237 F.3d 133, 145−47 (2d Cir. 2001) (affirming the lower court's decision to accord comity to a prior Hague Convention decision involving the same parties) (Br. 34−35); *Smedley v. Smedley*, 772 F.3d 184, 186 (4th Cir. 2014) (same) (Br. 29, 32.)

[5] *See, e.g.*, *Shealy v. Shealy*, 295 F.3d 1117, 1124 (10th Cir. 2002) (holding foreign court order dispositive only on question of "whether custody rights existed at the time of removal" and therefore whether removal was "wrongful" under the statute) (Br. 36); *Miller v. Miller*, 240 F.3d 392, 397, 400 (4th Cir. 2001) (upholding district court's deference to foreign custody order in determining that Canada was the children's "habitual residence" under the Hague Convention's "wrongful retention" analysis) (Br. 32.)

here, the Spanish court was not presented with, and did not decide, a claim for return under the Hague Convention nor affirmative defenses to such a claim.

Deferring to Spanish court return orders that did not adjudicate the specific claims and issues in this case would undermine the complex and carefully calibrated framework created by the Convention and implemented by ICARA. *See Holder v. Holder*, 305 F.3d 854, 864−65 (9th Cir. 2002) ("It would . . . undermine the very scheme created by the Hague Convention and ICARA to hold that a Hague Convention claim is barred by a state court custody determination.").

V. The district court appropriately exercised its discretion to deny Mr. Lomanto's petition for repatriation because two independent affirmative defenses were established, and denying the Petition was in the best interests of the Children.

While the district court is empowered to order return of children even in cases where affirmative defenses are established, it should only do so to "further the aims of the Convention." *Asvesta v. Petroutsas*, 580 F.3d 1000, 1004 (9th Cir. 2009) (quoting *Friedrich v. Friedrich* (*Friedrich II*), 78 F.3d 1060, 1067 (6th Cir. 1996)). The district court declined to use that discretion to order the return of the Children. In making its decision, the court explained that the Convention aims to prioritize "an interest in the welfare of the children and their interests in remaining settled" such as their "'interest

in choosing to remain, Art. 13 [and] in avoiding physical or psychological harm, Art. 13(b).” (SPA-108 (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 16 (2014)).)

That decision was well supported by the evidence, as described *supra* in Section II. Extensive testimony demonstrated that the Children enjoyed spending quality time with their local community and family members. (*See, e.g.*, A-1379:15–19; 802:9–16; 804:10–15; 921:14–16.) Mr. Lomanto even concedes the Children’s regular school attendance and involvement in church community and extracurricular activities. (*See* SPA-83.) The Children’s interest in remaining in New York and maintaining those connections satisfies a primary aim of the Convention, and the district court did not abuse its discretion in denying repatriation in line with that interest. *See, e.g.*, *Lozano v. Montoya Alvarez (Lozano II)*, 697 F.3d 41, 53 (2d Cir. 2012), *aff’d sub nom*, *Lozano v. Montoya Alvarez*, 572 U.S. 1 (2014) (affirming denial of repatriation on well-settled grounds and noting in particular that “the Convention is not intended to promote the return of a child to his or her country of habitual residency irrespective of that child’s best interests”).

Appellant’s arguments that the district court should have nevertheless exercised discretion to order return are unsupported by the evidence and the

court's factual findings. *First*, contrary to Mr. Lomanto's allegations of "premeditation" by Ms. Agbelusi, the district court found based on text messages that the original "plan" was for Ms. Agbelusi to return to Spain with the Children. (SPA-77.)[6] This finding was also well supported by Ms. Agbelusi's testimony that she only began to discuss Mr. Lomanto's abuse and to receive support from her family after arriving in New York. (A-1313:5–18; A-1314:7–8.) The district court also found that her "allegations of intimate partner violence" against Mr. Lomanto were "credible," "detailed, consistent, and unique." (SPA-87.) Where, as here, intimate partner violence is credibly alleged, there is no compelling equitable argument for the court to exercise its discretion to order return of the Children. *See, e.g.*, *Lozano v. Montoya Alvarez*, 572 U.S. 1, 13 (2014) (upholding the district court's decision not to order the return of a well-settled child, noting that the respondent had alleged sexual and emotional

[6] Even the cases cited by Mr. Lomanto make clear that the district court still would not have abused its discretion in denying return of the Children if it had found that Ms. Agbelusi engaged in premeditation. *See Shealy v. Shealy*, 295 F.3d 1117, 1123 (10th Cir. 2002) (affirming district court denial of petition for return of children based on "ample evidence to support the court's finding" despite being "concerned by [the mother's] actions" and the evidence "demonstrat[ing] the extent to which [the mother] helped manufacture the necessity for removal.").

abuse against petitioner, even though the district court did not apply the "grave risk" affirmative defense).

Second, the district court found that Ms. Agbelusi did not alienate the Children from Mr. Lomanto, and substantial evidence supports that finding. For example, the court-appointed expert concluded, and the district court credited his statement, that "neither child [is] biased against their father." (SPA-92–93.) The district court found only "evidence of Lomanto attempting to influence the [C]hildren against [Ms. Agbelusi]," such as Dr. Fernandez's notes that R.A.L. said "his father would try to influence them against Agbelusi" during Zoom visitations (SPA-92, n.9), and R.A.L.'s statement to Dr. Fernandez that Mr. Lomanto would "go inside my head and make me mad," and would tell R.A.L. what he should do to make his mother get "tired of [him]" so that she would send him back to Spain. (SA-175.)

Finally, as discussed in detail in Section IV, the Spanish court orders did not resolve any of the affirmative defenses at issue before the district court, and therefore are not owed any deference. Because the Children's interest in being settled is best served by their remaining in New York among their close-knit community, the district court did not abuse its discretion in denying the Petition for return.

VI. The absence of an interpreter for a single day of trial did not deprive Mr. Lomanto of due process because no fundamental interest was at stake.

Over the course of five months, the district court repeatedly reminded Mr. Lomanto and his retained counsel that it was Mr. Lomanto's responsibility to provide someone to interpret for him during the upcoming Hague trial. (*See, e.g.*, SA-75−76; SA-70–71; A-650:22–654:21, A-662:2–665:23, A-683:23–684:13, A-694:09–695:11, 695:23–697:17; SPA-54:20–55:04.) Crucially, the district court did not require that he retain a certified, professional, or paid interpreter, but only that the interpreter be an unbiased person who was not a fact witness. (A-664:23–665:3.) It is therefore untrue that Mr. Lomanto did not have an interpreter "solely because of his inability to pay." (Br. 59 (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996).) Mr. Lomanto chose to ignore the court's admonitions and appeared on the first day of trial without someone to interpret for him. (A-776:17–18.)

Although Mr. Lomanto and his counsel made no efforts to provide an interpreter—including by failing to attend the scheduled technology training that might have permitted remote interpretation by an unbiased person in Spain (A-777:15–21)—the district court endorsed a creative solution proposed by the attorneys for the Children that provided Mr. Lomanto access to certified interpreters at no cost to him. (A-768:3–10.) And the

court did so even though Mr. Lomanto—who was represented by retained counsel in the district court and sought to proceed *in forma pauperis* only after the trial court issued its decision, in connection with this appeal—had no entitlement to a free interpreter.

Neither the district court's successful efforts to secure interpretation for Mr. Lomanto without cost, nor the unavailability of such services for a few hours of a trial that lasted for more than a week, deprived Mr. Lomanto of due process. Indeed, Mr. Lomanto has been unable to identify any action that he could not take, evidence he did not present, nor testimony he could not challenge because he did not have an interpreter for the first few witnesses, all of whom related to the well-settled defense. This is not surprising, as Mr. Lomanto has conceded the district court's well-settled findings regarding the children's educational success, community contacts, family, and friends—which was based on testimony of the witnesses from the first day of trial.[7] "[T]he perfect cannot be the enemy of the good in assessing Hague Convention petitions," and due process does not require

[7] As explained above (*supra*, Section II.C), the only well-settled factors Mr. Lomanto challenges are the stability of the Children's residence, their financial stability, and their immigration status. That challenge fails for the reasons articulated in Section II.

perfection. *Ovalle v. Perez*, 681 F. App'x 777, 787 (11th Cir. 2017). The steps taken at trial by the district court more than satisfy due process.

Given his inability to identify any prejudice he suffered as a result of missing an interpreter for the first few hours of trial, Mr. Lomanto's fallback is to argue that this Hague Convention case was a de facto custody proceeding. (Br. 57.) That assertion is without foundation.

Hague proceedings, like this one, do not determine custody, access, or visitation. Hague Convention actions only decide which country will be "the forum for custody proceedings." *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020). Hague cases cannot "dispose of the merits of the controversy over custody." *Id.* at 729. *See also* 22 U.S.C. § 9001(b)(4) ("Convention and [ICARA] empower courts in the United States to determine *only* rights under the Convention and *not* the merits of any underlying child custody claims.") (emphasis added); Hague Convention, art. 19 (providing that a decision under the Convention concerning the return of a child is not "a determination on the merits of any custody issue").

Mr. Lomanto retains the right at any time to bring an action in New York family court to seek a ruling on custody, visitation, and access. As a result, Mr. Lomanto's due process rights to custody of his children are not implicated in this matter. All of the cases cited in Mr. Lomanto's brief

regarding the due process rights of a parent in a parental rights proceeding or custody action (Br. 55–59) are inapplicable and fully distinguishable. They shed no light on the entirely different question of return, which is the focus of a Hague Convention dispute.

CONCLUSION

For the foregoing reasons, the District Court's June 22, 2023 Opinion and Order should be affirmed and Mr. Lomanto's petition for the return of the Children denied.

Dated: February 12, 2024

Respectfully submitted,

/s/ Amelia T.R. Starr

Amelia T.R. Starr
Dara L. Sheinfeld
Meredith Manning
Brendan A. Blase
Ryann Moelis
Zoë Smith
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

amelia.starr@davispolk.com
dara.sheinfeld@davispolk.com
meredith.manning@davispolk.com
brendan.blase@davispolk.com
ryann.moelis@davispolk.com
zoe.smith@davispolk.com

Pro Bono Counsel for Respondent-Appellee Anthonia Aduke Agbelusi

CERTIFICATE OF COMPLIANCE

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Dated: February 12, 2024 */s/ Amelia T.R. Starr*
Amelia T.R. Starr