No. 24-2517

In the United States Court of Appeals for the Eighth Circuit

LUCAS ALZU,

Plaintiff-Appellant,

v.

AMY NICHOLE HUFF,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Missouri - Springfield, No. 6:23-cv-03022-MDH.
The Honorable M. Douglas Harpool, Judge Presiding.

BRIEF OF DEFENDANT-APPELLEE AMY NICHOLE HUFF

SAMUEL N. SHERMAN
SANDBERG PHOENIX & von CONTARD P.C.
4600 Madison Avenue
Suite 1000
Kansas City, MO 64112
(816) 627-5332

RICHARD A. ROTHMAN
ELAINA K. AQUILA
EMMA EVANS
WEIL GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Counsel for Defendant-Appellee

COUNSEL PRESS · (866) 703-9373

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

A couple leading a nomadic lifestyle separately traveled to Argentina for the birth of the Child, which occurred days before the COVID-19 pandemic caused global lockdowns and travel restrictions. Although the parties never intended to remain there, Appellant contends that Argentina became the Child's habitual residence while he was trapped there due to the pandemic. Appellee, a survivor of Appellant's severe violence, left with the Child for Missouri just six weeks after Argentina's borders opened, and decided to remain in the United States. Appellant filed this action in the Western District of Missouri under the Hague Convention and the International Child Abduction Remedies Act, 22 U.S.C. § 9001 *et seq*. seeking return of the Child to Argentina. The District Court bifurcated the threshold issue of habitual residence, and deferred considering Appellee's affirmative defenses, including that the Child would be in of grave risk of harm if returned to Argentina due to Appellant's violence and instability. After a two-day bench trial, the District Court found that Appellant had failed to meet his burden to establish that Argentina was the Child's habitual residence, and dismissed the petition. Appellant appealed, arguing that the District Court misapplied the totality of the circumstances test for determining habitual residence under *Monasky v. Taglieri*, 589 U.S. 68 (2020).

REQUEST FOR ORAL ARGUMENT

Appellee requests 20 minutes (10 minutes per side) for oral argument.

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PRELIMINARY STATEMENT

The District Court's Order represents a textbook example of how to apply the totality of the circumstances test under *Monasky v. Taglieri*, 589 U.S. 68 (2020). Here, the District Court properly assessed the parties' credibility and considered the "unique scenario" underlying this case—including that the young Child's nomadic parents never intended to stay and raise the Child in Argentina, and remained there only because they were trapped by the COVID-19 pandemic and related travel restrictions. Based on its analysis of the totality of the circumstances, the District Court reasonably concluded that the Child was not a habitual resident of Argentina.

Appellant has proffered no substantial arguments in support of his contention that the District Court's ruling was erroneous in any respect, much less "clearly erroneous." Rather, his appeal is based on claims that mischaracterize either the Decision below or *Monsasky,* and ultimately amount to no more than quibbles with how the District Court balanced the various factors properly included in its *Monasky* analysis. For example, Appellant argues that the District Court erred by treating the parties' intention to leave Argentina as soon as possible after the baby's birth as the "determinative factor" in its analysis. But the District Court did no such thing, as its Order plainly shows that its decision was based on its assessment of the totality of the circumstances, including those upon which Appellant relies. Contradictorily, Appellant argues—for the first time on appeal—that the sole issue before the District

Court should have been whether the young Child was integrated into a social and family environment to a degree that he was "at home" in Argentina. That argument is directly contrary to *Monasky*'s mandate that no one factor is dispositive of the habitual residence analysis, *and* that acclimatization is only relevant to older children who may be settled in school, athletics, or similar activities—not young children like the Child in this case. And in any event, the District Court's decision confirms that it did consider this factor. Here, as elsewhere, Appellant is merely unhappy with how the District Court balanced the various factors in its totality analysis.

In sum, and as demonstrated below, the District Court's decision based on its common sense analysis of the totality of the unique circumstances of this case, and its assessment of the parties' credibility, is precisely what *Monasky* mandates. There is no genuine basis for Appellant's contention that the District Court committed any error, much less one so egregious as to rise to the level of clear error, the standard of review on this appeal. The Court should affirm.

JURISDICTIONAL STATEMENT

The District Court's jurisdiction was founded on the Hague Convention and the International Child Abduction Remedies Act (the "**Hague Convention**"), 22 U.S.C. § 9001 *et seq*. The District Court entered final judgment on June 25, 2024. Appellant appealed on July 23, 2024. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1291, and 22 U.S.C. § 9001 *et seq*.

STATEMENT OF ISSUES

1. Should the Court affirm and hold that the District Court did not commit clear error when it concluded that Appellant had failed to sustain his burden of proving that Argentina was the Child's habitual residence for purposes of the Hague Convention based on the District Court's assessment of the totality of the unique circumstances of this case, as required by *Monasky v. Taglieri*, 589 U.S. 68 (2020)—including the Parties' respective credibility, that the Child's nomadic parents never intended to remain and raise the Child in Argentina, and they remained in Argentina only because COVID-19 restrictions prevented them from resuming their travels?

STATEMENT OF THE CASE

I. Factual Background

Ms. Amy Nichole Huff ("**Huff**," "**Appellee**," or "**Respondent**") was born and raised in Missouri. App.844; R.Doc.103, at 2; App.728–30; R.Doc.98, at 4:23–5:2. She graduated from Missouri State University in May 2016 with a bachelor's degree in anthropology before going on to complete her master's in applied anthropology in September 2017. App.844; R.Doc.103, at 2; App.729; R.Doc.98, at 5:3–12. She is currently an education abroad advisor at Missouri State University, where she works full-time. App.847; R.Doc.103, at 5; App.729; R.Doc.98, at 5:13–21.

Mr. Lucas Alzu ("**Alzu**," "**Appellant**," or "**Petitioner**"), thirty-nine years old, was born in Argentina and has lived a nomadic lifestyle since leaving Argentina seventeen years ago, when he was around twenty-one. App.844; R.Doc.103, at 2;

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App.608, 664; R.Doc.97 at 6:16–19; 62:4–25. After returning to Argentina a few months before the Child's birth, Alzu worked at his mother's domestic partner's pet food store three days a week, where he was paid in cash. App.658, 668; R.Doc.97 at 56:11–13; 66:15–16. This was the longest he had ever worked for an employer in Argentina. App.617, 658, 664–66; R.Doc.97 at 15:16–19; 56:11–19; 62:10–25; 63:11–25; 64:1–14.

A. The Parties Went To Argentina By Happenstance And Never Intended To Remain And Raise The Child There

Huff was traveling after completing her master's degree in September 2017 when she met Alzu. App.844; R.Doc.103 at 2; Ex.R-214[1]; App.513. The Parties were living a nomadic lifestyle when they met in Colombia at a Rainbow Gathering—a gathering of people, organized in unique locations, where people live in peace and surrounded by nature for a transient period. App.844–45; R.Doc.103 at 2–3 & n. 2; App.609, 610; R.Doc.97 at 7:6–20, 8:10–24; *see also* Ex.R-250; App.587. By mid-July of 2019, when the Parties were then[2] in Colombia, Huff became aware she was pregnant. App.730; R.Doc.98 at 6:9–10; Ex.R-214; App.513. Initially, the Parties planned to remain and make a "home" in Colombia. App.844; R.Doc.103 at 2; App.704; R.Doc.97 at 102:13–15; App.730; R.Doc.98 at 6:13–16. However, after

[1] The trial exhibits were not retained by the District Court and accordingly, do not appear on the docket. *See also* App. Br. at n.1

[2] Huff had traveled both to Panama and the United States after attending the Colombia Rainbow Gathering, by the time. App.610–11; R.Doc.97 at 8:15–9:6.

Huff's Colombian Visa application was denied (because the nonprofit organization sponsoring her had their paperwork lapse), the Parties began considering alternative locations to give birth where the couple could be together. App.844; R.Doc.103 at 2; App.730–31; R.Doc.98 at 6:13–7:12.

Mexico, Chile, and the United States were all options they deliberated, but Alzu had immigration problems with the majority of the countries the two considered due to his prior illegal entries or exits, including Mexico, as well as the United States from which he had been deported in 2013. App.844; R.Doc.103 at 2; App.613–14; R.Doc.97 at 11:10–12:4; App.730–33; R.Doc.98 at 6:11–9:16; Ex.R-209; App.510; Ex.R-208; App.507. Huff was "very fond of . . . going to Mexico" because it was close to the United States, she and Alzu had friends with young families who also lived there, and she knew of a midwife there. App.844; R.Doc.103 at 2; App.732–33; R.Doc.98 at 8:5–9:11.

Left with limited options, Huff returned home to the United States and Alzu went to Argentina—for the first time since 2017 and over a decade since he had last lived there. App.844-45, 850; R.Doc.103 at 2–3, 8 (noting "neither parent had been living in Argentina until the eve of the child's birth" and that "Petitioner had left Argentina many years earlier and spent little time there since leaving."); App.664, 672–74; R.Doc.97 at 62:10–25, 70:11–15; 71:24–72:6; App.733–34; R.Doc.98 at 9:17–10:9. He did so to obtain an official, tax-paying job that would enable him to

apply for a U.S. Visa and then join Huff in the United States.[3] Ex.R-T-006; App.392 (Alzu stating "the plan" was "work [in Argentina] doing something" and "ask Uncle Sam for permission to let [him] in" to the United States"); Ex.R-T-007; App.428; Ex.R-T-008; App.431-32; App.730; R.Doc.98 at 6:19–21.

Neither party intended to remain and raise the Child in Argentina. Alzu was not "fond of Argentina" and he would tell others he "didn't have strong ties to Argentina." App.734–35; R.Doc.98 at 10:25–11:21. For example, Huff testified that Alzu would change his accent when traveling through South America presumably so that others could not detect he was Argentinian. App.735; R.Doc.98 at 11:14–21. Alzu, who had spent his adult life outside of Argentina, testified that he did not care what country the Child was born in, nor did he "even know if [he] want[ed] to enroll [his] child under any national flag." Ex.R-T-006; App.385; App.663-64, 670; R.Doc.97 at 61:15–62:9, 68:10–20 (admitting he "suggested [having the baby] in any part of the southern hemisphere").

When Huff first decided to travel to Argentina (a country she had never set foot in) to meet Alzu, the two had not decided that they would remain there for the birth of the Child, and she testified that she believed Alzu would want to leave by the time she arrived. App.850; R.Doc.103 at 8 ("Respondent had never been to

[3] Huff's father had agreed to be an economic sponsor for Alzu's immigration. App.734; R.Doc.98 at 10:13–24.

Argentina prior to moving for the birth"); App.736–37, 739–40; R.Doc.98 at 12:20–13:8, 15:20–16:14. But with her preferred options eliminated due to Alzu's immigration problems, Huff reluctantly traveled to Argentina in December of 2019, when she was six months pregnant to give birth there. App. 844–45, 850; R.Doc.103 at 2–3, 8 (finding "the parties chose Argentina, in part, because their other choices were not available based on Petitioner's restrictions on entering certain countries."); App.744; R.Doc.98 at 20:10–14.

The couple did not plan to stay in Argentina for any longer than necessary, as they intended to resume their travels with the infant Child after the birth. App.845; R.Doc.103 at 3 ("It is clear, at the time of these discussions, both parties were interested in continuing a nomadic lifestyle"), App.850-51; R.Doc.103 at 8–9; App.662, 663; R.Doc.97 at 60:10–16; 61:2–9; App.740, 744, 749; R.Doc.98 at 16:15–20, 20:10–14, 25:7–16. Huff only brought two suitcases[4] with her and the couple's plan was to stay at Alzu's mothers house "for a couple of months so that [the Parties] could save the money" and "be able to buy a van and travel"—specifically to a Rainbow Gathering in Chile in 2020 or 2021, and ultimately arriving in the United States. App.845; R.Doc.103 at 3; App.610, 620; R.Doc.97 at 8:10–24,

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[4] Huff brought only the essentials for her and the Child with her from home—for example, she only had maternity clothes for herself and the necessities for the first few months of the baby's life, which she attained through a baby shower held by her friends and family in Missouri. *See* App.740-41; R.Doc.98 at 16:24–17:7.

18:8–17, 78:22–24; App.731, 740, 743–44, 749; R.Doc.98 at 7:21–22; 16:21–24, 19:13–20:9, 25:1–16, Ex.R-208; App.508; Ex.R-250; App.587. Huff and Alzu "never had any conversation indicating that we had a plan to stay in Argentina" and that "[a]ll the conversations we had were to the contrary." App.845; R.Doc.103 at 3; App.740; R.Doc.98 at 16:15–20. And Alzu admitted that the couple had no plan to live in Argentina for an extended period or to raise their Child there. App.845; R.Doc.103 at 3; Ex.R-T-005; App.368; *see also* App.668; R.Doc.97 at 66:19–25.

The Court found that the parties "only intended to stay [in Argentina] to have the birth of the child." App.848, 850; R.Doc.103 at 6, 8 ("The Court finds the testimony, from both parties, reflect the parties' clear intention to travel again resuming their nomadic lifestyle after the child was born."). Alzu admitted the Parties did not consider daycare or schools in Argentina, stating "[i]t wasn't important, honestly." App.66–61; R.Doc.97 at 58:24–59:3. In contrast, Huff took steps in preparation for bringing her Child back to the United States, and testified that the Child "being a citizen of the U.S. was one of [her] top priorities." App.765; R.Doc.98 at 41:13–14. For example, Huff confirmed with the U.S. Embassy the steps necessary to obtain the Child's U.S. citizenship, despite him being born abroad. App.764–65; R.Doc.98 at 40:25–41:16. She also obtained U.S. Medicaid pregnancy coverage, which enrolled the Child for U.S. healthcare after he was born, *but only* for medical costs incurred in the United States. App.741; R.Doc.98 at 17:8–21.

The evidence showed that Huff would have left Argentina even before the baby was born had she been able to do so. When she arrived in Argentina Huff learned that Alzu had broken the promises he had made to persuade her to come to Argentina to give birth. He had failed to get the kind of official, on the books, job that would be necessary to obtain a U.S. Visa. App.656–57, 660; R.Doc.97 at 54:25–55:10; 58:18–23; App.734; R.Doc.98 at 10:10–12. He had failed to line up a midwife for Huff's home birth. App.655–56; R.Doc.97 at 53:24–54:5. And the housing Alzu set up for Huff's home birth was a room in his mother's house, which was under construction. App.676; R.Doc.97 at 74:20–25; App.747; R.Doc.98 at 23:6–21.

Most importantly, after Huff arrived in Argentina—and when she was then eight months pregnant—Alzu was physically abusive, assaulting her on more than one occasion,[5] and causing her to move out of Alzu's mother's house. App.747–48; R.Doc.98 at 23:22–24:5 ("But the day that I moved out was because I was physically assaulted the night before while I was eight months pregnant and I was hit in the face and I was strangled and I was told that he hopes that I die in childbirth, and I was very scared, and I moved out the next day.").[6]

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[5] Huff later filed a police report against Alzu following a particularly harrowing incident of domestic violence. Ex.R-014; App.434 (police report dated February 1, 2021); *see also* App.851; R.Doc.103 at 9 ("Petitioner was physically abusive to the Respondent"); App.653; R.Doc.97 at 51:4–19 (Appellant admitting to physically assaulting Huff, and stated, "I don't remember how many times I hit her.").

[6] Contrary to Appellant's portrayal, the Parties did not move together, App. Br. at 8, instead, Huff moved out alone and Appellant later followed Huff. App.747–48, 750;

In light of Alzu's violence and broken promises, Huff wanted to leave Argentina even prior to the baby's birth. She remained there only "because [she] was too pregnant to fly." App.745; R.Doc.98 at 21:6–22:5 ("through my research I learned that I was likely too pregnant to be allowed to board a flight"); App.746–47; R.Doc.98 at 22:23–23:1. She also realized she would not be able to leave immediately afterwards because she needed time to get the Child's passport and paperwork. App.745-46; R.Doc.98 at 21:19–22:5; Ex.R-219; App.526. Huff testified that if she had been free to leave Argentina it would have been "[b]efore [she] gave birth or immediately afterwards." App.778; R.Doc.98 at 54:19–21.

B. The Parties Remained In Argentina Only Because They Were Trapped By COVID-19 Pandemic Restrictions

But almost immediately after the Child was born on March 4, 2020, the COVID-19 pandemic made leaving Argentina all but impossible. App.846, 851; R.Doc.103 at 4, 9; App.750–54; R.Doc.98 at 26:13–18; 27:12–30:1; Ex.R-225; App.535–36, Ex.R-227; App.537–47; App.677; R.Doc.97 at 75:4–23. In the few days before travel restrictions were imposed, the Child was too young to fly and for there to have been time to obtain his passport. *See* App.745–46, 750; R.Doc.98 at 21:19–22:5, 26:13–18. By the end of March 2020, the U.S. Embassy in Argentina was physically closed and not operating remotely or virtually, Argentina entered an

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R.Doc.98 at 23:22–24:5, 26:10–12.

official national quarantine period, and the country's borders were fully closed. App.750, 756; R.Doc.98 at 26:13–18, 32:13–18.

The COVID-19 pandemic quashed the Parties' prior plans to travel with the Child just a few months after Huff was expected to give birth. Specifically, they planned to buy a van, and slowly travel through South America and eventually attend the next Rainbow Gathering in Chile. App.851; R.Doc.103 at 9; App.680; R.Doc.97 at 78:17–24; Ex.R-208; App.508; App.748–51; R.Doc.98 at 24:8–25:16; 26:13–18; 27:12–30:1; Ex.R-225; App.535–36, Ex.R-227; App.537–47; Ex.P017; App.253. Alzu admitted that he knew Huff "felt imprisoned" in Argentina because of the COVID-19 pandemic, making their plans to leave Argentina impossible, and testified Huff told him multiple times that she felt incarcerated in Argentina. App.680-81; R.Doc.97 at 78:17–79:2. And there came a time where Alzu wanted to leave Argentina for Mexico, but Huff was afraid to travel alone with him in a van due to his domestic violence (she had by then filed a police report and obtained a restraining order against him) and she also felt it was too-risky to go pre-COVID-19 vaccines. App.754–55; R.Doc.98 at 30:15–31:24. "The Court f[ou]nd[] but for the COVID-19 travel restrictions the parties would not have remained in Argentina." App.851; R.Doc.103 at 9.

Despite the COVID-19 restrictions, Huff attempted to file for and receive the paperwork needed for her and the Child to travel once the pandemic limitations were

lifted. First and foremost was the Child's passport and citizenship. App.764–65; R.Doc.98 at 40:25–41:23; Ex.R-227; App.537–47. Even with the hurdles imposed by COVID-19, Huff looked for a way to return to her home in Missouri. App.752–54; R.Doc.98 at 28:4–30:1 ("I was trying to find out if there were any extra services that the embassy was offering for U.S. citizens to try to get us home."); Ex.R-225; App.535; Ex.R-227; App.537–47. But Alzu refused to cooperate. App.765–66; R.Doc.98 at 41:17–42:2. As early as June 2020, Alzu would not go to the U.S. Embassy to obtain the Child's U.S. passport. Ex.R-227; App.542. Thereafter, Alzu repeatedly refused to sign basic paperwork to allow the Child to obtain a U.S. passport and travel to Springfield—even for a visit to meet his maternal family—because he and his mother were afraid she would not return. App.846; R.Doc.103 at 4 ("Petitioner would not agree to allow the child to leave the country"); App.712; R.Doc.97 at 110:4–9[7]; App.764-66; R.Doc.98 at 40:25–42:4, 42:20–24 (discussing Alzu's concern that Huff and the Child would not return); Ex.R-T-016; App.449–50.

Huff testified at length that she believed that she was trapped in Argentina because of COVID-19 and Alzu's refusals to sign the necessary paperwork to let her leave with the Child. App.846; R.Doc.103 at 4; App.756; R.Doc.98 at 32:8–21

[7] Alzu's mother testified that she "thought if she went, she would not return." App.712; R.Doc.97 at 110:4–9.

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("[A]t this time the borders were still closed. There were no flights, to my knowledge, going in or out of Argentina . . . . And I believe by this time I had already learned that I couldn't go anywhere without Lucas's permission."); App. 757; R.Doc.98 at 33:6–13 ("I had already learned from [Alzu] that he had the power to keep us there despite, you know, the lack of agreement on that, and he had already let me know that."); App. 764; R.Doc.98 at 40:11–13 ("I was just resigning to the fact that I was literally stuck there. I felt like I didn't have any -- literally didn't have any other options at that time."); App. 764; R.Doc.98 at 40:14–19 ("[Alzu] had said things about, you know, whenever [the Child] is 16 years old, you can take him out of the country, you can get his American passport. So I was thinking like, I'm never going to get out of here.").

Huff and the Child interacted with the Alzu family while stuck in Argentina, such as occasional family dinners.[8] App.751; R.Doc.98 at 27:2–11 (explaining that Huff spent the Child's first Christmas with Alzu's family, despite Alzu not showing up, because she was "not interested in spending Christmas alone."); App.846; R.Doc.103 at 4 (noting the Child had contact with Alzu's family and that the Child and Huff spent Christmas with Alzu's family, but that he was absent—without explanation). And so that she and the Child could have better living conditions and

[8] Huff testified that the family gatherings were limited and sometime intermittent because of the COVID-19 pandemic and related restrictions. App.750-51; R.Doc.98 at 26:19–27:1.

more space while trapped during the pandemic, Huff also rented a home. App.845; R.Doc.103 at 3; App.756–59; R.Doc.98 at 32:8–35:1; Ex.P013; App.243; Ex.R-228; App.549–50; Ex.R-605; App.594.[9]

C. Six Weeks After The Argentinian Border Opened Huff And The Child Returned Home To Missouri

As soon as Argentina's travel restrictions lifted and Huff had the necessary paperwork to leave Argentina, she asked for Alzu's permission to leave Argentina with the Child. App.770, R.Doc.98 at 46:2–13. He refused, as he and his family feared she would not return. App.846; R.Doc.103 at 4; Ex.R-T-018; App.480–82; App.684, 712; R.Doc.97 at 82:10–12, 110:4–9; App.770; R.Doc.98 at 46:2–24 (explaining that Alzu was concerned that she and the Child would not come back to Argentina). Due to Alzu's refusals, Huff sought refuge in the Argentine courts immediately after Argentinian borders official opened. App.771; R.Doc.98 at 47:4–

[9] The lease was for a three year term because that is standard in Argentina. App.709; R.Doc.97 at 107:17–19. However, knowing she wanted to leave Argentina, Huff told the real estate agent, that she planned to break the lease, which she eventually did by paying the previously agreed upon amount of future rent. App.759–60; R.Doc.98 at 35:18–36:18 (explaining Huff was "very clear with [the realtor] about [her] intentions to not stay there for that amount of time" and that she understood she would be able to break the lease without issue); App.760; R.Doc.98 at 36:19–21. Huff also obtained an Argentinean national identity card ("**DNI**"). App.768; R.Doc.98 at 44:11–25. She did so because her visa was set to expire before the child's birth and she believed could not leave the country without a DNI with the Child, which was also necessary for "pretty much everything" in Argentina, including basic necessities like getting a cellphone or renting property. App.767–770; R.Doc.98 at 43:6–46:1

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9. Huff did not seek permission to leave indefinitely, and planned to return to Argentina, only because she believed she "didn't have any other options that were available." App.846; R.Doc.103 at 4; App.771–72; R.Doc.98 at 47:10–48:4. Specifically, Huff testified she was concerned that requesting relocation could result in even a visitation order being denied. App.771; R.Doc.98 at 47:10–23. That concern was based on her attorneys' advice and another victim of domestic violence in Argentina had previously experienced this. App.771; R.Doc.98 at 47:10–23.

On December 9, 2021, Huff received an Argentinian court order that enabled her to travel to the United States the following month. App.847; R.Doc.103 at 5; App.771; R.Doc.98 at 47:7–9. As a condition to being permitted to leave, Huff was required to agree that she would return to Argentina with the Child within forty days, and fearing she had no choice, she did so. App.846; R.Doc.103 at 4; App.771–72; R.Doc.98 at 47:24–48:4 ("I didn't have any other options that were available to me."), App.837; R.Doc.98 at 113:1–6 (Huff testifying that she "did not think that [she] would be able to" "go to the United States with [the Child] and stay indefinitely"). On December 14, 2021, Huff and the Child left Argentina for Springfield, Missouri. App.847; R.Doc.103 at 5; Ex.R-006; App.217–21. Then after consulting lawyers, on January 17, 2022, Huff decided that she and the Child would remain in Springfield, Missouri. App.847; R.Doc.103 at 5; App.774; R.Doc.98 at 50:3–5; Ex.R-243; App.553–56 (stating that as of January 12, 2022, Huff was

"hoping to not go back" to Argentina, but was "waiting on a positive word from some lawyers first"). Shortly after consulting her lawyers, in mid to late January, Huff informed Alzu that she and the Child would not return to Argentina. App. 774; R.Doc.98 at 50:3–6.

While Alzu continued to reside in Argentina at least through the trial, the evidence confirmed that not even he is firmly rooted in there—as he told friends that he "would like to . . . be free and travel" and that he is "fed up with the city," and remains in Argentina because of this dispute and the fines he would have pay to travel to other countries due to his having previously overstayed his visas. App.669; R.Doc.97 at 67:23–25; Ex.R-T-005; App.368.

II. Proceedings Below

Alzu filed this Hague Convention petition in federal court in the Western District of Missouri seeking the return of the Child to Argentina—alleging that was the Child's place of habitual residence. App. 13; R.Doc.1 at 4. In her answer, Huff denied that Argentina was the Child's habitual residence and raised the affirmative defenses that: (1) returning to Argentina would expose the Child to a grave risk of harm—including physical or psychological harm—and otherwise place the Child in an intolerable situation; and (2) Mr. Alzu had consented to the Child living in the United States and had acquiesced to the Child remaining in the United States. App.87; R.Doc.18 at 4, 6–7.

The District Court (Harpool, D.) bifurcated the case—proceeding on the threshold issue of whether Argentina was the Child's habitual residence, and deferred on hearing Huff's affirmative defenses pending a determination of whether Mr. Alzu had made out a prima facie case. After a two-day bench trial, the District Court issued an order finding that Mr. Alzu had failed to satisfy his burden of establishing Argentina as the Child's habitual residence, and accordingly, it dismissed the Hague Convention petition. App. 843; R.Doc.103.

In its decision, the District Court first described the factual background and "unique circumstances" of the case. App.843–47; R.Doc.103 at 1–5. The Order detailed: the parties' background; how they met while traveling; their future plans to travel after the birth of the Child; how they ultimately wound up in Argentina; their time in Argentina with the Child—including the COVID-19 pandemic and related restrictions that forced them to remain in Argentina; the Child's contact with his paternal family, such as his first Christmas; as well as the Argentine court order and Huff's remaining in the United States. App.843–47; R.Doc.103 at 1–5*; see also supra* Factual Background.

Then, after identifying a child's habitual residence is governed by the totality of the circumstance test mandated by *Monasky v. Taglieri*, 589 U.S. 68 (2020), App.847–49; R.Doc.103 at 5–7, the District Court observed that "birthplace alone does not establish habitual residence," App.850; R.Doc.103 at 8. The District Court

went on to "consider the fact intensive question of habitual residence, and found that Argentina was selected "because their other choices were not available based on Petitioner's restrictions on entering certain countries." App.850; R.Doc.103 at 8. Additionally, the District Court noted that "neither parent had been living in Argentina until the eve of the child's birth," that Alzu had not lived in Argentina for years ("and spent little time there since leaving"), and that "Respondent had never been to Argentina." App.850; R.Doc.103 at 8. The District Court concluded that "the testimony, from both parties, reflects the parties' clear intention to travel again resuming their nomadic lifestyle after the child was born," and that "but for the COVID-19 travel restrictions the parties would not have remained in Argentina." App.850-51; R.Doc.103 at 8–9. The District Court found Alzu's testimony that the parties intended to make Argentina "home base" "less likely based on the facts presented and there is no evidence the parties ever agreed to make Argentina their home." App.851; R.Doc.103 at 9.

Next, the District Court considered "whether a finding of a habitual residence is required." App.851; R.Doc.103 at 9. In rejecting Alzu's argument that Argentina must be the Child's residence "as the child had no other habitual residence," the Order noted "the Court does not believe Petitioner has met his burden to establish a habitual residence" where "[t]he record does not support that the parties intended to stay in Argentina." App.851; R.Doc.103 at 9. The District Court weighed numerous

considerations, including the parties' credibility—noting "Petitioner was physically abusive to the Respondent, failed to attend his child's first Christmas, and initially refused to cooperate in obtaining travel documents for the child," as well as the fact that Huff violated an Argentina court order, although the district court noted "[s]he arguably had no alternative but to seek permission from the Argentina courts given Petitioner's refusal to allow her to leave Argentina with the child." App.851; R.Doc.103 at 9.

Having "balanced the unusual circumstances which led the parties to Argentina, the travel limitations and the circumstances which caused them to stay in Argentina, and the parties' prior intentions to travel after the child's birth against the Argentina court order that Respondent blatantly violated," the District Court held "Argentina was not the habitual residence of the child." App.852; R.Doc.103 at 10. The District Court therefore dismissed the Hague Convention petition. This appeal followed.

SUMMARY OF ARGUMENT

The District Court correctly identified the totality of the circumstances test mandated by *Monasky* for determining the Child's habitual residence. Its findings should therefore be reviewed under the deferential clear error standard. The District Court's decision represents a faithful application of the totality of the circumstances framework, and Alzu's arguments, which distort both the District Court's Order and

Monasky, are meritless.

First, contrary to Alzu's representation, the District Court treated no single factor—such as parental intent—as dispositive. Rather, the District Court considered the totality of the circumstances in reaching the conclusion that Argentina was not the Child's habitual residence.

Second, although the extent to which a child is socially engrained in a country was not—and should not have been—the "sole question" posed to the District Court as Alzu now contends,[10] the District Court did consider the time the young Child spent with Alzu's family in determining whether the Child was a habitual resident of Argentina.

Third, Alzu argues that a child cannot have two habitual residences, but the District Court never held that the Child had two habitual residences, nor has Huff ever contended that a child could have two habitual residences—as that was never an issue in this case. The only tangentially related question was whether a Child needed to have a habitual residence, the answer to which Alzu concedes—i.e., that there are instances where a child will not have a habitual residence for purposes of the Hague Convention when a petitioner fails to sustain his burden of proof and make out a prima facie case. App. Br. at 49.

[10] Appellant did not advance this argument before the District Court.

ARGUMENT

I. Standard of Review

"Once the trial court correctly identifies the governing totality-of-the-circumstances standard," a district court's habitual residence determination is judged on appeal by a "clear-error review standard." *Monasky v. Taglieri*, 589 U.S. 68, 84 (2020); *Pope ex rel. T.H.L-P v. Lunday*, 835 F. App'x 968, 970 (10th Cir. 2020) (applying clear-error standard to the district court's habitual residence determination); *see also* App. Br. at 21 (quoting *Monasky* and acknowledging the clear-error review standard).

The clear-error standard of review is particularly deferential to the district court. *Monasky*, 589 U.S. at 84. As the Supreme Court explained:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. ***Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous***.

Anderson v. City of Bessemer City, 470 U.S. 564, 573–74 (1985) (emphasis added). This Court has applied this stringent burden, stating that the clear error "standard of review does not permit us to substitute our own impressions for those of the district court." *Horner v. Mary Inst.*, 613 F.2d 706, 713 (8th Cir. 1980). In applying the standard, an appellate court is not tasked with determining whether the lower court's

findings were correct, but rather whether those findings were clearly wrong. *Lesch v. United States*, 612 F.3d 975, 980 (8th Cir. 2010); *see also Excellent Home Props., Inc. v. Kinard*, 998 F.3d 352, 354 (8th Cir. 2021).

Although Alzu concedes that the District Court's "habitual residence determination is subject to deferential appellate review for clear error," he simultaneously argues that whether the District Court properly identified and applied the totality of the circumstances test "is a question of law that should be reviewed *de novo* because answering that question 'entails primarily legal work.'" App. Brief at 21, 37, 46. He is mistaken. The Supreme Court observed that "[t]he inquiry begins with a legal question: What is the appropriate standard for habitual residence?" *Monasky*, 589 U.S. at 84. But it then admonished that "[o]nce the trial court correctly identifies the governing totality-of-the-circumstances standard, however, ***what remains for the court to do in applying that standard . . . is to answer a factual question***." *Id.* (emphasis added). Here Alzu admits that the District Court correctly identified the totality of the circumstances as the governing standard mandated by *Monasky*. App. Br. 24 ("In this case, the District Court recognized the totality of the circumstances test announced in *Monasky*"); App.847, R.Doc.103 at 5–6 ("Whether a country is the child's habitual residence is based on a 'common sense' evaluation of the 'totality of the circumstances' of each case. *Monasky v. Taglieri*, 589 U.S. 68 (2020).").

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Accordingly, the District Court's ensuing application of the standard is governed by Federal Rule of Civil Procedure 52(a), which requires findings of fact to be reviewed for clear error. *See* FED. R. CIV. P. 52(a)(6). Additionally, "[a]s a deferential standard of review, clear-error review" "has a particular virtue in Hague Convention cases" as it "speeds up appeals and thus serves the [Hague] Convention's premium on expedition." *Id.* (citing Hague Convention on the Civil Aspects of International Child Abduction art. 2, 11, Oct. 25, 1980, T. I. A. S. No. 11670, S. Treaty Doc. No. 99–11).

As demonstrated below, there is no basis for the contention that the District Court's application of the totality of the circumstances test was clearly erroneous—or, for that matter, erroneous in any respect.

II. The District Court Correctly Considered The Totality Of The Circumstances In Determining If Alzu Had Satisfied His Burden To Establish That Argentina Was The Child's Habitual Residence

The Hague Convention provides for the return of children who were "wrongfully removed or retained" away from their "habitual residence." 22 U.S.C. § 9001(a)(4); *Barzilay v. Barzilay*, 600 F.3d 912, 916–17 (8th Cir. 2010). As a threshold matter, to establish a prima facie case under the Hague Convention it is the petitioner's burden to prove that the country to which return is sought was the Child's country of "habitual residence" at the time of the removal or retention. 22 U.S.C. § 9003(e)(1)–(f)(1). Only then does the Hague Convention apply. *See id.*

Although the Hague Convention does not define the term "habitual residence," the Supreme Court has made clear that "mere physical presence" is not a "dispositive indicator of an infant's habitual residence," nor is where a child was born "automatically" the country of habitual residence. *Monasky*, 589 U.S. at 76–77, 81; *Delvoye v. Lee,* 224 F. Supp. 2d 843, 851 (D.N.J. 2002), *aff'd*, 329 F.3d 330 (3d Cir. 2003). Rather, the determination of "habitual residence depends on the specific circumstances of the particular case." *Monasky*, 589 U.S. at 78. A habitual residence finding is a "fact-driven inquiry," and the Hague Convention gives courts "maximum flexibility" to act based on the precise scenario before it, "informed by common sense." *Id.* at 78–79.

Especially where a child is "too young or otherwise unable to acclimate," courts consider "relevant" "the intentions and circumstances of caregiving parents." *Id.* The Supreme Court emphasized in *Monasky* that district courts should use their "common sense" in determining, based on the "totality of the circumstances," whether a country is a child's "habitual residence" and that the "aim [is] to ensure that custody is adjudicated in what is presumptively the most appropriate forum—the country where the child is at home." *Id.* at 71, 78–79.

Courts have traditionally evaluated certain categories of evidence as "relevant." *Monasky*, 589 U.S. at 78. "***For older children*** capable of acclimating to their surroundings, courts have long recognized, facts indicating acclimatization

will be highly relevant." *Id.* (emphasis added). Such facts include whether the child is settled in school and the extent to which they are involved in extracurricular activities. *See, e.g.*, *Guzzo v. Hansen*, 2022 WL 3081159, at *5 (E.D. Mo. Aug. 3, 2022) (finding a child acclimated in Spain where the child had lived there for five years, attended school, developed friendships, and participated in soccer, horseback riding, and swimming), *aff'd*, 2023 WL 8433557 (8th Cir. Dec. 5, 2023); *Tsuruta v. Tsuruta*, 629 F. Supp. 3d 942, 952 (E.D. Mo. 2022) (holding a child was a habitual resident of Japan where the child attended daycare and school, participated in horseback riding, tennis, martial arts, and Kumon), *aff'd*, 76 F.4th 1107 (8th Cir. 2023). However, as "children, *especially those too young* or otherwise unable *to acclimate*, depend on their parents as caregivers, *the intentions and circumstances of caregiving parents are relevant considerations*." *Monasky*, 589 U.S. at 78. (emphasis added)[11]; *see also Delvoye*, 329 F.3d 334 (denying Hague petition where parents planned to "live there only temporarily" in Belgium); *New York ex rel. B.E. v. T.C.*, 164 N.Y.S.3d 374, 379 (N.Y. Sup. Ct. 2022) (denying Hague petition where parents never shared an intent to habitually reside in England).

[11] And as the Supreme Court recently clarified in *Monasky,* while the habitual residence determination is not dependent on whether there was an "actual agreement" confirming the parents' shared intent to designate a particular country as a child's habitual residence, evidence of the parent's intent is one significant factor in the common sense analysis of the totality of the circumstances necessary to determine the child's habitual residence. *Monasky*, 589 U.S. at 76.

The Child in this case was a toddler, less than two years old, when he moved from Argentina to the United States and was thus unable to acclimate. *See, e.g.*, *Soulier v. Marsumoto*, 2022 WL 2666946, at *11 (D.N.J. July 8, 2022) (holding that where a child was between two and three years old, he was "too young to fully acclimate to his new environment" even though (unlike this case) he was enrolled in daycare and attended birthday parties, unlike his eight year old sister who the court found capable of making such a connection). Here, the Child's brief life included none of the significant features that courts have considered in finding older children to have been acclimatized. Alzu's brief confirms that the sum total of the acclimatization evidence consists of the unsurprising facts that the baby was brought to some family dinners, held only intermittently due to pandemic restrictions, and that the extended family babysat for him after his parents separated due to Alzu's violent abuse of Huff. App. Brief at 8–9, 32, 40–41.

After summarizing "the unique scenario of the parties' nomadic lifestyles," as well as discussing "the world-wide travel restrictions imposed by the COVID-19 pandemic," the District Court did exactly as *Monasky* directs: it "consider[ed] the fact intensive question of 'habitual residence' and reach[ed] a decision based on the totality of the circumstances." App.844–47, 850, R.Doc.103 at 2–5, 8. During its analysis, the District Court weighed numerous facts, including the time spent with Alzu's family, such as the "[C]hild's first Christmas." App.851; R.Doc.103 at 9. The

District Court explained that it "balanced the unusual circumstances which led the parties to Argentina, the travel limitations and the circumstances which caused them to stay in Argentina, and the parties' prior intentions to travel after the child's birth against the Argentina court order that Respondent blatantly violated." App.852; R.Doc.103 at 10; *see also* App.850; R.Doc.103 at 8 ("The Court has taken into consideration the totality of the circumstances in reaching its decision."). Having done so, it concluded that Alzu had not met his burden to establish that Argentina was the Child's habitual residence.

The District Court's ultimate finding was supported by abundant evidence—much of it undisputed—and its assessment of the credibility of the Parties where any of it was contested. *Compare* App.850; R.Doc.103 at 8 (finding "the testimony, from both parties, refelec[ed] the parties' clear intention to travel again") *with* App.851; R.Doc.103 at 9 (finding "Petitioner['s] testi[mony that] Argentina was going to be their 'home base'" as "less likely."). The District Court's conclusion is unassailable, particularly because after weighing not only the parents' intentions, the time the young Child spent in Argentina, as well as a host of other facts, the District Court had to consider how the COVID-19 pandemic (and related travel restrictions) figured into the habitual residence analysis. App.847–52; R.Doc.103 at 5–10. This was important under *Monasky*, as the Supreme Court explained that if "an infant

lived in a country only because a caregiving parent had been coerced into remaining there. Those circumstances should figure in the calculus." *Monasky*, 589 U.S. at 78.

The COVID-19 pandemic presents a perfect example of external factors that forced a parent to remain in a foreign country. And the District Court's finding "that but for the COVID-19 travel restrictions the parties would not have remained in Argentina." is incontrovertible. *See* App.851; R.Doc.103 at 9. Huff testified, *inter alia,* about the lack of flights in and out of the country, as well as the fact that the U.S. Embassy was closed during the pandemic, thus delaying issuing the necessary paperwork for the Child to fly internationally and return to the United States. App.750–54, 756; R.Doc.98 at 26:13–18; 27:12–30:1; 32:13–18; *see also* Ex.R-225; App.535–36; Ex.R-227; App.537–47. The District Court credited that testimony, App.846, 851–52; R.Doc.103 at 4, 9–10, and properly weighed those conditions in determining that Alzu failed to meet his burden of establishing that the Child was a habitual resident of Argentina, App.851-52; R.Doc.103 at 9–10; *see also Monasky*, 589 U.S. at 78.

III. The Arguments Proffered by Alzu Mischaracterize the Order Below and the Supreme Court's Opinion in *Monasky*

The arguments proffered in Alzu's brief fail to demonstrate that the District Court's decision was erroneous in any respect, much less that it was unsupported by the record and clearly erroneous. Instead, Alzu's appeal amounts to no more than a grievance that the District Court should have balanced the factors differently—

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factors which the District Court had carefully considered. This type of criticism is precisely what does *not* rise to the level of clear error. *See Anderson*, 470 U.S. at 573; *Lesch*, 612 F.3d at 980. There can be no genuine argument that the District Court's finding was not amply supported by the factual record and reasonable, and the Court's ruling is therefore unassailable. *See Lesch*, 612 F.3d at 980; *Pope*, 835 F. App'x at 970.

A. The Parents' Intentions Were Not The Sole Dispositive Factor In the Court's *Monasky* Analysis

Alzu contends that the District Court erred in finding that the parties' intent to travel after the Child was born was the "determining factor" or "dispositive" in its assessment of the Child's habitual residence. App. Brief at 2, 17, 21, 26. But the District Court's Order demonstrates that the Court did no such thing, and treated no single consideration as conclusive. *See Supra* Section II.

1. Alzu's Claim That The District Court Erred By Considering The Intentions Of The Parties After They Separated Is Meritless

Alzu does not dispute that parents' intentions are "admittedly a factor to be considered under the totality of the circumstances" that the District Court was "clearly free [to] consider." Nevertheless, he then contends that "once the parties separated in February 2021, any prior plans they may have had to resume traveling as a family were off the table" such that those intensions should have been disregarded. App. Br. 26, 29. Alzu provides no meaningful explanation as to why

the District Court could no longer consider this admittedly relevant factor—an argument he advanced for the first time on this appeal—as part of its analysis of the totality of the circumstances. There is none. Moreover, the District Court found that the Parties' *post-birth* intentions and plans were entirely consistent with their original plan to resume their nomadic travels as soon as possible after the Child was born:

> The Court finds the testimony, from both parties, reflect the parties' clear intention to travel again resuming their nomadic lifestyle after the child was born. This is consistent with their prior lifestyle . . . [and] both parties testified regarding their intentions to travel to Chile shortly after the child's birth. Respondent testified the parties had no intention of remaining in Argentina or raising the child in Argentina. The Court finds that but for the COVID-19 travel restrictions the parties would not have remained in Argentina. Petitioner testified Argentina was going to be their 'home base.' The court finds this less likely based on the facts presented and there is no evidence the parties ever agreed to make Argentina their home.

App.850–51; R.Doc.103 at 8–9.

Finally if anything, the deterioration of the relationship due to Alzu's domestic violence solidified her desire to leave Argentina as soon as possible. App.745–48; R.Doc.98 at 21:6–24:5; App.851; R.Doc.103 at 9; App.653; R.Doc.97 at 51:4–19. Thus, as noted above, Huff testified that soon after she got to Argentina she would have left the country—even before the baby was born—had she been able to travel in her eighth month of pregnancy. App.778; R.Doc.98 at 54:19–21. And, as

the District Court found, the only thing that kept her and young Child in the country after the pandemic struck, just days following the birth, were the COVID-19 restrictions, as well as Alzu's refusal to grant the permission she needed from him to travel with the baby.[12] App.846, 850–51; R.Doc.103 at 4, 8–9. And here, as elsewhere, the Court's decision was based on his assessment of the Parties' respective credibility. App.851; R.Doc.103 at 9 (finding Petitioner's testimony to be less credible "based on the facts presented and there is no evidence the parties ever agreed to make Argentina their home.").

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[12] Appellant's unilateral attempts to keep Huff and the Child in Argentina after she left him because he feared she would not return cannot be sufficient to establish habitual residence. App.846; R.Doc.103 at 4 ("Petitioner would not agree to allow the child to leave the country"); App.712; R.Doc.97 at 110:4–9; App.765-66; R.Doc.98 at 40:25–42:4, 42:20–24. Appellant clings to a statement that in ten years, she "intended to be successful businesswoman in Argentina," made to a friend in an informal interview held over text message. App. Br. 44. Appellant claims this proves—in conflict with all of the other evidence—that "she still had the intention of continuing to reside in Argentina for an extended period of time." *Id.* However, as even he admits, "Respondent explained that she had resigned herself to the fact that she would have to stay in Argentina with the child at that time and was trying to make the best of her situation." App. Br. 11, 43; *see also* App.763, 764, 828; R.Doc.98 at 39:6–15; 40:14–18; 104:3–6. And Ms. Huff testified, "Yes, because I didn't have a job or any way to support myself in Argentina and I thought that I didn't have any rights to be able to leave Argentina, so I was just trying -- trying to make the best out of a really tough situation." App. 828; R.Doc.98 at 104:3-6. Weighing the parties' credibility and considering all the evidence, the District Court reasonably rejected Appellant's contention.

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B. Alzu's Claim that Argentina Was The Child's Habitual Residence Because The Parties Intended To Remain There For Less Than A Year Is Contrary To Monasky And The Record Below

Disregarding all the other factors the District Court considered—and now contradictorily relying on the parties' pre-birth plans—Alzu argues that "the parties intended to reside in Argentina with the child as a family for a sufficient amount of time to deem Argentina their home," App. Br. 18, 26, 28–29. The evidence in the record is to the contrary, and, as per the quote in the preceding section, the District Court did not find it credible that the two intended to make Argentina their home base. *See* App.850–51; R.Doc.103 at 8–9.

First, Alzu misstates that "the parties' pre-pandemic intentions were to live in Argentina with the child until at least the end of 2020"—which would have been ten months after his birth. App. Br. 18; *see also id.* 27 (arguing that "before the pandemic started, the parties already had the intention to reside in Argentina for at least a year"). But Huff testified that even before the pandemic, after realizing the Alzu had broken the promises that induced her to come to Argentina and then assaulted her, she would have left Argentina "before [she] gave birth or immediately afterwards" had she been free to do so. App.778, R.Doc.98 at 54:19–21. In fact, Huff also testified that when she decided to go to Argentina to re-connect with Alzu, the couple had not even decided if they would stay there for the birth of the Child, or travel somewhere else together. App.739–40; R.Doc.98 at 15:20–16:14. Additionally,

Huff testified that just a few months after the Child's birth, *Alzu wanted to leave for Mexico*. App.754–55; R.Doc.98 at 30:15–31:24. As noted above, they did not leave the country at that juncture only because she did not feel safe traveling alone in a van with Alzu because of his violent abuse of her, and due to the risks surrounding the COVID-19 pandemic. App.754–55; R.Doc.98 at 30:15–31:24. In any event, the District Court was clearly entitled to consider the totality of the circumstances and conclude that the fact that the parties planned to resume their travels to attend a Rainbow gathering in Chile, slated to occur no later than approximately ten months after an infant was born, did not transform Argentina into the infant's country of habitual residence under *Monasky*. App. 847, 850–851, R.Doc. 103 at 5, 8–9. That is particularly true because the District Court found Alzu's testimony that they intended to return to Argentina to be not credible.[13] App. 851; R.Doc.103 at 9.

Equally meritless is Alzu's contention that Huff's testimony that she initially intended to return to Argentina when she was finally permitted to leave with the Child to visit the United States shows that her "intent was to continue to reside in

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[13] Appellant argues that the fact that Huff began the process to obtain her Argentina residency *before* she left the United States "because she knew that her travel visa would expire *before the baby was born*," shows she intended to remain there *afterwards*. App. Br. 18 (emphasis added). However, his own admission that her visa would expire before the baby was born actually explains that her residency did *not* indicate anything about her plans to remain there *with the Child*. Instead, her Argentinian residency was needed even for the brief time they planned to remain in Argentina while she was pregnant. *Id.*; App. 767–768; R.Doc.98 at 43:6–44:21.

Argentina with the child, and that the child was, in fact, 'at home' in Argentina." App. Br. 44–45. As explained above, Huff testified that before she left Argentina, she did not believe she could go to the United States and remain there with the Child indefinitely. App.771–72, 837; R.Doc.98 at 47:10–48:4; 113:1–6. And for good reason—including the advice of an attorney and the experience of another domestic violence victim in Argentina—she feared that requesting relocation could result in her being denied permission to leave even for a visit to the United States. App.771; R.Doc.98 at 47:10–23. The District Court considered the "assurances" she was required to provide to the Argentina court, and was unpersuaded that this established the Child's habitual residence was Argentina. *See* App.846; R.Doc.103 at 4; *see* App.851-52; R.Doc.103 at 9–10 (considering Huff's violation of the Argentina court order, which promised she intended to return to Argentina). Thus, once again, the District Court considered Alzu's argument in its analysis of the totality of the circumstances based, inter alia, on its assessment of the parties' credibility. Its conclusion is supported by the record and unassailable.

C. In Balancing The Relevant Factors, The District Court Considered The Extent To Which The Child Was Integrated Into A Social And Family Environment In Argentina

Alzu argues that "the ***sole question*** before the District Court, as explained in *Monasky*, was whether the child was integrated into a social and family environment to a degree the child was 'at home' in Argentina." App. Br. 16 (emphasis added).

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This is a flat mischaracterization of *Monasky*, in which the Supreme Court could not have made clearer that no one factor should be dispositive. *Monasky*, 589 U.S. at 78. Moreover, as discussed above, all *Monasky* says about such "integration" is that it is a "highly relevant" consideration "***for older children*** capable of acclimating to their surroundings"—not for a twenty-two month old toddler, like the Child in this case. *See id.* at 77–78 (emphasis added); *see also Soulier*, 2022 WL 2666946, at *11 (holding a three year old was "too young to fully acclimate").[14]

Even though not compulsory given that the Child here was certainly not an "older" child, the District Court still did consider the extent to which the Child was integrated into Alzu's family. App.846, 851; R.Doc.103 at 4, 9; *see supra* Section II. Accordingly, Alzu's assertion—that "[n]otably absent from the Court's opinion in this case is any discussion or mention of the undisputed evidence showing the degree to which the child was integrated into a social and family environment" (App. Br. 28, 40)—is simply false.[15] Here again, Alzu's argument amounts to no more than

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[14] In fact, many of the categories of evidence that *Monasky* identified (in a footnote) as being relevant to acclimatization would not apply to the Child here—academic activities, participation in sports programs and excursions, and language proficiency. 589 U.S. at 78 n.3; *see also supra* Section II.

[15] Curiously, elsewhere Appellant asserts that "[t]he District Court apparently recognized that the child was . . . integrated into a social and family environment." App. Br. 19. While there was no such finding, as discussed *infra* Section III.C, his contention here demonstrates that his allegation that the District Court failed to consider, or even mention the Child's alleged integration is contrary to not only the District Court's opinion, but his own brief.

quibbling with how the District Court balanced the various factors in its analysis of the totality of circumstances. And the notion that the District Court erred—much less committed clear error—is baseless, especially given the paucity of the evidence Alzu cites, and the fact that the evidence he did proffer was disputed at trial.[16] For example, Huff testified that as one would expect due to the COVID-19 pandemic, the family did not get together consistently and therefore, went for periods of time without seeing the Child. *See supra* n. 8.

D. The District Court Did Not Recognize That The Child Was A Habitual Resident Of Argentina

Alzu claims that "the district court apparently recognized that the child was, in fact, settled and at home in Argentina," and because of this "apparent recognition that the child was habitually resident in Argentina" it committed clear error in "inconsistently conclud[ing] that Argentina was not the habitual residence of the child." App. Br. 19. This is another mischaracterization of the District Court's Order, which contained no such recognition.[17] The Child's habitual residence was the

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[16] Appellant's evidence of the Child's social integration consists of the fact that the Child spent Christmas with Alzu's family (although Appellant was notably absent) and that through "family dinners" with, and being babysat by, Appellant's family "Petitioner's family continued to have contact with the child and Respondent with whom they had formed relationships." *See* App. Br. at 32–33.

[17] The District Court was analyzing "whether a finding of a habitual residence is required." App.851; R.Doc.103 at 9. In its discussion, it considered Appellant's argument that "the only place of habitual residence under this circumstance is Argentina," *see* App.850; R.Doc.103 at 8. The District Court stated that "***If*** the Hague Convention requires every child to have a habitual residence the only obvious

ultimate issue before the District Court, and the District Court reached the opposite conclusion—that the Child was *not* a habitual resident of Argentina. App.852; R.Doc.103 at 10 ("Wherefore, based on the record before the Court, the Court finds Argentina was not the habitual residence of the child.").

E. The District Court's Conclusion Is Not In Tension With Other Court Findings That Hold A Child Cannot Have Two Habitual Residences

Alzu devotes five pages of his brief to arguing the irrelevant point that a child cannot have two habitual residences. *See* App. Br. 46–51. The District Court did not find that the Child had two habitual residences, nor has Huff taken the position that the Child has two habitual residences. *See generally* App.843–52; R.Doc.103. The only remotely relevant issue was whether the District Court could find that Alzu had failed to meet his burden of establishing Argentina as the Child's habitual residence, leaving the child without a habitual residence for purposes of the Hague Convention. And significantly, Alzu's brief explicitly concedes that such a scenario is permissible. *See* App. Br. at 49 ("there could conceivably be some extreme scenario

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choice in this instance would be Argentina as the child ha[s] no other habitual residence prior to Respondent removing the child to the United States," App.851; R.Doc.103 at 9 (emphasis added). The next word in the District Court's decision is "However"—and the District Court went on to explain it "does not believe Petitioner has met his burden to establish a habitual residence." App.851; R.Doc.103 at 9. And, as noted below, Appellant concedes that a child need not have a habitual residence, *see* App. Br. 49, which is merely an element in a Hague Convention proceeding that needs to be proven by a petitioner.

and circumstance where a child does not have a home count[r]y."). The District Court's analysis of the unique facts and the totality of the circumstances here led it to correctly conclude that finding Alzu had failed to prove that Argentina was the Child's habitual residence—necessary in order to make out a prima facia case—required dismissal of the petition. App.851-52; R.Doc.103 at 9–10.

Courts in this country have long held that dismissal of a Hague Convention petition is required where a petitioner has failed to satisfy the burden of proving that the country from which a child was removed was the child's habitual residence. *Watts v. Watts*, 935 F.3d 1138, 1147–48 (10th Cir. 2019); *In re A.L.C.*, 607 F. App'x 658, 663 (9th Cir. 2015) ("Because [the child] had no habitual residence, no further analysis of this matter under the Convention and its implementing legislation is possible, as the Convention does not apply to a child who was never wrongfully removed or retained."); *Delvoye*, 224 F. Supp. 2d at 851; *Diagne v. Demartino*, 2018 WL 4385659, at *13 (E.D. Mich. Sept. 14, 2018). There is no burden on a respondent to prove—and no need for a court to determine—an alternative habitual residence. *Pope*, 835 F. App'x at 971 ("The Convention does not require a district court to determine *where* a child habitually resides . . . [but] *whether* the child habitually resides in the location that the petitioner claims."); *Watts*, 935 F.3d at 1147–48.

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Post-*Monasky* decisions confirm that dismissal is required where a petitioner fails to satisfy his burden of proving a child's habitual residence.[18] *Smith v. Smith*, 976 F.3d 558, 563 (5th Cir. 2020); *Nisbet v. Bridger*, 2023 WL 6998081, at *4–5, *7 (D. Or. Oct. 24, 2023), *appeal filed*, No. 23-3877 (9th Cir. Nov. 30, 2023). And judicial decisions from other signatory countries also support that a child may have no habitual residence. *See R.K v. MA*, [2020] O.J. No. 6030 (Can.); *Lacy v. Stephen* [2007] NZFC FAM-2007-0009-466 (N.Z.); *P v. Sec'y for Just.* [2006] NZCA CA221/05 (N.Z.). The reason for this, is that habitual residence is nothing more than an element of the prima facie case for purposes of the Hague Convention—either a petitioner satisfies that burden or custody is litigated in the forum where the child currently resides—in this case, Missouri, where his mother has a stable job at Missouri State University that has enabled her to provide for him as he has lived and grown up in Springfield since 2021.

In contrast, acceptance of Alzu's position would amount to an outcome where even if the totality of the circumstances test mandated by *Monasky* establishes—at

[18] In *Monasky*, the Supreme Court correctly explained that it would have been wrong to require an actual agreement between parents in all cases because in many cases, there will be no such agreement, and requiring one would have created "a *presumption* of no habitual residence for infants" even in some "straightforward" cases when the totality of the circumstances demonstrates otherwise. 589 U.S. at 78, 81 (emphasis added). The Supreme Court's dicta did nothing to change the fundamental precept that it is a petitioner's burden to prove the child's habitual residence was the country he claims, and that where he fails to do so, his petitioner must be dismissed.

it did here—that a country from which a child was removed was ***not*** their habitual residence, a district court must nevertheless find that it ***was*** the child's habitual residence merely because they were born and lived there period, even if they did so only because, as in this case, they were trapped in the country by COVID-19 restrictions, or by a parent's coercion or some other external force. This single-factor categorical approach would be directly contrary to *Monasky*, 589 U.S. at 77–78, and the decisions of other courts that have repeatedly found that where a child was born is not "automatically" the country of habitual residence, and that "mere physical presence" is not a "dispositive indicator of an infant's habitual residence." *Monasky*, 589 U.S. at 76–77, 81; *Delvoye,* 224 F. Supp. 2d at 851.

* * * * *

In sum, the District Court's *Monasky* analysis was a model for how trial courts should determine whether a Hague Convention petitioner has satisfied the burden to establish the habitual residence of a child. Alzu has failed to proffer any substantial argument to demonstrate that the District Court erred in any respect, much less that it committed an error so egregious as to rise to the level of clear error.

IV. Even If The District Court Did Not Correctly Apply The Totality Of The Circumstances Test, Reversal Would Be Unnecessary and Improper

In *Monasky*, the Supreme Court found that the district court had erred in holding that an actual agreement between the parties selecting a child's country of habitual residence was necessary to establish a child's habitual residence. 589 U.S.

at 80–81. In spite of that error, the Supreme Court upheld the district court's ultimate finding that the petitioner had failed to establish his burden of proving the child's habitual residence. *Id.* at 85. The Court reasoned that the district court had "considered the competing facts bearing on" petitioner's arguments and "[n]othing in the record suggests that the District Court would appraise the facts differently on remand." *Id*. It therefore "decline[d] to disturb the judgment below." *Id.*

Even if this Court were to find that the District Court committed some clear error—which it did not—just as in *Monasky*, the District Court evaluated the facts Alzu urges support his claim that Argentina was the Child's habitual residence, and "[n]othing in the record suggests that the District Court would appraise the facts differently on remand." *Id.* at 86. Accordingly, neither reversal nor remand would be appropriate here, and would only cause additional delay in resolving the uncertainty in the young Child's life. *Id.*; *see also* App. Br. 29, 40; App.846, 851; R.Doc.103 at 4, 9; *see also supra* Sections II, III.

Finally, affirmance of the District Court's decision is particularly appropriate because as *Monasky* teaches, custody should be litigated in the place that best serves the interest of the child. *See Monasky*, 589 U.S. at 72. It would be a senseless travesty for the Child in this case to be forcibly removed from his current environment in Springfield—where his mother has a stable job at Missouri State University—and shatter his life to send him back for a custody litigation in Argentina—where his

father was unable to provide housing for him other than a room in his own mother's home while it was under construction, as he worked only part time, off-the books, in a relative's pet food store. Custody should be determined in Missouri, where the Child will be most at home.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court in all respects.

Date: October 17, 2024

Respectfully submitted,

/s/ Richard A. Rothman

Richard A. Rothman
Elaina K. Aquila
Emma Evans
WEIL, GOTSHAL & MANGES LLP
richard.rothman@weil.com
elaina.aquila@weil.com
emma.evans@weil.com
767 Fifth Avenue
New York, NY 10153
Telephone: 212-310-8000
Facsimile: 212-310-8007

–and–

Samuel N. Sherman
SANDBERG PHOENIX & VON GONTARD P.C.
ssherman@sandbergphoenix.com
4600 Madison Avenue, Suite 1000
Kansas City, MO 64112
Telephone: 816-425-9690
Facsimile: 816-627-5532

Pro Bono Attorneys for Amy Nichole Huff

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a). This brief contains 10,952 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in fourteen (14) point Times New Roman font.

Dated: October 17, 2024

/s/ Richard A. Rothman
Richard A. Rothman

Attorney for Appellee

CIRCUIT RULE 28A(H) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 28A(h), a version of the brief in a non-scanned PDF format. I hereby certify that the file has been scanned for viruses and that it is virus-free.

/s/ Richard A. Rothman
Richard A. Rothman

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 17, 2024, an electronic copy of the Brief of Defendant-Appellee Amy Nichole Huff was filed with the Clerk of the Court for the United States Court of Appeals for the Eight Circuit by using the CM/ECF system. The undersigned also certifies that all participants in this case are registered CM/ECF users and that service of the Brief will be accomplished by the CM/ECF system.

/s/ Richard A. Rothman
Richard A. Rothman