IN THE SUPREME COURT OF THE STATE OF NEVADA

AHED SAID SENJAB Appellant, vs. MOHAMAD ALHULAIBI Respondent.	Supreme Court No.: 81515 District Court No.: D-20-606093-D **RESPONDENT MOHAMAD ALHULAIBI'S FAST TRACK RESPONSE**

1. Name of party filing this fast track response:

Respondent, Mohamad Alhulaibi

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

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4. **Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal:**

None

5. Procedural history. Briefly describe the procedural history of the case only if dissatisfied with the history set forth in the fast track statement:

On August 4th **t**he District Court denied Mohamad's motion and Ahed's Countermotion as the underlying case was dismissed and the matters were not

collateral to the appeal. The Court also changed the custodial schedule in the Extended Order of Protection giving Mohamad additional custodial time.

6. Statement of facts. Briefly set forth the facts material to the issues on appeal only if dissatisfied with the statement set forth in the fast track statement (provide citations for every assertion of fact to the appendix, if any, or to the rough draft transcript):

Mohamad and Plaintiff are both citizens of Syria.[1] Mohamad and Plaintiff have one son together, Ryan Mohamad Alhulaibi ("Minor Child"), born on February 16, 2019 in Saudi Arabia.[2] The Minor is not a citizen of the United States.[3] Mohamad moved to Nevada to study at UNLV.[4] Mohamad has always planned to return to either Saudi Arabia or Syria after completing his education.[5] Ahed applied for a Visa to enter the United States on July 15, 2018, due to the presidential proclamation, Ahed was not granted VISA clearance until the end of 2019.[6]

Mohamad was in the United States on an F1 Visa (student visa).[7] Plaintiff was in the United States on an F2 Visa (student visa dependent).[8] Minor child was also

[1] AA000014
[2] Id.
[3] Id.
[4] Id.
[5] Id.
[6] AA000051
[7] AA000014
[8] Id.

on an F2 Visa.[9] Based on Plaintiff's current visa status a divorce would end Plaintiff's ability to remain in the United States.[10]

Mohammad returned to Saudi Arabia after the conclusion of the UNLV fall semester on or about December 17th or 18th, 2019.[11] Since Ahed's VISA was finally approved, Mohamad purchased roundtrip tickets for the entire family to go to Nevada so they could be together for his final semester.[12] The roundtrip tickets for Mohammad, Ahed, and Ryan had them land in Las Vegas on January 13, 2020, with everyone to return to Saudi Arabia on or about June 18, 2020.[13] Ahed moved out of the apartment on or about February 12, 2020.[14]

Mohamad has the Minor three (3) days a week.[15] Ahed initiated a child protective service case against Mohamad, the investigator found the allegations unsubstantiated.[16] On February 9, 2020, Ahed called the Las Vegas Metropolitan Police Department ("LVMPD") on Mohamad.[17] When LVMPD showed up to the apartment Ahed alleged Mohamad had verbally abused her.[18] On February 9th, Ahed

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[9] Id.
[10] Id.
[11] Id.
[12] Id.
[13] IAA000060-63
[14] AA00015
[15] IAA000240. The TPO Court has since modified the schedule granting Mohamad additional physical time.
[16] IAA000072
[17] IAA000074-76
[18] Id.

also informed LVMPD her brother-in-law was coming from Maryland State to pick her up. Id. At which point LVMPD admonished Plaintiff that she cannot take the Minor from Nevada. Id.

The next day on February 10, 2020, Mohamad called LVMPD so they could escort him while he retrieved items from their apartment.[19] While Mohamad was getting his items, Plaintiff alleged to LVMPD that Mohamad was both physically and verbally abusive, even though she never brought up physical abuse on February 9th. Id. Mohamad vehemently denies that he was ever physically or verbally abusive but admits they had a verbal altercation on February 9th, 2020.[20] The only purported sign of physical abuse found by LVMPD was bruising on Ahed's legs.[21] Upon information and belief, Ahed has hyporthyroidism, iron deficiency anemia, and varicose veins, which makes her more susceptible to bruising.[22]

Mohamad retained his counsel through the Nevada Bar's Lawyer Referral Service Modest Means Program, which means that he qualified for reduced fee legal services based on his financial situation and that he is not to be charged more than seventy-five dollars per hour for legal services.[23] Mohamad believes that Ahed has

[19] IAA000048-49
[20] IAA000052
[21] AA000049
[22] AA000052
[23] AA000052

roughly one hundred thousand dollars ($100,000.00) in assets consisting of gold and property in Saudi Arabia and Syria.[24]

Mohamad believes Ahed is using the divorce in an attempt to gain legal status in the United States for her and her family.[25]

7. Issues on appeal. State concisely your response to the principal issue(s) in this appeal:

a. Whether immigration law preempts non-immigrant aliens from lawfully establishing the subjective intent or domicile to remain in Nevada thereby precluding divorce subject matter jurisdiction?

b. Whether a minor that lived in Nevada with nonimmigrant alien parents for significantly less than six months can make Nevada his home state?

8. Legal argument, including authorities:

This is about Federal Immigration law preempting a nonimmigrant alien from establishing domicile in the United States. The intent required to establish domicile can be legally precluded. Prior to Park v. Barr 946 F.3d 1096, 1098 (9th Cir. 2020), the United States Supreme Court iterated in Toll v. Moreno, 458 U.S. 1 (1982) and reiterated in Mississippi Choctaw Indian Band v. Holyfield, 490 U.S. 30 (1989), the intent of certain individuals – in these two cases, certain nonimmigrant tourists, minors, and Indian parents subject to the Indian Child Welfare Act of 1978, 92 Stat.

[24] AA000015
[25] Id.

3069, 25 U.S.C. § 1901-1963 – can be legally precluded. The preclusion against establishing domiciliary intent for certain nonimmigrant and unlawful aliens was adopted by the Ninth Circuit in Carlson v. Reed, 249 F.3d 876 (9th Cir. 2001), Gaudin v. Remis, 379 F.3d 631, 637–38 (9th Cir. 2004), and our sister state of California in Regents of Univ. of Calif. v. Superior Court, 225 Cal. App. 3d 972 (1990).

This is about affording Mohamad the liberty to leave Nevada with the Minor who less than two and a half months before the divorce action commenced had never been in the United States.[26] This is about not making a father choose between being able to provide for his child and not seeing his child. Either party to this appeal could be removed from the United States and would have no ability to come back to modify their divorce order. A parent's immigration status and its derivative effects can be used as a factor in determining custody.[27] Ahed's immigration status and violation of said status could cause her to be detained by Immigration and Customs Enforcement at any time which would likely subject the Minor to being put into a detention center until they were repatriated or granted residency.

[26] Case T-20-203688-T has an order that the Minor Child may not be removed from Nevada. Mohamad currently has 3 unsupervised days with the Minor and if he leaves the U.S. he may not be able to return as his VISA expired two months after his graduation from UNLV.

[27] Rico v. Rodriguez, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005).

The effects of Park and the District Court's decision are not as far reaching as Ahed and NIWAP would have this Court believe. Ahed can still file for divorce and child custody in a court that has subject matter jurisdiction. Mohamad can still be personally sued in Nevada.[28] Domicile is not necessary to be sued in Nevada Courts. Id. Nor does preempting a party from filing divorce or child custody mean that a person would not receive protection in Nevada if they were abused.[29] Prosecution in

[28] Viega GmbH v. Eighth Jud. Dist. Ct., 130 Nev. 368, 374, 328 P.3d 1152, 1156 (2014)

[29] The amicus raises issues not properly before the Court. The issues raised were never addressed prior to Ahed's supplement and even then, were cursory and never discussed Section 204(a)(I)(8)(ii) of the Immigration and Nationality Act, 8 U.S.C. 1154(a)(I)(8)(ii) instead it argued "Ahed now has a path to citizenship, independent of MOHAMAD's Visa. Although the specifics of AHED's right path to citizenship is confidential and privileged under federal law…" AA000131. Ahed also disclosed a confidential record/Exhibit, which was not provided to Mohamed or his counsel regarding Ahed's purported pathway to citizenship. Mohamad's Counsel objected to the Exhibit. See Transcript referenced as AA000390-414. Appendix appears to jump from AA000389 to 415. Pg. 8: 16 – Pg 9: 2 of June 16, 2020 transcript.

Further, the amicus alludes to the need to protect Ahed pursuant to Section 204(a)(I)(8)(ii) of the Immigration and Nationality Act, 8 U.S.C. 1154(a)(I)(8)(ii) but it is inapplicable as Mohamad is not a permanent lawful resident. Further, "Many cases for relief under the Convention arise from a backdrop of domestic strife. Spousal abuse, however, is only relevant… if it seriously endangers the child." Souratgar v. Lee, 720 F.3d 96, 103–04 (2d Cir. 2013); *citing* Charalambous v. Charalambous, 627 F.3d 462, 468 (1st Cir.2010) (per curiam). The inquiry is whether repatriation would place the child at a grave risk of physical or psychological harm. Id. **"[S]poradic or isolated incidents of physical discipline directed at the child, or some limited incidents aimed at persons other than the child, even if witnessed by the child, have not been found to constitute a grave risk.'"** Ermini v. Vittori, 758 F.3d 153, 164–65 (2d Cir. 2014).

Nevada criminal courts do not require a party to be domiciled in the state.[30] Settling the forum for adjudication of a dispute over a child's custody, of course, does not dispose of the merits of the controversy over custody.[31] A party can still bring up allegations of abuse as it relates to child custody in the proper forum. Nor do Nevada Courts require domicile for emergency jurisdiction of child custody matters.[32]

An absurd result would follow if a person was forced to defend a divorce and child custody by temporarily living in the United States, especially when the party seeking divorce separated and left the family apartment after living in the United States for less than a month and has significant assets in Saudi. All parties came to Nevada knowing they would only be able to legally remain in the United States if Mohamad was attending UNLV. Ahed a VISA dependent of Mohamad, who was denied entry into the country for over a year, knew she could not legally remain in the country without Mohamad attending UNLV. By filing for divorce Ahed is no

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There are no allegations that Mohamad ever raised a finger to the Minor. The only allegation of abuse against the Minor stems from Ahed claiming that Mohamad abused her and that is somehow abuse against the Minor. Ahed's claims of abuse are unsubstantiated and Mohamad vehemently denies the allegations. Mohamad has maintained from the outset that Ahed is attempting to use these proceedings to gain legal status in the US for her and her family. AA000015.

[30] Shannon v. State, 105 Nev. 782, 792, 783 P.2d 942, 948 (1989); Despite all the vile allegations, no charges have been brought by the authorities against Mohamad.

[31] Monasky v. Taglieri, 140 S.Ct. 719, 729 (2020).

[32] NRS 125A.335(2) In relevant part states: If there is no previous child custody determination that is entitled to be enforced pursuant to the provisions of this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction pursuant to NRS 125A.305, 125A.315 and 125A.325

longer a dependent as defined by the F-2 VISA and has no legal rights to remain in the United States.[33] This case is about the proper forum and Nevada is not it. Ahed can avail herself of the courts in Saudi Arabia to effectuate her divorce.

DOMICILE AND SUBJECT MATTER JURISDICTION[34]

Nevada Rule of Civil Procedure 12(b)(1) allows a defendant to move for dismissal on the grounds that the court lacks jurisdiction over the subject matter of plaintiff's claims. Nev. R. Civ. Pr. 12(b)(1); Wright v. Incline Vill. Gen Improvement Dist., 597 F. Supp. 2d. 1191 (D. Nev. 2009), citing Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed. 2d 501 (1986). Once a 12(b)(1) defense is asserted the burden is on plaintiff to establish that the court has subject matter jurisdiction over the action. Assoc. of Medical Colleges v. United States, 217 F.3d 770, 778-779 (9th Cir. 2000).

Ahed has not met her burden. "A person residing in a given state is not necessarily domiciled there...."[35] Nevada law requires not only that a person reside in Nevada for six weeks but that it is accompanied by a bona fide intention to make

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[33] https://studyinthestates.dhs.gov/students/bringing-dependents-to-the-united-states

[34] Domicile regarding military members is not applicable as there is a specific federal statute governing their domicile. Nor was it briefed during the Motion to Dismiss.

[35] Gaudin v. Remis, 379 F.3d 631, 636 (9th Cir. 2004); *citing* Kanter v. Warner–Lambert Co., 265 F.3d 853, 857 (9th Cir.2001) (citing Lew v. Moss, 797 F.2d 747, 749 (9th Cir.1986))

Nevada their home and to remain in Nevada permanently or at least for an indefinite time. Aldabe v. Aldabe, 84 Nev. 392, 396, 441 P.2d 691, 694 (1968); Williams v. North Carolina, 325 U.S. 226, 241(1945); citing Lamb v. Lamb, 57 Nev. 421, 65 P.2d 872 (1937). "In Aldabe v. Aldabe, this court cited Fleming and a host of other Nevada cases for the proposition that '[r]esidence is synonymous with domicile and it is consonant with the many decisions of our court that the *fact* of presence together with *intention* comprise bona fide residence for divorce jurisdiction.'" Vaile v. Eighth Judicial Dist. Court ex rel. Cty. of Clark, 118 Nev. 262, 269–70, 44 P.3d 506, 511 (2002) "It is held that no jurisdiction for divorce can be acquired through accrual of the cause of action within the county unless both parties were then actually domiciled therein." State ex rel. Hoffman v. Second Judicial Dist. Court, 68 Nev. 333, 335, 232 P.2d 397, 398 (1951). This Court has made it clear that it will prohibit district courts from invoking subject matter jurisdiction when it would upset nationwide public policy.[36]

Ahed cannot form the subjective intent to remain in the United States or Nevada per Park as will be discussed *infra*, but Ahed appears never to have had the subjective intent to remain in Nevada, because when she called LVMPD on February 9, 2020, she informed them her brother in law was on the way to pick her up from

[36] *See* Friedman v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark, 127 Nev. 842, 854, 264 P.3d 1161, 1169 (2011).

Maryland. It appears Ahed only changed her mind about going to Maryland when the officer let her know that she could not leave Nevada with the Minor.

NONIMMIGRANT ALIEN DOMICILIARY INTENT

Domicile is primarily a creature of state law, but federal immigration laws impose outer limits on a state's freedom to define it.[37] Park is not the first case to preclude nonimmigrant aliens from forming the legal capacity to establish domicile in the United States. Nor is Park the first case to preclude domicile involving child custody matters.[38] There are numerous cases prior to Park in the 9th Circuit and in the United States Supreme Court that have previously held nonimmigrant aliens cannot form the subjective intent to be domiciled in the United States. Park simply applies the United States Supreme Court and 9th Circuit Court's precedent to a divorce matter.

Mohamad came to the United States on an F-1 nonimmigrant Visa to pursue his graduate degree at UNLV. A nonimmigrant student is defined as "an alien having a residence in a foreign country which he has no intention of abandoning… and who seeks to enter the United States temporarily and solely for the purpose of pursuing… a course of study…"[39] "Congress has precluded the covered alien from establishing

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[37] Park v. Barr, 946 F.3d 1096, 1098 (9th Cir. 2020); see Toll v. Moreno, 458 U.S. 1, 10-11, 102 S. Ct. 2977 (1982).
[38] *See* Gaudin v. Remis, 379 F.3d 631 (9th Cir. 2004)
[39] Elkins v. Moreno 435 U.S. 647, 665 (1978).

domicile in the United States."[40] Nonimmigrants cannot establish domicile as "Congress expressly conditioned admission… on an intent not to abandon a foreign residence".[41] In fact, the United States Supreme Court opined "that Congress intended that, in the absence of an adjustment of status… nonimmigrants in restricted classes who sought to establish domicile would be deported." Elkins v. Moreno 435 U.S. at 666.

It is undisputed that Ahed and Mohamad came to the United States on nonimmigrant Visas, thereby precluding either party from establishing domiciliary intent to remain in the United States. As neither party can lawfully form the necessary subjective intent to remain in Nevada the parties should be prohibited from divorcing in Nevada. Especially as Ahed has violated her Visa conditions since she is no longer a dependent as defined by congress and interpreted by the Department of Homeland Security of Mohamad and her presence in the country is illegal.

This is further illustrated by the holding in Gaudin v. Remis, Gaudin's children were retained in Hawaii despite Canada being their Habitual Residence. Gaudin, 379 F.3d at 634. Thereafter, Gaudin moved to Hawaii from Canada and sold all of her real property in Canada and moved all of her belongings from Canada to Hawaii. Gaudin, 379 F.3d at 634.

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[40] Gaudin v. Remis, 379 F.3d 631, 637–38 (9th Cir. 2004); *citing* Toll v. Moreno, 458 U.S. 1, 14 & n. 20, 102 S.Ct. 2977, 73 L.Ed.2d 563 (1982).
[41] *See* Elkins v. Moreno 435 U.S. at 665

The Court stated if Gaudin moved to Hawaii "for the sole purpose of regaining custody of the children to return to Canada," than her petition would not be moot. Gaudin, 379 F.3d at 637. "Notwithstanding the objective evidence of Gaudin's move to Hawaii and the uncertainty concerning her subjective intent to relocate permanently there, […] Gaudin is precluded by law from relocating permanently to the United States." Gaudin, 379 F.3d at 638. Gaudin a Canadian citizen invoked the Immigration and Nationality Act ("INA") § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B), to enter the United States, that provision has the same language as the F1 Visa in that it required her not to abandon her residence in a foreign country. Id. Accordingly, the Court held, "Gaudin is barred by law from possessing the requisite intent to establish domicile in Hawaii." Id; *See also* Graham v. INS, 998 F.2d 194, 196 (3d Cir. 1993) ("If petitioner complied with the terms of his temporary worker visa, then he could not have had the intent necessary to establish a domicile in this country. On the other hand, if he did plan to make the United States his domicile, then he violated the conditions of his visa and his intent was not lawful. Under either scenario, petitioner could not establish 'lawful domicile' in the United States while in this country on a nonimmigrant, temporary worker visa.").

Similar to Gaudin, Mohamad and Ahed are barred by law from possessing the requisite intent to domicile in Nevada. Mohamad's Visa restricts him from having such intent. Mohamad, currently only remains in the United States so he can be close

to his son and for the sole purpose of effectuating the return of his to Saudi Arabia. Mohamad has always complied with the terms of his Visa by not abandoning his residence abroad, but Gaudin shows even if Mohamad were to have disposed of all of his property in Saudi Arabia he still could not legally obtain domicile in the United States or Nevada.

Park while not the first Court to decide domicile in the nonimmigrant context has made it abundantly clear that a nonimmigrant cannot lawfully form the subjective intent necessary to remain in the United States in the divorce context. Park interpreted California Marriage law which is substantially similar to the Nevada requirements for Divorce in that it requires "(1) physical presence ... with (2) an intention to remain there indefinitely."[42]

In Park, Woul Park and her husband were married in Korea and after overstaying their VISA in the United States ultimately divorced at the Korean Consulate in California, the lower court determined the divorce was not valid as they held the parties were domiciled in California.[43] The 9th Circuit ultimately reversed holding a nonimmigrant, was precluded from establishing lawful domicile in California by operation of federal law and thereafter upholding a later marriage of

[42] Park v. Barr, 946 F.3d 1096, 1098 (9th Cir. 2020); *citing* In re Marriage of Tucker, 226 Cal. App. 3d 1249, 1258–59, 277 Cal.Rptr. 403 (1991)
[43] Park v. Barr, 946 F.3d at 1097.

Park and allowing her to become a U.S. Citizen.[44] The Court held that Congress has not permitted nonimmigrants to lawfully form a subjective intent to remain in the United States, as such an intent would conflict with Congress's definition of the nonimmigrant classification. Id. at 1100.

Further, Park held a nonimmigrant precluded from establishing residency could not gain residency by violating visa conditions because then her very presence in the country would be illegal. Park v. Barr, 946 F.3d at 1099; *citing* Carlson v. Reed, 249 F.3d 876, 880-81 (9th Cir. 2001). "Congress must have meant aliens to be barred from these classes if their real purpose in coming to the United States was to immigrate permanently."[45]

Mohamad is in no way arguing that the parties should not get divorced only that this is an improper forum. The Park court interpreted federal law for the 9th Circuit in a way that prevents nonimmigrant aliens from forming the lawful intent to domicile in the US, as domicile is a prerequisite to divorce in Nevada, this Court should ultimately uphold the decision dismissing the divorce action. Further, Park citing Elkins interpretation of the Immigration and Nationality Act makes it clear that if the real purpose of the nonimmigrant alien is to come to the United States so they can immigrate permanently they will be barred and deported. Mohamad has

[44] Id. at 1098.
[45] Park v. Barr, 946 F.3d 1096, 1099 (9th Cir. 2020); *Citing* Elkins, 435 U.S. at 665, 98 S.Ct. 1338.

maintained from the outset that the reason Ahed filed the restraining order and the reason she included her family in the description of his purported threats was solely for the purpose of helping her and her family immigrate from Saudi Arabia.

Ahed Cites to Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 13, 124 S. Ct. 2301, 2309, 159 L. Ed. 2d 98 (2004) for the proposition that the United States Supreme Court has deferred all family law issues to the states but the Court in that case made it clear that a substantial federal question that exists apart from family law i.e. immigration is appropriate for federal courts to address and the 9th circuit did exactly that in Park.

1. In Re Marriage of Dick

In Park, the Ninth Circuit Court eviscerated the California Court of Appeals rationale in reaching its holding in In re Marriage of Dick, 15 Cal. App. 4th at 154, 18 Cal.Rptr.2d 743, the Ninth Circuit declined to read Dick as applicable because it would conflict with federal law's interpretation of domicile. The Park Court ultimately read the holding of In Re Dick narrowly to accommodate the "preeminent role of the Federal Government with respect to the regulation of aliens within our borders." Park v. Barr, 946 F.3d at 1100; *citing* Toll, 458 U.S. at 10, 102 S.Ct. The Park Court noted the In Re Dick Court 'interpreted the word "residence" rather than "domicile"' while also pointing out that the In Re Dick court confoundingly interpreted California's civil code instead of its family law code to reach its

erroneous conclusion. The Park court ultimately held "Park was precluded from establishing domiciliary intent by virtue of her status as an out-of-status nonimmigrant[.]"

Nevada requires a party to be a domiciliary of the state in order to be able to maintain a divorce action. It is clear through a long of history of cases in the United States Supreme Court and the 9th Circuit that neither Ahed nor Mohamad can be domiciled in Nevada and therefore a divorce action cannot be maintained in the state. The fact that Ahed is no longer complying with the requirements of her Visa does not change the fact that she cannot establish domiciliary intent pursuant to Park and the rest of the cases in the United States Supreme Court and the 9th Circuit. Therefore this Honorable Court should uphold the District Court's ruling that it did not have subject matter jurisdiction to hear the divorce.

UCCJEA[46]

[46] Mohamad is aware that the Hague convention is not available in this matter but as in Ogawa the Court can issue return orders in substantial compliance with Hague case law authority and can look to case law interpreting the Hague to determine how to deal with an international custody dispute (Even when a country is not a party to the Hague convention, the court can properly order the return of a minor child.) *See* Ogawa v. Ogawa, 125 Nev. 660, 670–71, 221 P.3d 699, 706 (2009). Further, the Hague Convention was the foundation for the UCCJEA. In re Marriage of O.T. & Abdou El Alaoui Lamdaghri, No. E058911, 2018 WL 6242412, at *19 (Cal. Ct. App. Nov. 29, 2018), reh'g denied (Dec. 20, 2018)

Settling the forum for adjudication of a dispute over a child's custody, of course, does not dispose of the merits of the controversy over custody.[47] "[A] parent cannot create a new habitual residence by wrongfully removing and sequestering a child."[48] The lower Court discussed Custody and that Nevada could not be the Home State of the Minor as the parties had only recently moved from another country. In the May 20, 2020, hearing prior to supplemental briefing the court was very clear: "you cannot move here from another country, live here for six weeks and establish custody jurisdiction in Nevada this way."[49] The facts regarding the Minor's arrival in Nevada are uncontested.[50] The lower Court while not addressing child custody in its order was clear at both hearings, Nevada is not the child's home state "...your client was here for two months. The child is – home state is not Nevada." June 16, 2020 hearing.[51]

Home state is defined in Nevada as:

> **NRS 125A.085 "Home state" defined.** "Home state" means:
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> 1. The state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months, including any temporary absence from the state, immediately before the commencement of a child custody proceeding.

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[47] Monasky v. Taglieri, 140 S.Ct. 719, 729 (2020).
[48] Miller v. Miller, 240 F.3d 392, 400 (4th Cir. 2001)
[49] AA000516, Ln 8-10.
[50] Transcript is referenced as AA000390-414. Appendix appears to jump from AA000389 to 415. Pg. 4-5 of June 16, 2020 transcript.
[51] See fn 50. Pg. 15.

A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying NRS 125A.005 to NRS 125A.395, inclusive. Kar v. Kar, 132 Nev. 636, 639 (2016); *citing* NRS 125A.225(1). NRS 125A.305(1)(c) permits a court to exercise jurisdiction when other states that would have jurisdiction under paragraphs (a) or (b) have declined to do so "on the ground that a court of this State is the more appropriate forum to determine the custody of the child pursuant to NRS 125A.365 or 125A.375." This does not apply here because no state other than Nevada had the opportunity to decline jurisdiction. Id. at 642.

"Temporary absences do not interrupt the six-month pre-complaint residency period necessary to establish home state jurisdiction". Ogawa v. Ogawa, 125 Nev. 660, 662, 221 P.3d 699, 700 (2009). '"[A]nother aspect of the home state analysis, necessarily requires consideration of the parents' intentions, as well as other factors relating to the circumstances of the child's or family's departure from the state where they had been residing." In re Aiden L., 16 Cal. App. 5th 508, 518, 224 Cal. Rptr. 3d 400, 408 (2017).

Even when an entire family was temporarily absent from the state it did not deprive the Home State from having jurisdiction.[52] In Sarpel, the entire family left Florida for Turkey for 5 months and 29 days, the father was the only person to return

[52] Sarpel v. Eflanli, 65 So. 3d 1080, 1081 (Fla. Dist. Ct. App. 2011)

before 6 months expired, the father did not file a petition for two months after returning, the Court still held that the move to Turkey "was not intended to be a permanent move, characterizing the children's stay in Turkey…as a temporary absence." Id.

It is uncontested that Ahed and the Minor came to Nevada on January 13, 2020 so that Mohamad could conclude his studies at UNLV. It is uncontested that the parties VISA conditions by their very nature made their time in the United States temporary. It is uncontested that Ahed moved out of the shared Apartment on February 12, 2020, and that the Complaint was filed on March 24, 2020. Mohamad has reiterated throughout the proceedings that living in the United States was temporary. The Minor lived in Nevada for two months and eleven days prior to the commencement of the divorce action. It is uncontested that the parties had round trip tickets that had them scheduled to land in Saudi Arabia on or about June 18, 2020. There is no doubt Saudi Arabia remains the Minor's Home State.

Importantly, "a parent cannot create a new habitual residence by wrongfully removing and sequestering a child."[53] The UCCJEA was created to eliminate exploitable loop-holes and forum shopping.[54] Ahed is attempting to create a new

[53] Chambers v. Russell, No. 1:20CV498, 2020 WL 5044036, at *4 (M.D.N.C. Aug. 26, 2020) *citing* Miller v. Miller, 240 F.3d 392, 400 (4th Cir. 2001).

[54] In re Guardianship of K.B., 172 N.H. 646, 649–50 (2019).

loophole despite the fact she created the conditions for Mohamad not having returned to live in Saudi Arabia.

The argument that Ahed is advancing on page 28 would mean if a family came temporarily for business and they rented a house for thirty days they could subject themselves to having Nevada decide their child custody despite the fact they never gave up their permanent residence. Since under Ahed's reasoning all family members were present and currently "living" in Nevada. Further, under Ahed's line of reasoning the time frame could actually be even shorter and would create numerous exploitable loopholes, especially because under Ahed's rationale the parties don't have to give up their residence or domicile in their home state. This line of reasoning would upset nationwide public policy and create the very forum shopping the UCCJEA was created to prevent.

CHILD SUPPORT JURISDICTION

"We shall not entertain issues raised for the first time on appeal."[55] Ahed never raised the issue regarding child support jurisdiction in any briefing before the District Court. Mohamad does not agree to have child support order entered against him.

[55] See Cooke v. American Sav. & Loan Assn., 97 Nev. 294 (Adv.Op. 101), 630 P.2d 253 (1981); International Industries, Inc. v. United Mortgage Co., 96 Nev. 150, 153-54, 606 P.2d 163, 165 (1980); Central Bank v. Baldwin, 94 Nev. 581, 583 P.2d 1087 (1978); Penrose v. O'Hara, 92 Nev. 685, 557 P.2d 276 (1976); Young Electric Sign Co. v. Erwin Electric Co., 86 Nev. 822, 828, 477 P.2d 864, 868 (1970); Clark County v. State, 65 Nev. 490, 506, 199 P.2d 137, 144 (1948).

Mohamad is not currently working. "The district court never reached the merits of this request and resolving this issue will require factual determinations, that issue must be addressed by the district court in the first instance." Randall v. Caldwell, No. 73533, 2018 WL 3351975, at *3 (Nev. App. June 22, 2018); *See* Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc., 128 Nev. 289, 299, 279 P.3d 166, 172-73 (2012) (noting that trial courts are better suited to make factual determinations in the first instance). If this Honorable Court issues a return order as discussed *infra*, it will not need to reach this ultimate decision as the Minor and Mohamad will leave Nevada. "[B]ecause Pennsylvania is the child's home state, the Pennsylvania child support order controlled. **NRS 130**.207(2) (providing that if two states have continuing, exclusive jurisdiction because at least one of the parties resides in each of the states, the order from the state in which the child resides controls). Thus, the district court did not err in relinquishing jurisdiction over child support to the Pennsylvania court."[56] Here, the Home state of the child is Saudi Arabia and Nevada should relinquish jurisdiction over child support to Saudi Arabia.

[56] Henderson v. Henderson, 131 Nev. 1290 (2015)

SAUDI ARABIA CAN BE CONSIDERED A STATE[57]

The UCCJEA "mandates that any foreign nation must be treated as if it were a state within the United States for purposes of jurisdiction and inter-court cooperative mechanisms. The UCCJEA is not a reciprocal act. There is no requirement that the foreign country enact a UCCJEA equivalent."[58] The UCCJEA is intended to eliminate competition between courts in matters of child custody, with **jurisdictional priority conferred to a child's home state**.[59] The UCCJEA does not provide exceptions for foreign countries that have no diplomatic jurisdiction with the United States to be deemed anything but a State, nor should a Court read that exception into the Statute.[60] **That a foreign jurisdiction's law is different or strikes us as outdated is not an indication that it violates fundamental principles of human rights, and, therefore, that is not the test under the UCCJEA.[61]**

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[57] This issue was not briefed during the motion to dismiss or supplemental briefing. It was briefed and ultimately undecided as it was filed in the underlying case after it was dismissed. In the interest of expediting this matter, it will be fully addressed.
[58] S.B. v. W.A., 38 Misc. 3d 780, 809, 959 N.Y.S.2d 802 (Sup. Ct. 2012), aff'd sub nom. Badawi v. Wael Mounir Alesawy, 135 A.D.3d 792, 24 N.Y.S.3d 683.
[59] Id.
[60] People In Interest of A.B-A., 2019 COA 125, ¶ 45, 451 P.3d 1278, 1287.

[61] Matter of Yaman, 167 N.H. 82, 105 A.3d 600, 611 (2014); *See* Coulibaly v. Stevance, 85 N.E.3d 911, 917 (Ind. Ct. App. 2017) *See* D. Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 Fam. L. Q. 547, 565 (2004)("…that the provision not become the basis for magnifying every difference between the U.S. legal system and that of a foreign nation to virtually stymie effective application of the UCCJEA in international cases.")

Courts interpreting the UCCJEA's Escape clause (commonly known as the human rights exception) routinely look to Article 20 of the Hague convention for assistance in interpreting the clause. People In Interest of A.B-A., 2019 COA 125, ¶ 29, 451 P.3d 1278, 1285. The Article 20 defense is to be "restrictively interpreted and applied." Id. *citing* U.S. State Dep't, Hague International Child Abduction Convention: Text and Legal Analysis, Pub. Notice*, 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986)*. The defense is to be invoked only on 'the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process." Id. It "is not to be used ... as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed." Id.

The Article 20 defense has yet to be used by a federal court to deny a petition for repatriation. Souratgar v. Lee, 720 F.3d 96, 108–09 (2d Cir. 2013). *Citing* Fed. Jud. Ctr., *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* 85 (2012). "In urging the Article 20 exception in this case, Lee insists broadly that Syariah Courts are incompatible with the principles "relating to the protection of human rights and fundamental freedoms" of this country. **While this general assertion might find sympathy among some in this country as a political statement, we decline to make this categorical ruling as a legal matter."** Id. **(***emphasis added***).**

In Coulibaly, the court had to make a decision regarding Mali as a Home State the court followed the intent of the UCCJEA and opined "it clear that our scrutiny is limited to Mali's child custody law and not on other aspects of its legal system, including the law (or absence of law) concerning [Female Gentile Mutilation]."[62] Coulibaly also discussed parental preference stating "custodial preferences are not foreign to American jurisprudence. Indeed, gender-based custody preferences were the norm in the United States in the not-so-distant past."[63]

"Jurisdictional issue is limited to determining whether another forum is available with jurisdiction which will determine the child custody issue in accord with minimum due process and award custody on the basis of the best interests of the child. Collateral matters relating to the culture, mores, customs, religion, or social practices in that other forum are not only irrelevant to the question of jurisdiction but also such cultural comparisons have no place in the ultimate custody award."[64]

The UCCJEA was created to eliminate forum shopping. Saudi Arabia is the proper jurisdiction and is available to decide the custody matters in accord with the minimum due process and make the award based on the best interest of the child.

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[62] Coulibaly v. Stevance, 85 N.E.3d 911, 920–21 (Ind. Ct. App. 2017).
[63] Id.
[64] State ex rel. Rashid v. Drumm, 824 S.W.2d 497, 505 (Mo. Ct. App. 1992).

While Ahed attempts to make a categorical statement that countries with Sharia Courts cannot be considered a Minor's home state. No Court has actually reached that decision. In fact as discussed above most courts have found the complete opposite. Ahed cites to Ali v. Ali, for the proposition that the "the law of the Sharia court was arbitrary and capricious" but fails to discuss that New Jersey was the home state of the minor not Gaza, the party attempting to enforce the Sharia Court order failed to provide a copy of the Gaza decree, and that there was a lack of notice to the other party.[65] Additionally, the sentence cited while sounding very drastic was talking about the specific Sharia court and not Sharia Courts in general.

After the Ali v. Ali, decision the New Jersey Supreme Court decided Ivaldi. In Ivaldi the New Jersey Supreme Court held "We trust, however, that the Moroccan court will consider the child's best interests in fashioning a custody order. In that regard, the Hague Convention on Jurisdiction seeks to assure that the best interests of the child is the primary consideration in all international disputes involving children…We trust further that the Moroccan court will consider the parties' separation agreement, including its provision calling for the application of New Jersey law. Our goal is to further the purposes of the Act and of the Hague Convention on Jurisdiction by avoiding jurisdictional competition while

[65] Ali v. Ali, 279 N.J. Super. 154, 167, 652 A.2d 253, 259 (Ch. Div. 1994).

simultaneously discouraging parents from unilaterally removing their children to obtain a more favorable forum."[66] The Court went on to discuss why it ultimately declined to assume jurisdiction "If the Family Part dismisses this action, the dismissal will not preclude a New Jersey court from subsequently reviewing the enforceability of the Moroccan custody decree. For example, if the Moroccan court denies the father procedural due process or refuses to consider Lina's best interests, the Family Part may then refuse to enforce the Moroccan decree. Id.

Here, there is nothing in the record that would show that Saudi Arabia would not provide due process to all parties involved or make a decision based on the best interest of the child.[67] Instead Ahed makes categorical statements that no Minor should ever be returned to his Home State if he is from a non-Hague country.

RETURN ORDER

A child wrongfully removed from her country of "habitual residence" ordinarily must be returned to that country.[68] The Convention ordinarily requires the

[66] Ivaldi v. Ivaldi, 147 N.J. 190, 206–07, 685 A.2d 1319, 1327–28 (1996).
[67] While not properly before the court at this time (see fn 57), please see AA000442-449 as it was included in the record and Ahed made numerous arguments about Saudi Arabia not being able to be a Home State, even though it was not briefed during the motion to dismiss but briefed in subsequent motions, for which a notice of appeal will be filed today.
[68] Monasky v. Taglieri, 140 S. Ct. 719 (2020).

prompt return of a child wrongfully removed or **retained** away from the country in which she habitually resides(*emphasis added*).[69]

The UCCJEA does not require a full evidentiary hearing; rather it aims for the speedy resolution of jurisdictional challenges.[70] "Following the example set in Monasky, we do not remand for the district court to reconsider because to do so would **'consume time when swift resolution is the Convention's objective,'** and there is no indication that **'the District Court would appraise the facts differently on remand.'"**[71]

Here, the District Court based on the undisputed record of when the parties arrived, and the parties Visa Conditions has already indicated at both the hearing held on the Motion to Dismiss and supplemental briefing hearing that the Court would find Nevada was **not** the Minor's Home State. There is nothing in the appeal that would likely lead the District Court to apprise the facts differently on remand.

Thus, this Honorable Court should issue a return order or a substantially similar order so that Mohamad can return to Saudi Arabia with the minor child. The

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[69] Monasky v. Taglieri, 140 S. Ct. 719, 723 (2020); *citing* Art. 12, Treaty Doc., at 9 (cross-referencing Art. 3, *id.*, at 7); *see also* Chafin v. Chafin, 568 U.S. 165, 180, 133 S. Ct. 1017, 1028, 185 L. Ed. 2d 1 (2013) (The Hague Convention mandates the prompt return of children to their countries of habitual residence.)

[70] Chaker v. Adcock, 464 P.3d 412 (Nev. App. 2020); *citing* In re Yaman(*sic*), 105 A.3d 600, 613-14 (N.H. 2014).

[71] Smith v. Smith, No. 19-11310, 2020 WL 5742023, at *4 (5th Cir. Sept. 25, 2020) *citing* Monasky, 140 S. Ct. at 731; *see also* Farr v. Kendrick, No. 19-16297, 2020 WL 4877531, at *2 (9th Cir. Aug. 20, 2020).

Supreme Court of the United States has indicated that the Hague Convention "is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence."[72][73] When a Court does not order the prompt return of a child, the child loses precious months in which the child could have been readjusting to life in her country of habitual residence.[74]

The Minor has already lost precious months since this action was instituted in which he could be readjusting to life in his Home State especially during the ongoing pandemic. The Minor is almost two years old now and is barely entering his formidable toddler years in which he will really begin learning to speak. Delaying his return to his Home State will only serve to prevent the process of readjustment that is so critical. Especially, since he is currently being shuffled between a shelter and an apartment.

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[72] Mohamad is aware the Hague convention is not available here but as in Ogawa this Court can issue a return orders by interpreting Hague case law to determine how to deal with an international custody dispute *See* Ogawa v. Ogawa, 125 Nev. 660, 670–71, 221 P.3d 699, 706 (2009).

[73] Cook v. Arimitsu, No. A19-1235, 2020 WL 1983223, at *3 (Minn. Ct. App. Apr. 27, 2020); *citing* Abbott v. Abbott, 560 U.S. 1, 20, 130 S. Ct. 1983, 1995 (2010); *see also* Monasky, 140 S. Ct. at 723 (recognizing that the "core premise" of the Hague Convention is that the children's best interests are generally "best served when custody decisions are made in the child's country of habitual residence").

[74] *See* Chafin 568 U.S. at 178.

This Court has previously "decline[d] to adopt a bright-line rule prohibiting out-of-country visitation by a parent whose country has not adopted the Hague Convention or executed an extradition treaty with the United States" and that was when the minor's Home State was actually Nevada.[75] Based on this Court's precedent, the Minor should not be barred from returning to his non-Hague Home State of Saudi Arabia. This Honorable Court should issue a return order as was done by the United States Supreme Court in Monasky and the various Federal Circuit Courts that have since interpreted Monasky since it was decided earlier this year so the minor can be promptly returned to his Home State.

CONCLUSION

This Court should uphold the lower Court's Decision as it properly interpreted Park and the litany of other cases deciding domicile and lawful subjective intent as it relates to non-immigrant aliens and hold that nonimmigrant aliens cannot legally form the intent necessary to be domiciled in the United States and therefore cannot be divorced in Nevada.

After which, this Honorable Court should issue an order pursuant to the United States Supreme Court's decision in Monasky and issue a return order for the

[75] Davis v. Ewalefo, 131 Nev. 445, 454, 352 P.3d 1139, 1145 (2015); *see also* Long v. Ardestani, 241 Wis.2d 498, 624 N.W.2d 405, 417 (Wis.Ct.App.2001) (finding no cases that "even hint" at a rule that provides, "as a matter of law that a parent ... may not take a child to a country that is not a signatory to the Hague Convention if the other parent objects").

Minor to his Home State of Saudi Arabia, as remanding to the District Court would consume time when swift resolution is the UCCJEA's objective, and there is no indication the District Court would appraise the facts differently on remand.

DATED this 12th day of November, 2020.

Respectfully submitted by:

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VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This fast track response has been prepared in a proportionally spaced typeface using Microsoft Word in font size 14 and type style Time New Roman

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) and/or this Court's October 28, 2020 Order because it is:

Proportionately spaced, has a typeface of 14 points or more, and contains 7,637 words.

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3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 12th day of November, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of MARKMAN LAW, and that on this 12th day of November, 2020, a document entitled **RESPONDENT MOHAMAD ALHULAIBI'S FAST TRACK RESPONSE** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows, to the attorneys listed below at the address, email address, and/or facsimile number indicated below:

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