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Far from Now-Settled: The Supreme Court's Decision in *Lozano v. Montoya Alvarez* as a Violation of Substantive and Procedural Due Process Under the International Child Abduction Remedies Act

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FAR FROM NOW-SETTLED: THE SUPREME COURT’S DECISION IN LOZANO V. MONTOYA ALVAREZ AS A VIOLATION OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS UNDER THE INTERNATIONAL CHILD ABDUCTION REMEDIES ACT

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INTRODUCTION

In 2008, Manuel Lozano’s partner, Diana Montoya Alvarez, took their daughter from London and never returned.¹ Lozano finally found them in New York over a year later and filed a Petition for Return of Child under both the Hague Convention (“the Convention”) and the International Child Abduction Remedies Act (“ICARA”), which were both created to deter

* Juris Doctor Candidate, May 2019, Incoming Note & Comment Editor, Volume 27, American University Journal of Gender, Social Policy & the Law, B.A. American History, Franklin Pierce University. Supremely grateful for my fantastic editors and publication team. Endlessly thankful for my parents, David Michael Erler and Joan Belle Erler, for their constant love and support throughout my academic career. Finally, huge thanks to my faculty advisor Professor Rick Wilson for his wisdom and guidance.

1. See *In re Lozano*, 809 F. Supp. 2d 197, 209 (S.D.N.Y. 2011) (alleging that Lozano was physically and emotionally abusive to Montoya Alvarez and possibly to the child as well).

parents from abducting their children on an international level.²

When Lozano located his wife and daughter over sixteen months later, his petition to have his daughter returned to the United Kingdom was denied because she was “now-settled” in New York.³ The court also declined to extend the petition’s one-year filing period, even though the respondent concealed the child.⁴ Both the Second Circuit and the Supreme Court affirmed.⁵

In court, Montoya Alvarez relied on the “grave risk” defense and the “now-settled defense.”⁶ To satisfy the “grave risk” defense, the respondent needed to prove that returning her daughter to the U.K. would expose the child to harm or otherwise place her in an intolerable situation.⁷ The district court found that the evidence did not support a grave risk defense and only considered the now-settled defense.⁸ To satisfy this defense, the respondent must prove that it is in the child’s best interest to remain in his/her new environment where he/she has become settled after more than one year.⁹

The court determined that Lozano’s daughter became settled in New York during the time that she was concealed.¹⁰ The court declined to extend the one-year filing deadline to account for the months in which the child was

2. See generally Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, S Treaty Doc. No-99-11 [hereinafter Hague Convention]; International Child Abduction Remedies Act, 22 U.S.C. §§ 9001-9011 (2014); Laurie L. Trotter, Comment, *The Hague Convention Two Decades Later: Assessing the Effectiveness of the International Child Abduction Remedies Act*, 6 GONZ. J. INT’L L. 1 (2002-2003) (describing the relationship between the Hague Convention and its implementing legislation in the United States (ICARA)).

3. See *In re Lozano*, 809 F. Supp. 2d at 228 (explaining that removal may harm a child if he or she becomes settled in their new environment).

4. See *id.* at 228-29 (holding that equitable tolling will not be applied to the one-year filing period).

5. See *Lozano v. Montoya Alvarez*, 134 S.Ct. 1224, 1236 (2014) (affirming that equitable tolling will not be applied to the Hague Convention).

6. See *In re Lozano*, 809 F. Supp. 2d at 220 (noting that affirmative defenses may only be raised after one year).

7. See *id.* (clarifying that the respondent must establish the grave risk defense by clear and convincing evidence).

8. See *id.* at 225 (finding that the respondent had failed to establish clear and convincing evidence that returning to the U.K. would place the child at a grave risk of harm).

9. See *id.* at 226 (discussing the Convention’s rationale in setting the one-year threshold).

10. See *id.* at 234 (holding that the child had reached the point where she had become so settled in her new environment that repatriation would not be in her best interest).

concealed while also acknowledging that refusing to extend the deadline seemed inconsistent with the Convention goals.¹¹

Lozano appealed twice, ultimately losing his case before the Supreme Court of the United States.¹² The Supreme Court's decision in *Lozano* meant that equitable tolling would not be applied to the one-year filing deadline stipulated in the Convention and ICARA, regardless of whether an abducting parent conceals a child.¹³ By denying Lozano's petition, the Court ignored facts that pointed to Lozano's extensive efforts to locate his child, and that Lozano's petition merely sought to compel Montoya Alvarez and their daughter to return to the U.K. for custody evaluations.¹⁴

This Comment argues that refusing to apply equitable tolling to ICARA's one year filing period is an unconstitutional violation of a custodial parent's due process rights because it hinders custodial parents from utilizing the statutory processes afforded to them under ICARA when their children are abducted/removed from the country; additionally, it deprives custodial parents of their fundamental right to raise their children.¹⁵ Part II describes the creation of ICARA and the Convention, and how equitable tolling has been applied to ICARA.¹⁶ Part II further explains how equitable tolling is a matter of procedural due process, and how parental rights are protected as fundamental rights under the Fourteenth Amendment.¹⁷ Part III asserts that equitably tolling ICARA is necessary to protect custodial parents' procedural and substantive due process rights, and that judicial discretion is not an adequate substitute.¹⁸ Part IV recommends overturning *Lozano* and applying

11. See *id.* at 228 (acknowledging that refusing to apply equitable tolling to the deadline could encourage abducting parents to hide their children long enough for them to become settled).

12. See *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1236 (2014) (concluding that the Court of Appeals had rightly decided that the Hague Convention was not subject to equitable tolling).

13. See *Lozano*, 134 S. Ct. at 1236 (holding that the Convention drafters did not intend to apply equitable tolling). Note that for the purposes of this Comment, it is assumed that the substantive due process rights guaranteed under the Fourteenth Amendment extend to non-US citizens.

14. See *In re Lozano*, 809 F. Supp. 2d at 225 (referencing a doctor's testimony stating that returning to the U.K. would not result in trauma or bring about a grave risk of harm).

15. See generally U.S. CONST. amends. V, XIV (establishing that no person shall be deprived of life, liberty, or property without due process of law).

16. See *infra* Part II (documenting the origins of ICARA and how courts have applied or declined to apply equitable tolling to the statute).

17. See *id.* (detailing how U.S. courts have protected parental rights).

18. See *infra* Part III (asserting that equitably tolling ICARA will allow courts to properly protect custodial parents' due process rights).

equitable tolling to ICARA.¹⁹ Part V concludes by reiterating that the Supreme Court's decision in *Lozano v Montoya Alvarez* constitutes an unconstitutional violation of procedural and substantive due process and should be overturned in favor of equitable tolling in cases of child concealment.²⁰

II. BACKGROUND

A. International Child Abduction Laws

1. *The Hague Convention on the Civil Aspects of International Child Abduction*

According to the Department of Justice, more than three-fourths of all child abductions are committed by a family member.²¹ With the rise of international marriages, language barriers and foreign legal systems have created hurdles for parents attempting to reclaim their abducted children.²²

The creation of the Convention allowed courts to address the extreme difficulty parents face in regaining custody of their abducted children internationally.²³ Each state that ratifies the Convention is required to establish a central authority designed to locate abducted children and secure their return.²⁴ For the U.S., this is the Department of State.²⁵

To file a petition for the return of one's child, the Convention requires the

19. See *infra* Part IV (arguing that the Supreme Court should overturn their ruling in *Lozano* and allow equitable tolling to be applied to ICARA's one-year filing period).

20. See *infra* Part V (concluding that equitably tolling ICARA is a legitimate solution to protecting custodial parents' fundamental right to parent, as well as their due process rights).

21. See Blake Sherer, Comment, *The Maturation of International Child Abduction Law: From the Hague Convention to the Uniform Child Abduction Prevention Act*, 26 J. AM. ACAD. MATRIM. L. 137, 138 (2013) (referencing data from 1999 that analyzed child abductions on an international level).

22. See Dana R. Rivers, Comment, *The Hague International Child Abduction Convention and the International Child Abduction Remedies Act: Closing Doors to the Parent Abductor*, 2 TRANSNAT'L L. 589, 591, 639 (1989) (noting that it is difficult to obtain effective assistance from foreign authorities without proper international legislation).

23. See Sherer, *supra* note 21, at 147 (noting that the U.S. ratified the Convention in 1988 by passing ICARA).

24. See W. A. Stranko, *International Child Abduction Remedies*, 1993 ARMY L. 28, 28 (1993) (explaining that central authorities further Convention goals on a state level).

25. See *id.* at 29 (establishing the United States federal government as an enforcer of the Convention).

following: (1) the child must be taken to a state which has ratified the Convention, (2) the child must be under age sixteen, (3) the child must have crossed an international border, and (4) the petition must be filed with the central authority of the state where the abducted child has been taken.²⁶

Once the Department of State receives a petition, it has an obligation to take every appropriate measure dictated by Convention guidelines.²⁷ These measures, however, have a time limit; courts have a legal obligation to return an abducted child, but it is only triggered if a custodial parent files a petition within one year of the child's removal.²⁸ Under Convention guidelines, a court may decline the return order if an abducted child has become settled in her new environment.²⁹ Once a year has passed, an abducting parent may raise a now-settled defense to prevent the child from being returned under court order.³⁰

Judicial discretion determines whether a child is returned after a year has passed.³¹ Convention guidelines allow judges to examine the facts of each case to determine whether granting the petition would be in a child's best interest.³² This discretion is allowed because once a year has passed, a court's absolute obligation to return an abducted child to their home state becomes a permissive obligation dependent on the particular circumstances of the case.³³

26. See Trotter, *supra* note 2, at 9 (clarifying that ICARA applies only to abduction cases rather than custody issues, thus barring courts from ruling on non-jurisdictional matters).

27. See *id.* (articulating that the Department of State has a duty to initiate administrative proceedings and ensure a child's safe return should voluntary return negotiations fail).

28. See *id.* (emphasizing the difference between an absolute and permissive obligation; once a year has passed, the return obligation becomes permissive and up to judicial discretion).

29. See *id.* (explaining how judicial discretion is used to look after a child's best interests).

30. See *id.* (addressing the "now settled" affirmative defense, which relies on a child becoming settled within their new environment once a year has passed).

31. See *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1236 (2014) (noting that judicial discretion was used to determine that Lozano's daughter had become settled in New York).

32. See Trotter, *supra* note 2, at 8 (noting how the Convention responsibilities shift once one year has passed).

33. See *id.* (noting that after the one-year deadline, courts may use their discretion to consider affirmative defenses raised by respondents, who must provide clear and convincing evidence to support their claims).

2. *International Child Abduction Remedies Act*

When incorporating the Convention, the U.S. did more than establish the Department of State as a central authority; it also established the International Child Abduction Remedies Act (ICARA).³⁴ ICARA acknowledges the Convention as a sound framework to help resolve the issue of international child abduction.³⁵ ICARA ensures that Convention terms are smoothly implemented by resolving jurisdictional, evidentiary, and privacy issues particular to the U.S. legal systems.³⁶ Its purpose is to better serve Convention goals by expediting rulings and emphasizing quick turn-around times for U.S. petitions.³⁷

ICARA and the Convention are nearly identical but for a few additional conditions found in ICARA.³⁸ In addition to the Convention's filing requirements, ICARA specifies that an English version be included in all foreign correspondence related to the Convention and clarifies that the U.S. government will not assume any costs associated with returning an abducted child.³⁹

B. *Equitable Tolling and ICARA*

Prior to *Lozano*, multiple U.S. courts applied equitable tolling to the one-year filing deadline in cases where an abducting parent has concealed the location of the child.⁴⁰ In *Furnes v. Reeves*, the Eleventh Circuit became the

34. See International Child Abduction Remedies Act, 22 U.S.C. § 9001 (2014) (clarifying that the provisions in ICARA were intended to supplement, rather than replace, Convention provisions).

35. See *id.* (acknowledging that international agreement is necessary to effectively combat the issue of child abductions).

36. See Stranko, *supra* note 24, at 31 (noting that this was a rare example of the United States taking steps to make matters less complicated and more uniform).

37. See Trotter, *supra* note 2, at 11 (explaining that ICARA's goal is to serve the Convention's purpose of deterring international child abductions by expediting rulings in U.S. courts).

38. See *id.* at 5-6 (noting that language and financial conditions were added when ICARA was codified).

39. See *id.* (adding that such costs may include legal fees and court costs related to bringing litigation within the United States).

40. See, e.g., Duarte v. Bardales, 526 F.3d 563, 569 (9th Cir. 2008) (acknowledging that both the Convention and ICARA are silent as to whether equitable tolling should be applied to the one-year filing period). *But c.f.* Lynn D. Wardle, *Is the Now Settled Defense to a Hague Abduction Convention Claim for Return of a Child Subject to Equitable Tolling – Lozano v. Montoya Alvarez*, 41 A.B.A. PREVIEW U.S. SUP. CT. CASES 139, 142 (2013) (noting that while the Fifth, Ninth, and Eleventh Circuits allow equitable tolling of the “now settled” defense, the First and Second Circuits rejected it).

first circuit to decide that equitable tolling was applicable under ICARA.⁴¹ The *Furnes* court adopted the reasoning in *Mendez Lynch v. Mendez Lynch*, where the court held that equitable tolling applied to ICARA petitions because failing to apply it would otherwise reward an abducting parent for concealing their children for one year.⁴²

In *Mendez Lynch v. Mendez Lynch*, the mother unlawfully removed her two minor children without her husband's consent on January 19, 2000.⁴³ The petitioning father filed a missing person report two days later and began his own investigation.⁴⁴ Three months later, he learned that his family was in Florida.⁴⁵

The court in *Mendez Lynch* noted that the father did not file the petition until more than a year after the mother wrongfully removed the children.⁴⁶ However, the court also noted that in this case equitable tolling would apply until July 6, 2000, as this was the deadline the State Department gave the mother to decide whether to voluntarily return the child.⁴⁷ The father had filed the petition in a timely fashion and the mother could not raise an affirmative defense.⁴⁸ The court stated that there was no indication Congress intended to preclude equitable tolling from ICARA's one-year filing

41. See generally *Furnes v. Reeves*, 362 F.3d 702, 723 (11th Cir. 2004) (citing *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1374, 1362-63 (M.D. Fla. 2002) (adopting the district court's reasoning in *Mendez Lynch* that equitable tolling could apply in ICARA cases where the abducting parent has concealed the child's location).

42. See *Mendez Lynch*, 220 F. Supp. 2d at 1362-63 (reasoning that equitable tolling should be read into every federal statute of limitations unless Congress states otherwise). Cf. *Yaman v. Yaman*, 730 F.3d 1, 16, 19 (2013) (asserting a court's discretion even if a child is already settled in their new environment).

43. See *Mendez Lynch*, 220 F. Supp. 2d at 1359 (rejecting the notion that the removal was a "vacation").

44. See *id.* at 1352 (noting that the petitioner revoked his written permission for his children to travel without his presence).

45. See *id.* at 1354 (adding that a pastor told the petitioner his family was somewhere in Florida just before April 2, 2000).

46. See *id.* at 1362 (noting that the petition was also not filed within one year of the wrongful retention date, which was March 7, 2000).

47. See *id.* at 1363 (emphasizing that the respondent had taken active and consistent steps to prevent contact between the petitioner and his children until November of 2000). *Contra Anderson v. Acree*, 250 F. Supp. 2d 872, 875 (S.D. Ohio 2002) (clarifying that a risk of harm to the child remains even where the petitioner has a good reason for not filing sooner).

48. See *Mendez Lynch*, 220 F. Supp. 2d at 1363 (concluding that the children were not well-settled in Florida because they had lived in seven different locations within one year).

deadline.⁴⁹ It pointed out that refusing to apply equitable tolling would reward abducting parents for concealing their children and allow parents to assert affirmative defenses that would be otherwise unavailable.⁵⁰

Similarly, the court in *Furnes v. Reeves* equitably tolled the one-year limitation period until the petitioner located his missing daughter.⁵¹ Like the court in *Mendez Lynch*, the Eleventh Circuit acknowledged that equitable tolling could apply to ICARA petitions when the abducting parent has concealed the child.⁵²

When it decided *Lozano*, the trial court acknowledged that its refusal to apply equitable tolling went against prior district court decisions.⁵³ It based its holding on *Matovski v. Matovski*, which emphasized that because parents could still file petitions after one year, the filing period is not a one-year statute of limitations.⁵⁴ However, the courts in *Matovski* and *Lozano* did not consider that rejecting equitable tolling creates a one-year statute of limitations that opens the door for parents to raise a now-settled defense while infringing on the co-parent's substantive and procedural due process rights.⁵⁵

49. See *id.* at 1362 (acknowledging that the Eleventh Circuit noted the similarities between this one-year period and a statute of limitations but was silent on whether equitable tolling applied to ICARA); see also *Lops v. Lops*, 140 F.3d 927, 946 (11th Cir. 1998) (agreeing that the one-year filing period was analogous to a statute of limitations).

50. See *Mendez Lynch*, 220 F. Supp. 2d at 1363 (noting that the respondent took several intentional steps to conceal her children, while the petitioner sought to resolve the issue without resorting to Convention proceedings).

51. See *Furnes v. Reeves*, 362 F.3d 702, 723 (11th Cir. 2004) (noting that *Furnes*' daughter was removed in the summer of 2001, but no petition was filed until November of 2002).

52. See *id.* (citing *Young v. United States*, 535 U.S. 43 (2002)) (reasoning that equitable tolling should apply to limitation periods unless it would be inconsistent with the statute's text). *Contra* *Yaman v. Yaman*, 730 F.3d 1, 16 (1st Cir. 2013) (reasoning that if the drafters of the Convention had meant for the one-year period to start once the petitioner knew the child's location, they would have said so).

53. See *In re Lozano*, 809 F. Supp. 2d 197, 228 (S.D.N.Y. 2011) (acknowledging that only a few other courts reject equitable tolling on the basis that the one-year period is not a statute of limitations).

54. See *id.*; see also *Matovski v. Matovski*, No. 06 Civ. 4259(PKC), 2007 WL 2600862, at *9 (S.D.N.Y. Aug. 31, 2007) (stating that the now-settled defense recognizes that after one year, it may not be in the child's best interest to be removed from their environment).

55. See *Furnes v. Reeves*, 362 F.3d 702, 723 (11th Cir. 2004) (arguing that equitable tolling should apply to limitation periods unless it would be inconsistent with a statute's text).

C. *Equitable Tolling as a Due Process Requirement*

Courts find equitable tolling necessary to meet certain constitutional due process requirements.⁵⁶ The issue is determining when exactly this process is due and under what circumstances.⁵⁷ The Supreme Court noted in *Mathews v. Eldridge* that due process is a flexible concept with procedural protections largely determined by the demands of specific situations.⁵⁸ Three factors determine when a specific process is due: (1) the presence of a private interest that will be affected by official action, (2) the risk of erroneous deprivation of this interest through the current procedures used, and (3) the probable value of additional or substitute procedural safeguards and governmental interest in the matter.⁵⁹

Procedural due process such as equitable tolling protects individuals by imposing constraints on governmental decisions that deprive individuals of liberty or property interests.⁶⁰ As such, the Court in *Mathews* found that procedure must be tailored to the capacities and circumstances of those who are to be heard to ensure that they are given a meaningful opportunity to present their case.⁶¹ The Court's concern was satisfying a fundamental requirement of due process by giving individuals the opportunity to be heard at a meaningful time and in a meaningful manner.⁶²

A state's power to regulate the procedures under which its laws are carried out are only limited by the Due Process Clause when the procedure offends some principle of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁶³ The Supreme Court subjected the

56. See generally U.S. CONST. amends. V, XIV (establishing that no person shall be deprived of life, liberty, or property without due process of law).

57. See *Holland v. Florida*, 560 U.S. 631, 633 (2010) (holding that equitable tolling is not warranted in a statutory matter when there is only a "garden variety claim of excusable neglect").

58. See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (adding that due process must flexibly address each case's circumstances).

59. See *id.* at 335, 340 (using these factors to hold that the Due Process Clause does not require an evidentiary hearing prior to terminating Social Security disability benefit payments).

60. See *id.* at 332 (adding that these interests must fall within the meaning of the Due Process Clauses of the Fifth and Fourteenth Amendments).

61. See *id.* at 349 (defending an individual's right to have their case heard in a U.S. court of law).

62. See *id.* at 333 (emphasizing the timeliness of hearing cases and the availability of courts).

63. See *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (holding that placing the burden of proving an affirmative defense by preponderance of the evidence on the defendant does not violate due process).

Antiterrorism and Effective Death Penalty Act (“AEDPA”) to this concept in *Holland v. Florida*, incorporating equitable tolling into the federal statute despite governmental protests.⁶⁴ The Court disagreed with the state’s argument that equitable tolling undermined the statute’s basic purpose of eliminating delays in the review process, since prior law determined timeliness under equitable principles.⁶⁵ The Court declined to interpret the statute’s silence on equitable tolling as “congressional intent to close courthouse doors that a strong equitable claim would keep open,” and held that a petitioner is qualified to equitable tolling if he shows: (1) that he has been pursuing his rights diligently and (2) that some extraordinary circumstances stood in his way and prevented a timely filing.⁶⁶

Though it is a federal statute, equitable tolling is not currently read into ICARA.⁶⁷ However, ICARA is “designed to honor the international philosophy of the Convention without violating U.S. constitutional standards of due process.”⁶⁸ Since ICARA is considered a domestic American law, a parent must receive due process and a fair opportunity to be heard by a court.⁶⁹ To be heard in a U.S. court, a custodial parent must submit a petition in English to the Department of State, in which they must also prove by a preponderance of the evidence that the abducting parent wrongfully took the child.⁷⁰ Likewise, proving an exception to ICARA, such as the now-settled defense, only requires a preponderance of the evidence on the part of the

64. See *Holland v. Florida*, 560 U.S. 631, 634 (2010) (allowing equitable tolling of AEDPA under extraordinary circumstance that amounted to more than mere excusable negligence).

65. See *id.* at 646-48 (noting that a non-jurisdictional statute of limitations is subject to a rebuttable presumption in favor of equitable tolling).

66. See *id.* at 649 (looking beyond the exact text and reading equitable tolling into the statute as a matter of American custom).

67. See Dorothy Carol Daigle, *Due Process Rights of Parents and Children in International Child Abductions: An Examination of the Hague Convention and its Exceptions*, 26 VAND. J. TRANSNAT’L L. 865, 882-83 (1993) (noting that Convention proceedings do not guarantee a custody hearing which satisfies due process); Nicole Fontaine, *Don’t Stop the Clock: Why Equitable Tolling Should Not Be Read into the Hague Convention on International Child Abduction*, 54 B.C. L. REV. 2091, 2105-06 (2013) (finding a “lack of support for equitable tolling in the text and drafting history of the Convention and ICARA).

68. See Rivers, *supra* note 22, at 638 (speculating that judicial discretion could pose a risk to the effectiveness of ICARA if statutory exceptions become too widespread).

69. See Daigle, *supra* note 67, at 893 (adding that a custodial parent has a right to be heard before they lose custody of their child).

70. See Rivers, *supra* note 22, at 634-35 (noting that once a petition is submitted, the respondent must receive notice).

respondent.⁷¹

D. Parental Rights and Substantive Due Process

The U.S. Supreme Court affords great deference to parental rights.⁷² In *Meyer v. Nebraska*, the Court emphasized that parents have a substantive right to raise their children.⁷³ Furthermore, the Court stated that parents have a natural duty to give their children a suitable education.⁷⁴ The Court in *Pierce v. Society of Sisters* reinforced this opinion when it held that a statute mandating children to attend public schools unreasonably interfered with the liberty of parents to direct the upbringing and education of their children.⁷⁵

The Fourteenth Amendment grants parents the freedom to retain custody of their children, as well as to nurture and care for them, although not without limits.⁷⁶ In *Paris Adult Theater v. Slaton*, the Court deemed child rearing to be a fundamental right that falls under one's guaranteed right to privacy.⁷⁷ The Court further stated in *Wisconsin v. Yoder* that Western civilization

71. See *id.* at 636-37 (emphasizing that the "now settled" defense can be proven by a preponderance of the evidence, while the grave risk defense must be proven by clear and convincing evidence).

72. See Christopher Klicka, [italics] *Decisions of the United States Supreme Court Upholding Parental Rights as "Fundamental,"* HOME SCH. LEGAL DEF. ASS'N: CURRENT ISSUE ANALYSIS (Oct. 27, 2003), <https://hslida.org/content/docs/nche/000000/00000075.asp> (elaborating that the Supreme Court "has unwaveringly given parental rights the highest respect and protection possible."); see, e.g. *Meyer v. Nebraska*, 262 U.S. 390, 390 (1923) (holding that a statute barring the teaching of foreign languages in schools violates the Fourteenth Amendment).

73. See *Meyer*, 262 U.S. at 400 (acknowledging that the right of parents to educate their children falls within the liberty protected by the Fourteenth Amendment); see also *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (affirming *Meyer's* holding that parents have a right to control their children's religious upbringing and education).

74. See *Meyer*, 262 U.S. at 400 (noting that parents had a right to ask the plaintiff to instruct their children in a foreign language, and thus the plaintiff had a right to teach it).

75. See *Pierce v. Society of Sisters*, 268 U.S. at 534-35 (stating that parents have both the right and duty to prepare their children to survive in society); see generally *Farrington v. Tokushige*, 273 U.S. 284, 298-99 (1927) (barring a statute eliminating private schools because it would unreasonably restrict a parent's ability to direct their child's education).

76. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (clarifying that this right is not beyond government regulation in the public interest).

77. See *Paris Adult Theater v. Slaton*, 413 U.S. 49, 65 (1973) (elaborating that privacy rights also extend to matters of family and marriage); see also *Parham v. J.R.*, 442 U.S. 584, 603-06 (1979) (addressing a parent's right to make decisions regarding their child's mental health and stating that the notion that governmental power should supersede parental authority in all cases of parental neglect or abuse goes against American tradition).

traditionally supported parental concern for the upbringing of their children, and parents play a primary role in a child's upbringing.⁷⁸ The Court in *Carey v. Population Services International* clarified that an individual may make personal decisions relating to marriage and family relationships barring a compelling government interest.⁷⁹

The Court spoke further on matters of child custody in *Santosky v. Kramer*, holding that parental rights are fundamental and specially protected under the Fourteenth Amendment.⁸⁰ The Court distinguished these decisions in *Lehr v. Robertson*, where the Court ruled against a birth father's rights on the basis that he did not have a sufficient custodial, personal, or financial relationship with his child.⁸¹ Meanwhile, the Court strengthened parental rights in *Vernonia School District 47J v. Acton*, reasoning that because most minors lacked fundamental rights of their own, parents who possess such rights must use them in their child's best interests.⁸² Finally, in *Troxel v. Granville*, the Court established a strict scrutiny test and held that the government cannot infringe on parents' rights to control their children's upbringing unless the government uses the least restrictive means to achieve a compelling government interest, validating its previous holdings that parental rights are worthy of substantial protections.⁸³

78. See *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972) (upholding the right to homeschool children and emphasizing that it is not enough that the regulation is reasonable; the government must have a compelling interest in order to obstruct such a right).

79. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977) (requiring regulations to be narrowly drawn to address compelling state interests).

80. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 37 (1981)) (holding that termination procedures regarding parental rights must satisfy Due Process Clause requisites, regardless of whether an individual has been a model parent or has temporarily lost custody of their child to the state).

81. See *Lehr v. Robertson*, 463 U.S. 248, 268 (1983) (holding that parental rights are coupled with parental duties to prepare their children for societal obligations and that carrying out those duties affords a parent constitutional protections).

82. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (acknowledging that children are subject to the control of their parents, even regarding their physical freedom).

83. See, e.g. *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000) (blocking a Washington statute that allowed courts to order visitation rights for any person when it could serve the best interests of a child and supporting precedent that granted due process protection to parental rights); see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (holding that under strict scrutiny government practices restricting fundamental rights are "justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.").

III. ANALYSIS

A. ICARA Should be Subject to Equitable Tolling Even if it is Not Applied to the Hague Convention Because it is a Federal Statute Subject to U.S. Law and Customs Which Protect Individuals' Substantive and Procedural Due Process Rights

*1. ICARA as a Federal Statute was Created to Comply with U.S. Law and Customs*⁸⁴

ICARA should be subject to equitable tolling because it is a federal statute that must satisfy constitutional due process requirements.⁸⁵ When abducting parents conceal their children to wait out the filing deadline and raise affirmative defenses, the non-abducting custodial parent is robbed of the opportunity to be heard by the court in a timely manner and further denied fundamental parental rights when courts decline to apply equitable tolling.⁸⁶ To satisfy due process requirements, courts must consider ICARA's one-year filing period to be a statute of limitations subject to equitable tolling in cases of concealment.⁸⁷

Courts decline to apply equitable tolling to the one-year filing period because equitable tolling is not generally assumed to apply to conventions.⁸⁸

84. For the purposes of this analysis, it is interesting to note that not once in its reasoning against equitable tolling did the Supreme Court mention the long-standing precedent set in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), which states that "An act of Congress ought never to be construed to violate the law of nations if any other construction remains . . . further than is warranted by the law of nations as understood in the United States." If the Court truly believed that equitable tolling would violate the Hague Convention, an international treaty, then the *Charming Betsy* case should have been the first one they referenced rather than falling back on vague concepts of "American historical tradition."

85. See Rivers, *supra* note 22, at 638 (noting that ICARA is designed to honor the international philosophy of the Convention without violating U.S. constitutional standards of due process).

86. See *id.* (cautioning courts about allowing exemptions such as the "now settled" defense to lessen ICARA's effectiveness).

87. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (highlighting the Supreme Court's focus on satisfying a fundamental requirement of due process by giving individuals the opportunity to be heard at a meaningful time and in a meaningful manner); see, e.g., *Webb v. United States*, 66 F.3d 691, 701 (4th Cir. 1995) (applying this reasoning to concealment of tax fraud and stating that "as a general rule, . . . a statute of limitations is tolled by a defendant's fraudulent concealment . . . because it would be inequitable to allow a defendant to use a statute intended as a device of fairness to perpetrate a fraud").

88. See *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014) (detailing their

The court in *Yaman* examined Article 12 of the Convention and, though equitable tolling was not mentioned, the court stated that the text “suggested” that equitable tolling did not apply.⁸⁹ The court would ultimately find equitable tolling not just inapplicable, but unnecessary as applied to the Convention.⁹⁰

By extension, since ICARA is implementing legislation for the Hague Convention, courts that oppose equitable tolling assert that equitable tolling should not be read into ICARA either.⁹¹ This instinct to pair ICARA with the Convention speaks to courts’ tendencies to view the Convention and ICARA as indistinguishable.⁹² Anti-equitable tolling courts, such as those in *Yaman* and *Lozano*, further argue that if equitable tolling were applied to ICARA but not the Convention, the uniformity sought through ICARA would be undermined.⁹³

This view fails to take into account that while the Convention and ICARA are extremely similar, they are not identical because ICARA contains conditions that differentiate it from the Convention, which were added before ICARA was codified into U.S. law.⁹⁴ These conditions show that ICARA is its own federal statute, and should thus be treated as such by the U.S. legal system.⁹⁵

Anti-equitable tolling cases like *Yaman* rely far too heavily on the explicit text of the Convention, rather than properly treating ICARA as a federal

refusal to apply equitable tolling the Convention’s one-year filing period).

89. See *Yaman v. Yaman*, 730 F.3d 1, 12-13 (1st Cir. 2013) (quoting passages of Article 12 to note that The Convention does not mention the date a child’s location is discovered and instead relies on the date the child is removed or abducted).

90. See *id.* at 13 (stating that Article 12 already provides a mechanism to prevent misconduct from being rewarded in the form of judicial discretion).

91. See *id.* (declining to view the one-year filing period as a statute of limitations, which are traditionally subject to equitable tolling in federal statutes); see also *Lozano*, 134 S. Ct. 1236 (declining to recognize equitable tolling as a viable tool in ICARA cases since it was not mentioned by the drafters of the Convention).

92. See Trotter, *supra* note 2, at 6 (noting that while ICARA and the Convention are nearly identical, conditions regarding the language of documents and litigation costs were added to ICARA, distinguishing it as an independent piece of legislation).

93. See Stranko, *supra* note 24, at 31 (noting that ICARA’s uniformity keeps parents from abusing the system after abducting their children, as it does away with the possibility of dealing with fifty different state statutes).

94. See Trotter, *supra* note 2, at 5-6. (identifying the differences between ICARA and the Hague Convention that establish ICARA as its own federal statute).

95. See *id.* at 11 (explaining that ICARA’s goal is to expedite rulings to better serve the goals of the Hague Convention).

statute subject to U.S. customs and traditions.⁹⁶ The Supreme Court has previously declined to interpret a federal statute's silence on equitable tolling as "congressional intent to close courthouse doors that a strong equitable claim would keep open."⁹⁷ The Hague Convention neither allows nor forbids equitable tolling, so allowing equitable tolling aligns with the decision in *Furnes v. Reeves*, which reasons that equitable tolling should apply to limitation periods unless it would be inconsistent with the text of the relevant statute.⁹⁸ In *Holland v. Florida*, the Court held that equitable tolling could be applied to a statute of limitations if a petitioner diligently pursued her rights and if some extraordinary circumstances prevented her from filing her petition in a timely fashion.⁹⁹

ICARA's one-year filing period is essentially a statute of limitations and should be equitably tolled as per American legal custom.¹⁰⁰ In 2002, the court in *Mendez Lynch v. Mendez Lynch* found that equitable tolling should be read into every federal statute of limitations unless Congress states otherwise.¹⁰¹ The Supreme Court reiterated this concept in 2010 when it noted that non-jurisdictional statutes of limitations are subject to a rebuttable presumption in favor of equitable tolling, reinforcing the idea that the availability of equitable tolling is not limited to a statute's explicit text.¹⁰² Four years prior to *Mendez Lynch*, the Eleventh Circuit analogized ICARA's one-year filing period to a statute of limitations subject to equitable tolling,

96. See *Yaman v. Yaman*, 730 F.3d 1, 112-13 (2013) (considering the drafting history of the Hague Convention rather than examining ICARA as it fits into the U.S. legal system, including the conditions added to it before its codification).

97. See *Holland v. Florida*, 560 U.S. 631, 649 (2010) (allowing equitable tolling of a federal statute under extraordinary circumstances that amounted to more than excusable negligence).

98. See *Furnes v. Reeves*, 362 F.3d 702, 722 (11th Cir. 2004) (citing *Young v. United States*, 535 U.S. 43, 49 (2002) (applying equitable tolling in cases of intentional concealment)).

99. See *id.* (applying equitable tolling as per American custom even though the statute never explicitly mentions it).

100. See generally *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002) (recognizing the one-year filing period as a statute of limitations subject to equitable tolling).

101. See *id.* (invoking equitable tolling to extend the one-year filing period in a Convention abduction case where the abducting parent conceals the child from the petitioner).

102. See *Holland v. Florida*, 560 U.S. 631, 631-32 (2010) (stating that equitable tolling would not impact the timeliness of court decisions because timeliness has always been determined under equitable principles).

though it did not make a definitive decision.¹⁰³ ICARA is a federal statute, so its one-year filing period should be treated as a statute of limitations that should have equitable tolling automatically read into it.¹⁰⁴

The Supreme Court in *Lozano* justified its refusal to apply equitable tolling to ICARA by differentiating ICARA from other federal statutes, largely on the basis that ICARA was created solely to implement a pre-existing international convention.¹⁰⁵ The Court reasoned that implementing legislation of an international convention does not share the same historical background as a federal statute passed independently in the United States.¹⁰⁶ As such, it would be inappropriate to apply such historical principles to ICARA because it is a statute passed as implementing legislation for a foreign convention.¹⁰⁷

Furthermore, the Supreme Court justified its decision in *Lozano* by declining to view ICARA's one-year filing period as a statute of limitations.¹⁰⁸ Traditional historical principles of American law illuminate how statutes of limitations are treated within federal law: while statutes of limitations exist to prevent individuals from raising stale claims, U.S. legal custom recognizes the need to equitably toll these limitations when certain circumstances arise.¹⁰⁹ By refusing to recognize ICARA's one-year filing period as a statute of limitations, the Court was able to dismiss *Lozano*'s assertion that American courts could apply their own "common law doctrine of equitable tolling" to the Convention's one-year filing period.¹¹⁰

103. See *Anderson v. Acree*, 250 F. Supp. 2d 872, 875 (S.D. Ohio 2002) (disagreeing with the Eleventh Circuit's notation in *Lops v. Lops*, 140 F.3d 927, 946 (11th Cir. 1998) that may have allowed the one-year filing period to be considered a statute of limitations).

104. *Contra Anderson*, 250 F. Supp. 2d at 875 (citing the remaining potential for harm to a child as a reason for disagreeing with the decisions in *Lops* and *Mendez Lynch*).

105. See *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014) (reasoning that implementing legislation of a foreign treaty is not the same as an independent federal statute passed by Congress because it is not rooted in the same historic principles and traditions).

106. See *id.* (elaborating that Congress is assumed to incorporate equitable tolling into federal statutes of limitations because it is a traditional part of American law).

107. See *id.* (adding that it would be equally inappropriate to apply traditional American legal principles to the Hague Convention itself).

108. See *id.* at 1234 (declining to follow the Eleventh Circuit's view that ICARA's one-year filing deadline could be analogous to a statute of limitations because parents are can still file a petition after one year has passed).

109. See *Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008) (highlighting the need for equitable tolling in cases where a parent has concealed their child to wait out the one-year filing deadline and gain the ability to raise affirmative defenses).

110. See *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1236 (2014) (noting that the

Viewing ICARA more as an extension of the Hague Convention, rather than an independent federal statute, directly effects petitioners' procedural due process rights.¹¹¹ Like many courts, the Supreme Court apparently considers ICARA and the Convention to be interchangeable.¹¹² The petitioner in *Lozano* failed to identify historical acceptance or instances of equitable tolling practiced by other signatories of the Hague Convention, a fact which the Court used to conclude that equitable tolling was not meant to apply to the Convention or its implementing legislation.¹¹³

The Supreme Court dismissed the fact that ICARA is a federal statute passed by Congress, viewing it instead as implementing legislation requiring a specific mention of equitable tolling for tolling to apply.¹¹⁴ This double standard — requiring equitable tolling to be explicitly stated in ICARA when it is presumed to apply to most other federal statutes — is apparently necessary for courts to ensure a uniform international interpretation of the Convention amongst signatory states.¹¹⁵ Congress passed ICARA to ensure uniformity amongst the fifty states utilizing the same guidelines as other countries participating in the Convention.¹¹⁶ Because the drafters of the Convention neglected to include equitable tolling in Article 12, the Court reasoned, allowing equitable tolling to be applied to ICARA would be inconsistent.¹¹⁷

Hague Convention allows states to use additional sources of law to help secure the return of abducted children, but refusing to recognize equitable tolling as a viable tool in ICARA cases since it was not mentioned by the drafters of the Convention).

111. *See id.* at 1229 (relying heavily on the text of the Hague Convention when faced with an ICARA case, reasoning that ICARA was created as implementing legislation for the Convention).

112. *See id.* (noting that ICARA instructs courts to decide international child abduction cases in accordance with the Hague Convention).

113. *See id.* at 1233 (adding that the petitioner conceded that no foreign courts had adopted equitable tolling because these courts lacked the same historic customs principles as the United States).

114. *See id.* (adding that ICARA is not meant to alter the Convention, and that ICARA provisions are in addition to rather than in lieu of provisions found in the Hague Convention).

115. *See id.* at 1233-34 (explaining that Congress did not attribute the same historical principles of American law to ICARA simply by enacting it as a federal statute).

116. *See Stranko, supra* note 24, at 31 (enumerating the benefits of implementing legislation, including uniformity amongst state governments in the United States).

117. *See Yaman v. Yaman*, 730 F.3d 1, 13 (2013) (examining the drafting history of the Convention and noting that equitable tolling, while present in the Preliminary Draft Convention, was left out of the Convention to eliminate the difficulty of determining the date the child's location was discovered and establish a minimum time period for the "now settled" defense").

This justification fails to acknowledge that absolute uniformity is neither practical, nor generally practiced, regarding international treaties and domestic implementing legislation, and that Congress added certain conditions to ICARA before passing it into law.¹¹⁸ Furthermore, ICARA's provisions are meant to be read as additions to the Convention rather than replacements for any existing guidelines.¹¹⁹ The provisions exist to ensure that ICARA can coexist amongst other federal statutes and satisfy constitutional due process requirements.¹²⁰ If petitioners must meet certain standards set by ICARA to have their case heard in an American court, those courts must afford petitioners all the constitutional protections due to them, including access to a fair and timely trial.¹²¹

A glaring issue with the Supreme Court's argument that ICARA cannot be modified beyond the text of the Convention is that Congress made modifications to ICARA before it was codified into U.S. law.¹²² Modifications to the Convention were necessary to make matters dealing with language barriers and government costs conform more closely to American legal practices.¹²³ The addition of such conditions clearly conflicts with the Court's stance that no modifications or reservations can be added to ICARA due to uniformity concerns.¹²⁴ The very practice of drafting implementing legislation for international treaties affords Congress the right to add provisions that better suit the U.S. legal system with certain historical

118. See Trotter, *supra* note 2, at 5-6 (noting the existence of additional conditions in ICARA, despite the Court's stance that they cannot modify or add conditions to implementing legislation).

119. See International Child Abduction Remedies Act, 22 U.S.C. § 9001 (2014) (clarifying that the provisions in ICARA were in addition to and not in lieu of Convention provisions, reinforcing the concept of uniformity).

120. See Rivers, *supra* note 22, at 638 (acknowledging ICARA as an independent federal statute meant to reflect the philosophy of the Hague Convention while ensuring that petitioners in American courts receive constitutional protections).

121. See *id.* at 635 (noting that ICARA requires petitioners to prove by a preponderance of the evidence that a child has been wrongfully taken for a court to hear the petition).

122. See *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1236 (2014) (declaring that the Court could only apply equitable tolling to the Hague Convention if Convention drafters intended to include equitable tolling and holding that the drafters did not intend to include equitable tolling in the Convention or, by extension, ICARA).

123. See Trotter, *supra* note 2, at 5-6 (illustrating how the United States slightly altered ICARA to better suit its own legal system before Congress codified it).

124. See *Lozano*, 134 S. Ct. at 1233 (stating that it would be inappropriate for American historical values to be read into either ICARA or the Hague Convention because such values were not considered when the Convention was drafted).

principles in mind.¹²⁵ Further, Congress's implementing additional conditions in ICARA shows that requiring equitable tolling is certainly feasible, as well as necessary and appropriate to achieve ICARA's legislative and policy objectives.¹²⁶

The Supreme Court's holding in *Lozano* undermines the policy rationale behind ICARA.¹²⁷ When ICARA was first implemented, the Department of State questioned the propriety of rewarding abductors for concealing their children and saw ICARA as a way to prevent this result from occurring.¹²⁸ Similarly, courts in *Mendez Lynch* and *Belay v. Getachew* recognized the importance of using ICARA to further the Convention's objective to provide a mechanism for parents to legally bring about the return of their abducted children.¹²⁹ These courts also saw equitable tolling as a logical and necessary tool to prevent an abducting parent from being rewarded for concealing a child to defeat a court order through the now-settled defense.¹³⁰

Concealment of an abducted child works directly against the expediency sought in ICARA proceedings, as it deliberately delays the filing process in an effort to pass the one-year filing deadline and open up the possibility of raising affirmative defenses.¹³¹ Once that year passes, judges are granted the

125. See *id.* at 1233 (revisiting the Supreme Court's reference to the historical principles found in federal statutes).

126. See *Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008) (articulating the concern shared by pro-equitable tolling courts about rewarding abducting parents for abusing the constraints of ICARA and the Hague Convention by concealing their children).

127. See Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,505 (Mar. 26, 1986) (acknowledging the implementation of ICARA into U.S. law as a domestic means to help combat international child abduction).

128. See *Duarte*, 526 F.3d at 570 (quoting Hague International Child Abduction Convention, 51 Fed. Reg. 10,494, 10,505) (Mar. 26, 1986) (noting the questionable propriety of rewarding parents for concealing their children because it goes directly against the Hague Convention's main goal of preventing child abductions).

129. See *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002) (noting that the respondent raised the now-settled defense after deliberately concealing her children's location from the petitioner); see also *Belay v. Getachew*, 272 F. Supp. 2d 553, 565 (D. Md. 2003) (concluding that the abducting parent would not be allowed to benefit from the "protective sweep" of Article 12 and rejected her now-settled defense because she had concealed her child's whereabouts from the petitioner).

130. See *Mendez Lynch*, 220 F. Supp. 2d at 1363 (detailing respondent's efforts to conceal her children from the petitioner during the one-year period); see also *Belay*, 272 F. Supp. 2d at 564 (noting that the respondent purposefully withheld information regarding the child's location, and witnesses refused to inform the petitioner of his child's whereabouts).

131. See *Trotter*, *supra* note 2, at 20 (addressing the now-settled affirmative defense

discretion to return a child to the abducting parent, thereby complicating an otherwise simple filing process with deliberation of fact and weighing of a parent's legal rights versus their child's best interests.¹³² This confusion and discretion often unjustly rewards the abductor for concealing his or her child.¹³³ Even if courts cannot apply equitable tolling to the Convention itself, the courts may apply equitable tolling to ICARA, which is a codified federal statute with its own goals and underlying purpose.¹³⁴

2. *Equitably Tolling ICARA is Necessary to Comply with Procedural Due Process Requirements*

Equitable tolling is necessary to satisfy due process requirements in ICARA cases involving child concealment because it satisfies the factors set forth by the Supreme Court in *Mathews v. Eldridge*.¹³⁵ The first factor is the presence of a private interest that will be affected by official action, which in this case is a parent's ability to exercise the fundamental right to raise their children.¹³⁶ Petitioners who bring ICARA petitions before American courts are seeking to obtain their abducted children from the United States in order to resume their custodial duties and responsibilities.¹³⁷ Furthermore, petitioners in American courts have an interest in pursuing legal claims in a fair and timely manner.¹³⁸ Without applying equitable tolling to ICARA's one-year filing period, petitioners who do not learn the location of their children until after a year has passed do not benefit from a court with an

aised by abducting parents once a year has passed since the initial abduction).

132. See *id.* (explaining that after one year, the obligation to return a child to the non-abducting parent becomes permissive rather than absolute and is left up to judicial discretion).

133. See *Duarte v. Bardales*, 526 F.3d at 570 (2008) (quoting Hague International Child Abduction Convention, 51 Fed. Reg. 10,494, 10,505 (Mar. 26, 1986)) (questioning the propriety of awarding abductors for concealing their children in order to make affirmative defenses available after the one-year filing deadline has passed).

134. See *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1347 (M.D. Fla. 2002) (reasoning that equitable tolling should be read into every federal statute of limitations unless Congress states otherwise).

135. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (elaborating that when all three factors are present, an individual is due a specific process).

136. See *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 65 (1973) (holding that child rearing is a fundamental right that falls under one's guaranteed right to privacy).

137. See *Lehr v. Robertson*, 463 U.S. 248, 257 (1983) (stating that parental rights are coupled with parental duties that must be carried out to have Constitutional protection).

138. See *Mathews*, 424 U.S. at 348 (holding that procedure must be tailored to the capacities and circumstances of those who are to be heard, to ensure that they are given a meaningful opportunity to present their case).

absolute requirement to return the child to their home state, and must instead depend on judicial discretion.¹³⁹

The second factor that must be satisfied under the *Mathews* standard is the risk of erroneous deprivation of a private interest through the current procedures used by the government.¹⁴⁰ The outcome of an ICARA trial determines whether the petitioner's child is returned to their home state, or whether the child remains in the country in which they have been concealed.¹⁴¹ If the respondent conceals the child for over a year and raises a successful now-settled defense, the petitioner is further deprived of their ability to exercise the parental rights guaranteed to them under the Fourteenth Amendment.¹⁴²

ICARA's one-year filing period must be considered a statute of limitations in order to properly address the concerns raised in this second factor.¹⁴³ Due process exists to impose constraints on governmental decisions which deprive individuals of liberty or property interests, and failing to view the one-year deadline as a statute of limitations ignores the reality that after one year petitioners lose the right to an absolute return of their child.¹⁴⁴ While the court may still grant petitions after one year, it also has the discretion to deny the petition if the respondent raises a successful affirmative defense such as a now-settled defense.¹⁴⁵ Thus, a petitioner's fundamental parental

139. See Trotter, *supra* note 2, at 8 (noting that once a year has passed, a court's return obligation becomes permissive and allows the respondent to raise affirmative defenses).

140. See *Mathews*, 424 U.S. at 335; see also *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002) (noting that after a year passed, the respondent was able to raise a now-settled defense after concealing her child until the one-year filing period passed).

141. See *In re Lozano*, 809 F. Supp. 2d 197, 220 (S.D.N.Y. 2011) (holding that the child will remain in New York with the respondent even though the respondent concealed the child for over sixteen months).

142. See *Meyer v. Nebraska*, 262 U.S. 390, 390 (1923) (acknowledging that the Supreme Court has recognized parental rights as fundamental and worthy of constitutional protection).

143. See *Mathews*, 424 U.S. at 335 (stating that procedural due process must be tailored to the capacities and circumstances of those who are to be heard by the court and to ensure that they are given a meaningful opportunity to present their case).

144. See *id.* at 332 (adding that these interests must fall within the meaning of the Due Process Clause); see also Trotter, *supra* note 2, at 21 (noting that an absolute return obligation only exists if a petitioner files their petition with the proper central authority within one year of the child's abduction).

145. See *In re Lozano*, 809 F. Supp. 2d at 234 (holding that petitioner's child had become so settled in New York that repatriation to the U.K. would not be in her best interest and acknowledging that accepting this now-settled defense meant ignoring the petitioner's parental rights).

rights are at the mercy of broad judicial discretion due to circumstances outside of his control.¹⁴⁶

A further concern addressed by this second factor is that ICARA only requires respondents to prove by preponderance of the evidence that a child is settled.¹⁴⁷ In comparison, the grave risk defense must be proved with clear and convincing evidence, a much higher threshold than the now-settled defense.¹⁴⁸ The court in *Lozano* granted the respondent's now-settled defense on the basis that the child had developed ties to her new community, even though those ties were developed while the child was deliberately concealed from the petitioner.¹⁴⁹

The benefits of applying equitable tolling to ICARA address the third *Mathews* factor, which examines the probable value of additional or substitute procedural safeguards as well as governmental interest in the matter.¹⁵⁰ Equitably tolling the one-year filing deadline in cases of intentional concealment would further ICARA's and the Convention's goal of deterring international child abductions by removing parents' incentive to hide their children overseas.¹⁵¹ Furthermore, allowing equitable tolling would limit respondents' ability to raise affirmative defenses which would, in turn, limit the uncertainty that accompanies judicial discretion.¹⁵²

The government's interests in maintaining the current system — namely,

146. See Daigle, *supra* note 67, at 894 (cautioning courts to exercise their discretion to ensure that individuals receive their constitutionally-protected human rights and individual freedoms); see also Rivers, *supra* note 22, at 638 (emphasizing that ICARA's effectiveness will depend largely on how courts apply exceptions and affirmative defenses to the facts of each case and cautioning the widespread use of affirmative defenses).

147. See Rivers, *supra* note 22, at 636-37 (noting that this is the same standard a petitioner must reach to prove that a child was wrongfully taken).

148. See *id.* at 637 (noting that the standard of evidence for some affirmative defenses, such as the now-settled defense, was lowered).

149. See *In re Lozano*, 809 F. Supp. 2d 197, 234 (S.D.N.Y. 2011) (using judicial discretion to determine that the child was now settled in New York and it would be against her best interests to return her to her home state).

150. See *Mathews v. Eldridge*, 424 U.S. 319 335 (1976); see also *In re Lozano*, 809 F. Supp. 2d at 228 (acknowledging that the lack of equitable tolling may encourage abducting parents to hide their children long enough for them to become settled).

151. See *Duarte v. Bardales*, 526 F.3d 563, 570 (2008) (voicing Congress' own concerns about rewarding parents for abducting their children).

152. See Rivers, *supra* note 22, at 620-21 (addressing the concern that judicial discretion can lead to uncertainty and injustice if not kept in check); see also Stranko, *supra* note 24, at 31 (discussing the uniformity ICARA seeks to achieve to keep parents from abusing the system by moving their children around to different signatory states).

a need for uniformity and the concern for children's best interests — are not compelling enough to justify infringing on petitioner's constitutional rights.¹⁵³ Equitable tolling will increase uniformity among ICARA cases by decreasing the usage of judicial discretion and limiting the exceptions that a respondent can raise if they deliberately conceal their child.¹⁵⁴ Regulations that allow for such broad judicial discretion are not narrowly drawn enough to justify depriving petitioners of their fundamental rights to raise their children, particularly when concealment does not prevent a court from granting a now settled defense.¹⁵⁵

Equitable tolling in cases of intentional concealment for ICARA cases meets all three factors laid out in the Supreme Court's decision in *Mathews v. Eldridge*.¹⁵⁶ As such, refusing to apply equitable tolling to ICARA is an unconstitutional violation of procedural due process that robs petitioners of their guaranteed rights and freedoms.¹⁵⁷

Equitable tolling should also be available in ICARA cases where petitioners meet the additional due process factors laid out by the Supreme Court in *Holland v. Florida*.¹⁵⁸ In *Lozano, Mendez Lynch*, and *Furnes* the petitioners exhausted countless avenues of relief as they searched for their children, while the abducting parents took measures to conceal the children.¹⁵⁹ These efforts satisfy the first factor put forth by the Supreme

153. See Klicka, *supra* note 72 (concluding that parental liberty is to be protected by the highest standard of review: the compelling interest test).

154. See *Belay v. Getachew*, 272 F.Supp.2d 553, 565 (D. Md. 2003) (holding that the respondent may not benefit from the "protective sweep" of the now-settled defense because the respondent deliberately concealed the child's location from the petitioner).

155. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684 (1977) (requiring regulations to be narrowly drawn to address compelling state interests).

156. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (viewing due process as a flexible concept whose protections are largely determined by the demands of specific situations).

157. See *id.* at 332 (adding that these rights and freedoms are limited to those contemplated by the Fifth and Fourteenth Amendments).

158. See *Holland v. Florida*, 560 U.S. 631, 631 (2010) (allowing equitable tolling of AEDPA under extraordinary circumstance that amounted to more than a petitioner's excusable negligence).

159. See *In re Lozano*, 809 F. Supp. 2d 197, 210 (S.D.N.Y. 2011) (explaining that Lozano exhausted all resources in the United Kingdom before beginning his search in the United States); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002) (noting that the respondent took several intentional steps to conceal her children's whereabouts, while the petitioner had sought to resolve the issue outside of Convention proceedings); *Furnes v. Reeves*, 362 F.3d 702, 708 (11th Cir. 2004) (equitably tolling the one-year deadline until the petitioner actually found his child, whom the respondent kept concealed during the petitioner's search).

Court in *Holland*: the petitioner must diligently pursue her rights in order for equitable tolling to apply.¹⁶⁰ This factor aligns with the holding in *Belay v. Getachew* that differentiates between cases in which a custodial parent has not filed a timely petition due to negligence and cases in which an abducted child has been intentionally concealed for the sake of raising affirmative defenses.¹⁶¹

Intentionally concealing an abducted child satisfies *Holland's* second factor: the presence of some extraordinary circumstances that prevented her from filing a timely petition.¹⁶² The petitioners in *Mendez Lynch* and *Furnes* diligently pursued their rights, and would have likely filed their petitions in a timely manner if they had known the location of their children.¹⁶³ In those cases, the respondents deliberately concealed their children's locations in an effort to keep the petitioners from taking effective legal action, thereby acting directly in opposition to the goals of ICARA and the Convention.¹⁶⁴ In both cases, respondents were assisted by individuals who withheld information and helped conceal the child's location, further hindering the petitioner's efforts to locate his child before the deadline expired.¹⁶⁵

In cases where a respondent has intentionally concealed her child for over a year in order to raise a now settled defense, both of the Supreme Court factors laid out in *Holland v. Florida* are sufficiently met to establish a right to due process.¹⁶⁶ Though equitable tolling is not explicitly mentioned in

160. See *Holland*, 560 U.S. at 632 (allowing equitable tolling to be considered on a case-by-case base).

161. See *Belay v. Getachew*, 272 F. Supp. 2d 553, 565 (D. Md. 2003) (differentiating between cases where an abducted child has been concealed and cases where a parent has neglected to file a petition in time despite knowing their child's location).

162. See *Holland*, 560 U.S. at 644 (noting that negligence or inadequate counsel do not qualify as extraordinary circumstances).

163. See *Mendez Lynch*, 220 F. Supp. 2d at 1359 (emphasizing that the respondent took active and consistent steps to prevent contact between the petitioner and his children and noting that the petitioner had previously revoked permission for his children to travel without his presence); *Furnes*, 362 F.3d. at 708 (noting that the respondent concealed the child from the summer of 2001 to July of the next year).

164. See *In re Lozano*, 809 F. Supp. 2d 197, 228 (S.D.N.Y. 2011) (justifying its refusal to apply equitable tolling by assuming the drafters of the Hague Convention favored a child's best interests over the risk of encouraging abductions).

165. See *id.* at 211 (noting that the respondent had been staying with her sister in New York while concealing her child); *Mendez Lynch*, 220 F. Supp. 2d at 1354 (noting that witnesses refused to inform the petitioner of his child's whereabouts and that a pastor had finally told the petitioner his family was somewhere in Florida).

166. See *Holland*, 560 U.S. at 632 (allowing equitable tolling to be considered due process even if it not explicitly mentioned in the statute if both factors are met).

ICARA or the Convention, Supreme Court precedent deems it appropriate to consider equitable tolling due process, the denial of which is an unconstitutional violation of the Fifth and Fourteenth Amendments.¹⁶⁷

3. *Equitably Tolling ICARA is Necessary to Satisfy Strict Scrutiny and Protect Custodial Parents' Substantive Due Process Right*

The government's interest in protecting children's best interests is not a sufficiently compelling reason to satisfy the strict scrutiny standard, nor is the Court's reliance on the exact text of the Convention narrowly drawn enough to address the government's concern.¹⁶⁸ In its refusal to apply equitable tolling to ICARA's filing period, the Supreme Court in *Lozano* stated that an abducted child's best interests could be overlooked if equitable tolling were to be applied in all cases of concealment.¹⁶⁹ The Court adopted this reasoning even though the Convention and ICARA's ultimate purpose is purportedly to prevent international child abduction by deterring would-be abductors from taking their children across national borders.¹⁷⁰ The Court claims that equitable tolling actually undermines the purpose of the Convention, relying on its absence within the Convention's text as evidence that it was not meant to apply.¹⁷¹

Court decisions in *Lozano* and other anti-equitable tolling cases favor one of the Convention's objectives – the rights of the child – over the equally important objective of protecting parental and substantive rights.¹⁷² Further,

167. See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (allowing for flexibility when determining due process because due process is closely dependent upon time, place, and circumstances).

168. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 678 (1977) (requiring regulations to be narrowly drawn to address compelling state interests); see also *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (noting that the government must have a compelling interest to obstruct a parent's right to raise their children).

169. See *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1235 (2014) (rejecting *Lozano's* argument that equitable tolling is consistent with the purpose of the Hague Convention to prevent child abductions).

170. See *id.* (agreeing that the Hague Convention reflects a design to discourage international child abductions but adds that this is not a goal to be pursued at any cost, particularly if that cost is a child's best interests).

171. See *Lozano*, 134 S. Ct. at 1235; see also *Yaman v. Yaman*, 730 F.3d 1, 13-14 (1st Cir. 2013) (reasoning that if Convention drafters had meant for the deadline to begin when the parent learned of their child's whereabouts, they would have put such language within the Convention, and noting that the current language exists to establish a minimum time limit for a child to become settled within their new environment).

172. See *Lozano*, 134 S. Ct. at 1234-35 (first quoting Hague Convention, Arts 12-13 *supra* note 2; then quoting *In re M.*, [2008] 1 A.C. 1288, 1310 (Eng. 2007) (opinion of Baroness Hale of Richmond)) (concluding that children "should not be made to suffer

courts such as those in *Yaman* and *Anderson* appear to claim that the potential disregard of one's parental and substantive rights is a risk worth taking since equitable tolling may not ultimately prevent parents from concealing their children.¹⁷³ The parental rights of the petitioner in these cases are rarely mentioned in detail, and are often dismissed after a brief acknowledgement.¹⁷⁴

Additionally, courts citing a child's best interests as a compelling state interest ignore that the abducting parent was unilaterally making a decision about a child's interests, which violates the other parent's constitutional right to be a part of such decisions.¹⁷⁵ In cases where both parents have custody of a child, it is the responsibility of both parents to act in a way that is best for the child's personal interests.¹⁷⁶ While custody matters are outside ICARA's scope, matters of substantive due process rights, such as a parent's right to raise their child, are meant to be strongly protected within the American legal system.¹⁷⁷ Furthermore, by refusing to apply equitable tolling to ICARA's one-year filing period, courts deny petitioners their procedural due process right to properly bring their case before an American court and reclaim their parental rights.¹⁷⁸

As a whole, courts that oppose equitable tolling offer the same hypothetical solution: judicial discretion.¹⁷⁹ Suddenly, a risk that was too

for the sake of general deterrence of the evil of child abduction world wide," and refusing to apply equitable tolling to the Convention's one-year filing period).

173. See *Lozano*, 134 S. Ct. at 1236 (listing alternatives that the Court deems suitable to prevent concealment and noting that concealment can sometimes prevent a child from becoming truly settled).

174. See *In re Lozano*, 809 F. Supp. 2d 197, 228 (S.D.N.Y. 2011) (presuming that the child's best interests were to be considered of higher importance than the risk of encouraging abductions).

175. See *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654 (1995) (acknowledging that children are subject to the control of their parents, even regarding their physical freedom).

176. See *Furnes v. Reeves*, 362 F.3d 702, 707 (11th Cir. 2004) (reasoning that parents are meant to act in the child's best interest when making decisions for the child in personal matters).

177. See *Stranko*, *supra* note 24, at 31 (noting that ICARA is meant to simplify jurisdictional issues for international Convention cases and indicating that the United States can only debate custody issues if a grave risk of harm defense is successfully raised).

178. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (noting that the opportunity to be heard at a meaningful time and in a meaningful manner is a fundamental requirement of procedural due process).

179. See, e.g., *Yaman v. Yaman*, 730 F.3d 1, 12 (1st Cir. 2013) (explaining that permissive discretion could still be used even if a child has become settled).

great — the possibility that a court may act against a child’s best interest — is not too large a hurdle to overcome if it is left to a court’s individual discretion rather than legislation.¹⁸⁰ Viewing deliberate concealment of a child as just one factor a court will weigh leaves too much to judicial discretion and results in less predictability and consistency regarding what rights ICARA will afford parents.¹⁸¹

Furthermore, it is insufficient to simply offer “discretion” as a viable and equal alternative to equitable tolling.¹⁸² The Court in *Lozano* reasoned that parents would already be deterred from concealing their children because concealment “sometimes” prevents a child from becoming settled in the first place, undermining a potential affirmative defense.¹⁸³ Rather, the Court suggests, lower courts will be able to properly examine the facts and decide whether or not a child has truly become settled during their concealment.¹⁸⁴

Such a view makes an odd distinction between abductors who successfully settled their children while actively concealing them and those who were unable to simultaneously settle and conceal their children.¹⁸⁵ In practice, parents who successfully conceal their children will benefit from a now-settled defense, while those that are unable to settle their children will not.¹⁸⁶

By refusing to treat ICARA like any other federal statute by incorporating equitable tolling, courts are violating petitioners’ substantive and procedural due process rights by failing to offer alternatives to equitable tolling that

180. *See id.* (elaborating that no matter how settled a child is, after one year a court has the permissive discretion to return the child to their home state).

181. *See id.* at 19 (listing concealment as a negative factor when considering a now-settled defense).

182. *See id.* at 13 (asserting that parents still have access to due process because the passage of a year does not prevent them from filing a return petition).

183. *See Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1236 (2014) (listing alternatives to equitable tolling that the Court deems suitable to prevent parents from concealing their children); *see also Wigley v. Hares*, 82 So.3d 932, 942 (Fla. App. 2011) (determining that the now-settled defense could not be raised where the abducting parent purposely kept the child out of community activities, sports, and church to keep him concealed).

184. *See Lozano*, 134 S. Ct. at 1231 (noting that the child was settled due to evidence of stability in her family, education, social, and home life during her concealment in New York).

185. *See Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002) (finding that the abducted children were not well-settled in Florida since they had lived in seven different locations within one year).

186. *See generally Furnes v. Reeves*, 362 F.3d 702, 723 (11th Cir. 2004) (allowing the one-year filing period deadline to be equitably tolled until the date that the petitioner actually learned of his child’s location after she had been concealed).

protect petitioners' rights to raise their children.¹⁸⁷ Without a compelling government interest, the Supreme Court's decision in *Lozano* defies their own precedent which grants ample protection to parental rights under the Fourteenth Amendment, and fails to properly serve the goals of ICARA and the Convention.¹⁸⁸

Furthermore, refusing to apply equitable tolling to ICARA's one-year filing period violates procedural due process in a manner that does not satisfy the strict scrutiny requirement articulated in *Wisconsin v. Yoder*.¹⁸⁹ In *Parham v. J.R.*, the court found that governmental power superseding parental authority in all cases goes against American tradition.¹⁹⁰ In ICARA cases where the child has been concealed and the one-year filing deadline has passed, the court exercises its governmental power through discretion.¹⁹¹ This discretion usurps the parental authority of petitioners who are now vulnerable to losing their rights if the respondent raises a successful affirmative defense.¹⁹² Such broad discretion is not narrowly drawn enough to satisfy the legal requirements of a strict scrutiny standard, nor has any compelling government interest been properly articulated that would warrant denying petitioners their substantive and procedural due process rights.¹⁹³

B. Refusing to Apply Equitable Tolling to Lozano's ICARA Petition was an Unconstitutional Violation of Substantive and Procedural Due Process

The Supreme Court's refusal to equitably toll the one-year filing period in *Lozano v. Montoya Alvarez* was an unconstitutional violation of the

187. See *Lozano*, 134 S. Ct. at 1236 (asserting that the exercise of judicial discretion in cases of concealment is an adequate alternative to equitable tolling).

188. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing that parental rights are protected under the Fourteenth Amendment).

189. See *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (requiring the government to explicitly name a compelling interest for obstructing a constitutional right and clarifying that the mere reasonableness of a regulation does not satisfy this requirement).

190. See *Parham v. J.R.*, 442 U.S. 584, 604-06 (1979) (addressing a parent's right to make decisions regarding their children's mental health).

191. See *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1236 (2014) (asserting that the exercise of judicial discretion in cases of concealment is an adequate alternative to equitable tolling).

192. See *Trotter*, *supra* note 2, at 8 (addressing the now-settled affirmative defense raised by abducting parents once a year has passed since the initial abduction).

193. See *Yoder*, 406 U.S. at 233 (holding that governmental interference in children's education violates parents' substantive rights because it unconstitutionally infringes on a parent's right to raise their child and make decisions regarding their education); see also *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977) (requiring regulations to be narrowly drawn to address compelling state interests).

petitioner's Fourteenth Amendment substantive and procedural due process rights.¹⁹⁴ Lozano filed his petition under both the Convention and its implementing legislation, ICARA.¹⁹⁵ As a petitioner in the American legal system, Lozano had a right to constitutional due process protections, including the application of equitable tolling.¹⁹⁶ Failing to equitably toll ICARA unjustly severs a petitioner's parental rights and should be subjected to the compelling interest test established in *Yoder* to evaluate whether obstructing a parent's right to raise their child is constitutional.¹⁹⁷ Under this test, the government's interest in protecting a child's best interests is not sufficiently compelling to warrant disregarding Lozano's fundamental parental rights, nor is the current system narrowly drawn enough to achieve this purpose.¹⁹⁸

The fact that the Convention found it reasonable to set a firm one-year filing deadline is not sufficient to satisfy due process because *Wisconsin v. Yoder* demands that the government must have a compelling interest in order to obstruct a parent's right to raise their children.¹⁹⁹ In *Lozano*, the government has failed to identify a compelling state interest, such as a public safety risk, that would arise from allowing equitable tolling.²⁰⁰ As such, Lozano's parental rights must be protected as per the precedent set forth by the Supreme Court in *Yoder*.²⁰¹

194. See U.S. CONST. amend. XIV (establishing that no person shall be deprived of life, liberty, or property without due process of law); see also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (acknowledging that the Supreme Court has recognized certain liberties protected under the Fourteenth Amendment, including parental rights).

195. See International Child Abduction Remedies Act, 22 U.S.C. § 9001 (2014) (clarifying that the provisions in ICARA were in addition to and not in lieu of the provisions of the Convention).

196. See *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976) (noting that due process is meant to be flexible to accommodate the different circumstances presented in each case).

197. See *Yoder*, 406 U.S. at 233 (noting that having a reasonable regulation does not satisfy constitutional requirements when addressing the infringement of fundamental rights).

198. See *In re Lozano*, 809 F. Supp. 2d 197, 226 (S.D.N.Y. 2011) (acknowledging that protecting a child's best interest by rejecting equitable tolling seems to go against the government's interest in furthering the goals of the Hague Convention and preventing international child abductions).

199. See *Yoder*, 406 U.S. at 233 (emphasizing that it is not enough that the regulation is reasonable).

200. See *In re Lozano*, 809 F. Supp. 2d at 220 (discussing the affirmative defense that addresses public safety risks, the grave risk of harm defense, which prevents children from being exposed to physical or psychological harm).

201. See *Yoder*, 406 U.S. at 233 (emphasizing the importance of parental concern for the upbringing of their children and defending a parent's right to play a primary role in

Denying Lozano an opportunity to raise his daughter was a serious violation of substantive due process, because Lozano's petition was denied due to circumstances manufactured by the respondent that allowed her to raise a successful affirmative defense.²⁰² In *Lozano*, the Court showed insufficient regard for Lozano's fundamental right to raise his daughter.²⁰³ Manuel Lozano would not likely be considered a model father; the respondent alleged that their child was traumatized by her time living with the petitioner.²⁰⁴ However, because the court determined that there was no grave risk of harm present due to lack of evidence, such allegations cannot be considered in determining the child's best interests.²⁰⁵ Additionally, ICARA and the Convention deal solely with jurisdictional issues rather than custody issues themselves, thus anything other than a grave risk of harm cannot be considered when U.S. courts hear ICARA petitions.²⁰⁶

Due Process Clause requirements must be met even in cases in which an individual has not been a model parent.²⁰⁷ Refusing to equitably toll the one-year filing period for Lozano's petition deprived him of his parental rights just as surely as would allowing his daughter to remain in a location where Lozano has no input regarding her upbringing.²⁰⁸ For more than two years, Lozano was denied any say in where his child was raised, where she was educated, and what medical choices were made for her.²⁰⁹ Fundamental

her child's upbringing).

202. See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (noting that due process is meant to impose constraints on governmental decisions which deprive individuals of liberty or property interests); see also *Pierce v. Soc' of Sisters*, 268 U.S. 510, 534-35 (1925) (ruling against a statute that unreasonably interfered with the liberty of parents to direct the upbringing of their children).

203. See *Yoder*, 406 U.S. at 233-34 (stating that public safety can outweigh the rights of parents to claim control over their children).

204. See *In re Lozano*, 809 F. Supp. 2d at 208-09 (alleging that petitioner was physically and emotionally abusive to respondent and possibly to the child as well).

205. See *id.* at 225 (finding that respondent failed to establish evidence that the child would be exposed to physical or psychological harm or otherwise intolerable situations if she returned to the United Kingdom).

206. See *Stranko*, *supra* note 24, at 31 (noting that ICARA was implemented in the United States to, in part, simplify jurisdictional issues for international Convention cases).

207. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 37 (1981)) (holding that termination procedures regarding parental rights have to satisfied Due Process Clause requisites, even in cases when an individual has not been a model parent).

208. See *Anderson v. Acree*, 250 F. Supp. 2d 872, 875 (2002) (considering the legal and custodial rights of the petitioner).

209. See *In re Lozano*, 809 F. Supp. 2d at 210 (explaining that petitioner exhausted

parental rights include the right to control a child's upbringing, including the child's health and education.²¹⁰ While concealing their child in New York, the respondent enrolled the child in a new school and took the child to a therapist and a doctor.²¹¹ At the same time, the respondent concealed the child's location from Lozano and neither informed him about nor sought his advice or approval regarding their child's education and health.²¹² With every one of these independent decisions, the respondent further trampled upon Lozano's fundamental right to have a say in his child's upbringing, and the respondent was rewarded for this behavior when the court granted her affirmative defense.²¹³

Lozano was entitled to constitutional protection of his parental rights because he had a significant custodial, personal, and financial relationship with his daughter prior to the abduction.²¹⁴ The Supreme Court has held that the constitutional protection afforded to a parent is directly connected to that parent's duties to their child.²¹⁵ For a parent's rights to be protected, she must have some significant custodial, personal, or financial relationship with her child.²¹⁶ Lozano played a significant role in his daughter's life; he lived in the same apartment as the respondent and child, he worked two jobs to support his family, and he exhausted all avenues in attempting to locate his daughter after she was abducted.²¹⁷ Under the standard articulated in *Lehr*,

all resources in the United Kingdom before beginning his search in the United States).

210. See *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (including control over education and religious upbringing among parental rights); see also *Parham v. J.R.*, 442 U.S. 584, 604-06 (1979) (addressing a parent's right to make medical decisions regarding their children's health).

211. See *In re Lozano*, 809 F. Supp. 2d at 224-25 (referring to a therapist's testimony regarding the likely source of the child's trauma, and a doctor's testimony that returning to the United Kingdom would not result in trauma).

212. See *id.* at 228, 234 (finding that the respondent deliberately concealed the child's location from the petitioner, and that during the sixteen months of concealment the child became settled in New York).

213. See *Rivers*, *supra* note 22 at 638 (remarking that ICARA's effectiveness at deterring international child abductions will depend largely on how courts use their discretion to apply exceptions such as the now-settled affirmative defense).

214. See *In re Lozano*, 809 F. Supp. 2d at 207 (noting that Lozano and the respondent lived together with their child as a family unit despite apparent marital discord).

215. See *Lehr v. Robertson*, 463 U.S. 248, 257 (1983) (holding that parental rights are directly correlated with parental duties that are meant to prepare their children for future societal obligations).

216. See *id.* at 258-59 (holding that a biological father without any prior relationship to his child did not possess any parental rights protected by the Constitution since he failed to act on his parental duties).

217. See *In re Lozano*, 809 F. Supp. 2d at 210-11 (explaining that after the respondent

retention of parental rights is contingent on the exercise of and participation in parental duties.²¹⁸ Accordingly, Lozano should be afforded his constitutionally-protected parental rights, which should in turn be protected by procedural safeguards guaranteed by the Due Process Clause.²¹⁹ This procedural due process, which must be imposed to protect Lozano's liberty regarding his parental rights, must take the form of equitable tolling.

The court in *Lozano* acknowledged that accepting a now settled defense meant ignoring the petitioner's parental rights in favor of the child's best interests.²²⁰ However, in exercising its discretion, the court ignored clearly articulated Supreme Court precedent that recognizes a parent's general right to determine his or her child's best interests.²²¹ Further, when the Court rejected the respondent's grave risk of harm affirmative defense, it also removed any legal basis under ICARA for giving the respondent the unilateral power to determine their child's best interest.²²² By still granting the respondent's now-settled defense, Lozano was denied his procedural due process rights, as well as his right to act in the best interest of his child's limited rights.²²³

Generally, the Fourteenth Amendment grants parents the right to retain custody of their children in the absence of a court order or state interest.²²⁴ Neither a respondent nor a court addressing an ICARA petition has the authority to deny a petitioner their custody rights.²²⁵ The right to raise one's

and child disappeared, the petitioner went to the police and attempted to locate them using the U.K.'s legal system before filing his petition through both ICARA and the Hague Convention once he had finally located them in the United States).

218. See *Lehr*, 463 U.S. 248, 257 (articulating the standard for protection of parental rights)

219. See *id.* at 258 (discussing the relationship between parental rights and parental duties; the protection of the former was deemed to be contingent upon the exercise of the latter).

220. See *In re Lozano*, 808 F. Supp. 2d at 234 (holding that petitioner's child had become so settled in New York that repatriation to the U.K. would not be in her best interest).

221. See *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654 (1995) (stating that parents must use their parental rights to further their child's best interests).

222. See *id.* (acknowledging that children are subject to the control of their parents, even regarding their physical freedom).

223. See *Acton*, 15 U.S. at 654 (explaining that children must depend on their parents to exercise their rights for them); see also *In re Lozano*, 809 F. Supp. 2d at 225 (noting that Lozano's petition sought for his daughter to be returned to the United Kingdom's jurisdiction so that he could begin custody proceedings).

224. See *id.* (adding that this includes the right to nurture and care for one's children).

225. See *Stranko*, *supra* note 24, at 31 (reaffirming that ICARA and the Hague

children is associated with the well-recognized right to privacy, which extends to matters of the home such as child rearing.²²⁶ Lacking a compelling interest by the state, individuals are free to make personal decisions relating to marriage and family relationships without unjustified government interference.²²⁷

The Court in *Lozano* suggests that protecting an abducted child's best interests constitutes a compelling interest that justifies violating the non-abducting parent's fundamental right to raise his or her child.²²⁸ The possibility that a child's best interests could be overlooked in a single case is not a compelling government interest that outweighs a custodial parent's substantive and procedural due process rights.²²⁹

The Supreme Court's reliance on judicial discretion highlights the risk of not applying equitable tolling to ICARA's one-year filing deadline, as the respondent was granted an affirmative defense despite concealing the child in order to exploit ICARA's provisions.²³⁰ With no viable grave risk of harm defense, the *Lozano* court's decision not to apply equitable tolling to the one-year filing period effectively rewards the respondent for purposefully concealing her daughter for sixteen months.²³¹ By such standards, the respondent could have lost only if she had been particularly unskilled at hiding her child.²³² The Court's exercise of its discretion in this matter prevented *Lozano* from being able to effectively exercise his procedural and substantive due process rights.²³³

Convention address jurisdictional issues rather than custodial issues).

226. See *Paris Adult Theater v. Slaton*, 413 U.S. 49, 65 (1973) (elaborating that privacy rights also extend to matters of family, marriage, motherhood, and procreation).

227. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (requiring regulations to be narrowly drawn to address compelling state interests).

228. See *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1235 (2014) (lamenting that equitable tolling could uproot children who have settled in their new environment, resulting in harm).

229. See *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1359 (M.D. Fla. 2002) (detailing respondent's efforts to conceal her children, and the danger of allowing her to benefit from these actions through a now-settled defense).

230. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (noting the second factor of a due process consideration, which examines the risk of depriving an individual of a private interest through the procedures proscribed by statute).

231. See *Lozano*, 134 S. Ct. at 1231 (noting that the district court found evidence of stability in the child's family, educational, social, and home life in New York).

232. See *Wigley v. Hares*, 82 So. 3d 932, 942 (Fla. App. 2011) (rejecting a now-settled defense because the respondent purposely kept the child out of community activities to keep him concealed).

233. See *Lozano*, 134 S. Ct. at 1236 (concluding that the Court of Appeals had rightly

The Supreme Court in *Lozano* further erred by refusing to recognize ICARA as a federal statute in its own right.²³⁴ Congress modified ICARA to make it more accurately reflect American legal principles and traditions.²³⁵ Stressing the need for a uniform international interpretation of the Convention ignores the fact that equitable tolling would not replace any part of the Convention.²³⁶ Even though Congress did not explicitly state that equitable tolling should be read into the one-year filing period, the Supreme Court has previously found it necessary to read equitable tolling into statutes rather than risk barring valid claims.²³⁷ The Supreme Court in *Lozano* should have automatically applied equitable tolling to the one-year filing deadline just as they would with any other federal statute.²³⁸ By failing to read equitable tolling into ICARA, the Supreme Court effectively deprived *Lozano* of his parental rights by ensuring that his daughter would continue to receive her education and medical care in a completely different country without his input.²³⁹

The Court fails to realize that abducting parents who conceal their children are counting on a petitioner's claim to become stale in order to create the opportunity to raise affirmative defenses.²⁴⁰ After one year has passed, petitioners lose the ability to automatically reclaim their parental rights, and are instead reliant upon the discretion of the court.²⁴¹ Because the

decided that the Hague Convention was not subject to equitable tolling and rejecting *Lozano's* petition for the return of his child to the United Kingdom).

234. See *id.* at 1232 (attempting to distinguish ICARA from other federal statutes).

235. See *id.* at 1233 (stating that ICARA was irrelevant to the discussion on equitable tolling because it does not exist to alter the Hague Convention).

236. See *id.* at 1233-34 (reasoning that adding provisions to ICARA would negatively affect the Convention's goal of uniformity).

237. See *Holland v. Florida*, 560 U.S. 631 (2010) (declining to reject equitable tolling just because the text of the statute was silent on the matter); see also *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1359 (M.D. Fla. 2002) (citing *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998)) (reasoning that equitable tolling should be read into every federal statute of limitations unless Congress states otherwise).

238. See *Mendez Lynch*, 220 F. Supp. 2d at 1359 (considering the one-year filing deadline to be a statute of limitations and applying equitable tolling).

239. See *Lozano*, 134 S. Ct. at 1231 (detailing the child's entrance into school and therapy in New York).

240. See *Duarte v. Bardales*, 526 F.3d 563, 570 (2008) (cautioning courts about rewarding abductors for concealing the whereabouts of their children long enough to establish a now-settled defense).

241. See *Trotter*, *supra* note 2 at 8 (emphasizing the difference between an absolute and permissive obligation; once a year has passed, the return obligation becomes

government has not formally put forth a compelling interest to deny custodial parents their fundamental rights to raise their children, it is unacceptable not to consider the one-year filing deadline as a statute of limitations to protect parents' ability to fight for their fundamental rights.²⁴²

Lozano did not "sleep on his rights" and wait to look for his daughter until after a year had passed; he spent over sixteen months searching for his child, whom the respondent concealed in another country.²⁴³ Concealment effects a petitioner's likelihood that she will be able to recover his or her child and resume parental duties.²⁴⁴ Failing to equitably toll the filing period to account for this concealment unfairly punishes petitioners and rewards respondents who actively seek to avoid liability for their actions.²⁴⁵ If not for this concealment, Lozano would have filed a petition in a timely manner and received an absolute return of his child in line with American due process requirements.²⁴⁶ Instead, his case was left up to judicial discretion, the result of which deprived him of his fundamental parental rights in violation of substantive due process.²⁴⁷

The inability to make this distinction between cases in which parents are negligent in filing petitions and those in which concealment prevents parents from filing means that the Supreme Court in *Lozano* did not properly consider which parent's rights were in danger of being violated.²⁴⁸ While it is true that the respondent built a stable life for her daughter in New York and made decisions regarding her health and education, she had no right to effectively sever the father's rights by leaving him out of major domestic,

permissive and up to judicial discretion).

242. See *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (emphasizing that the government must have a compelling interest to obstruct such a right).

243. See *Belay v. Getachew*, 272 F. Supp. 2d 553, 563 (2003) (differentiating between cases where an abducted child has been concealed and cases where a parent has neglected to file a petition in time despite knowing their child's location).

244. See *Lehr v. Robertson*, 463 U.S. 248, 257-58 (1983) (holding that parents must have had a prior relationship with their children to establish protected parental rights).

245. See *Duarte*, 526 F.3d at 570 (quoting Hague International Child Abduction Convention, 51 Fed. Reg. 10,494, 10,505 (Mar. 26, 1986) (questioning the propriety of rewarding abductors for concealing their children)).

246. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (noting that due process requires the opportunity for a petition to be heard at a meaningful time).

247. See *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1236 (2014) (concluding that the Court of Appeals had rightly decided that the Hague Convention was not subject to equitable tolling and upholding the respondent's now-settled defense).

248. See *Lehr*, 463 U.S. at 257 (examining the relationship between parental rights and parental obligations).

medical and educational decisions.²⁴⁹ The respondent abused her custodial rights at the expense of the petitioner's, and was rewarded by the court for her actions.²⁵⁰

The Supreme Court erred when it refused to apply equitable tolling to the one-year filing period for Lozano's ICARA petition.²⁵¹ By favoring a child's potential best interests over the procedural and substantive due process rights of the petitioner, the Supreme Court has set a dangerous precedent that allows for unconstitutional violations of the Fourteenth Amendment and disregards the narrow tailoring requirements of the strict scrutiny standard.²⁵²

IV. POLICY RECOMMENDATION

If the United States wants to properly carry out the goals of the Convention and protect parents' procedural and substantive due process rights, it must begin by acknowledging ICARA for what it truly is — a federal statute that has already seen its share of modifications and added conditions, which should be subject to traditional American legal traditions and assumptions.²⁵³ The one-year filing period should also be recognized as a statute of limitations in its own right, as it marks the time during which a parent can exercise their fundamental rights without question.²⁵⁴

Allowing the current precedent to stand effectively enables parent abductors to abuse a system that was specifically created to deter their wrongful actions.²⁵⁵ Rather than using proper legal channels to obtain sole custody, parents are uprooting children from their homes and fleeing across national borders to avoid both the parent who has been left behind and all the

249. See *Vernonia Sch. Dis. v. Acton*, 515 U.S. 646, 654 (1995) (acknowledging that children have very few fundamental rights that they can exercise).

250. See *In re Lozano*, 809 F. Supp. 2d 197, 210 (S.D.N.Y. 2011) (explaining that Lozano exhausted all legal resources in the United Kingdom before beginning his search in the United States and ultimately filing his petition).

251. See *Lozano*, 134 S. Ct. at 1235 (2014) (citing the child's best interests as its reason for refusing to grant Lozano's petition).

252. See *id.* at 1236 (rejecting Lozano's contention that the Hague Convention leaves room for US courts to apply their own "common law doctrine of equitable tolling" to Article 12's one-year filing period).

253. See generally Trotter, *supra* note 2 (elaborating on the conditions added to ICARA before it was codified into U.S. law, including language and financial modification).

254. See generally *Lops v. Lops*, 140 F.3d 927 (11th Cir. 1998) (explaining that the one-year filing period was analogous to a statute of limitations).

255. See *In re Lozano*, 809 F. Supp. 2d at 228 (acknowledging that abducting parents could be encouraged to conceal their children if equitable tolling is not applied to ICARA's filing deadline).

legal consequences awaiting them in their home country.²⁵⁶ While there may be regrettable instances where parents are taking their children and fleeing abusive situations, many parents abduct their own children out of spite, malice, and callous disregard for the other parent's fundamental rights.²⁵⁷

Regardless of any international treaty, individuals who bring a case before a U.S. court should be able to rely on the Constitution. The Fourteenth Amendment protects parental rights for parents who have fulfilled their duty to their children, as well as the procedural due process rights of all individuals within the American legal system.²⁵⁸ In cases where there is no viable grave risk of harm defense, a parent's right to raise and nurture her child should always trump an abductor's right to conceal her children in order to raise an affirmative defense and avoid litigation in her home country.²⁵⁹

V. CONCLUSION

Refusing to apply equitable tolling is an unconstitutional violation of procedural and substantive due process because it prevents custodial parents from using the statutory processes afforded to them under ICARA when their children are abducted or removed from the country and denies them their fundamental parental rights.²⁶⁰ The Supreme Court must recognize the similarities between a statute of limitations and ICARA's one-year filing period, and equitably toll this period in cases of concealment.²⁶¹ Failure to

256. See generally Sherer, *supra* note 21 (noting the conditions of international child abduction that led to the creation of ICARA and the Hague Convention).

257. See Rivers, *supra* note 22 at 591 (emphasizing the difficulty in obtaining effective assistance from foreign authorities and other hurdles faced by custodial parents of abducted children).

258. See generally U.S. CONST. amends. V, XIV (establishing that no person shall be deprived of life, liberty, or property without due process of law).

259. See generally *See Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973) (finding child rearing to be a fundamental right that falls under one's constitutionally guaranteed right to privacy).

260. See *Holland v. Florida*, 560 U.S. 631, 632 (2010) (determining that timeliness is always determined under equitable principles and holding that equitable tolling does not undermine a statute's purpose of eliminating delays). See generally *Mathews v. Eldridge*, 424 U.S. 319 (1976) (identifying three factors that determine when process is due and elaborating that a fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner).

261. See generally *Belay v. Getachew*, 272 F. Supp. 2d 553, 261 (2003) (concluding that the abducting parent would not be allowed to benefit from the "protective sweep" of Article 12 and rejecting her now-settled defense since she concealed her child's whereabouts from the petitioner).

do so violates the fundamental parental rights that the Court has recognized for decades.²⁶² Furthermore, the Court should recognize that its holding in *Lozano v. Montoya Alvarez* was in error, and decline to follow it as precedent in future ICARA cases.²⁶³

262. See generally *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing that the Fourteenth Amendment protects parental rights).

263. See generally *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (emphasizing that the government must have a compelling interest in order to obstruct such a fundamental right); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (requiring regulations to be narrowly drawn to address compelling state interests).