No. 08-645

IN THE
Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,
Petitioner,

v.

JACQUELYN VAYE ABBOTT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a non-custodial parent has the right under the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, to demand that the parent with exclusive rights of custody over the child return the child to his country of habitual residence when the removal from that country by the parent with exclusive rights of custody violates a *ne exeat* order.

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BASIS FOR JURISDICTION

The United States District Court for the Western District of Texas had jurisdiction under 42 U.S.C. § 11603(a). The United States Court of Appeals for the Fifth Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

This case presents the question whether a non-custodial parent has the right under the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670 (the "Convention"), to demand that the parent with exclusive rights of custody over the child return the child to his country of habitual residence when the removal from that country by the parent with exclusive rights of custody violates a *ne exeat* order. The United States Court of Appeals for the Fifth Circuit properly concluded that the answer to that question is "no."

The Convention draws a sharp distinction between "rights of custody" and "rights of access," and affords the remedy of mandatory return only to a parent who not only *holds* but actively *exercises* "rights of custody." The Convention's avowed purpose is to protect the child by maintaining the custodial *status quo* so that custody proceedings in a nation's courts are not preempted by one parent's unilateral action. Nevertheless, the Convention's signatory nations did not grant the remedy of return for violations of "rights of access," because they could not reach consensus on its propriety or contours. Petitioner, who holds only access rights, asks this Court to rewrite the Convention. Moreover, far from furthering the Convention's purpose of protecting the child by maintaining the custodial *status quo*, Petitioner seeks a draconian remedy of mandatory return of a child to a country from which his sole custodial parent, a U.S. citizen, is absent.

The petition does not remotely justify this Court's review. There is no true conflict in the circuits; the Eleventh Circuit case on which the proposed split depends decided a different issue from the Fifth Circuit, holding only that a *ne exeat* order coupled with a joint right of responsibility under Norwegian law constituted "rights of custody" under the Convention. Nor is Petitioner's portrait of an international consensus opposed to the rule of the American circuit courts accurate; the purported conflict that Petitioner conjures is overstated, and involves a hodge-podge of decisions in a handful of signatory nations on idiosyncratic facts and legal issues not present here. There is no mature and significant conflict among international courts of last resort that might someday warrant this Court's attention. Given the heterogeneous circumstances in which this issue arises, this Court's intervention will do little to promote the uniform interpretation and effective enforcement of the Convention. The petition should be denied.

1. Background On The Convention. The Convention, implemented in this country by the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11611, draws a sharp distinction between "rights of custody" and "rights of access." As defined by the Convention, "rights of custody" "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Convention art. 5(a). "Rights of access," in contrast, "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention art. 5(b).

The distinction between "rights of custody" and "rights of access" has real meaning. Under the Convention, a parent has a right to have his child returned to the country of the child's habitual residence only if that parent's "rights of custody" have been violated by the removal. Convention arts. 3, 12. A parent who enjoys only "rights of access" has some remedies under the Convention but does not have the right to petition for the child's return.

The custodial parent's return remedy is not absolute. A parent who enjoys "rights of custody," but who was "not actually exercising the custody rights at the time of removal or retention," loses the right to seek return. Convention art. 13(a). Nor will a signatory country grant a petition for return if there is "a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" or if return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Convention arts. 13, 20.

These provisions reflect the Convention's overarching goal of protecting the child's best interests. As the Convention states, its signatories were "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody." Convention, pmble.

2. Factual Background. Respondent Jacquelyn Abbott is a United States Citizen. Pet. App. 1a. She married Petitioner Timothy Abbott, a British Citizen, in November 1992 and had a son with him in 1995. *Id*. The boy was born in Hawaii and is a U.S. citizen.

Id. Beginning in 2002 and until Mr. and Ms. Abbott separated in March 2003, the parties resided with their son in La Serena, Chile. *Id*.

After Mr. and Ms. Abbott separated, they litigated over the custody of their son in Chilean Courts. Pet. App. 1a-2a. Over the years, the Chilean Court entered four separate custody orders. Pet. App. 2a. The first, a January 2004 order, granted visitation rights to the Petitioner, Mr. Abbott. *Id*. The second, a November 2004 order, denied Mr. Abbott's custody request, granting *all* custodial rights to Respondent Ms. Abbott. *Id*. The third, a February 2005 order, granted Mr. Abbott some additional visitation, including some summer-vacation time. *Id*. The fourth, a January 13, 2004 *ne exeat* order granted at Ms. Abbott's request, prohibited either parent from removing the child from Chile without the other parent's consent. *Id*. Because the visa that permitted Ms. Abbott to live in Chile did not permit her to work for pay, Ms. Abbott had no means of economic support in Chile after the separation. On August 26 2005, Ms. Abbott took her son back to the United States. At the time of the removal, Ms. Abbott enjoyed "all custody rights" pursuant to the Chilean Court's November 2004 order. *Id*. Ms. Abbott and her son now reside in Texas. *Id*.

3. Judicial Proceedings. Mr. Abbott filed a "Petition for Temporary Enforcement of Order for Visitation Issued by a Competent Court of the Child's Home State and for Temporary Restraining Order and Order to Show Cause" in the 274th Judicial District Court of Hays County, Texas on January 31, 2006. Pet. App. 17a. Although Mr. Abbott could have denominated his claims under the Convention

because the International Child Abduction Remedies Act vests concurrent original jurisdiction in both state and federal courts, *see* 42 U.S.C. § 11603(a), he did not do so. Pet. App. 17a. Nevertheless, he sought the same relief, an order allowing him to take his son to Chile. *Id.* The Hays County court granted Mr. Abbott visitation during February 2006 while Mr. Abbott was in Texas but otherwise denied him relief. *Id.*

In May 2006, after the Hays County court's decision, Mr. Abbott filed this action styling his claim as one for relief under the Convention and the International Child Abduction Remedies Act. Pet. App. 18a. Mr. Abbott's argument was that the *ne exeat* provision in the Chilean court order that Ms. Abbott requested to safeguard her sole custody rights gave *Mr. Abbott* "rights of custody" as defined in the Convention. Pet. App. 23a. This, Petitioner argued, entitled him to an order from the District Court directing his son, a U.S. citizen, to return to Chile. *Id.* As noted, neither Petitioner nor Respondent are citizens of Chile. Pet. App. 1a. Mr. Abbott's argument hinged on characterizing the *ne exeat* order as a "right to determine the child's place of residence," language used in the Convention to describe what it means by "rights of custody."

The District Court denied Mr. Abbott's petition, concluding that it "defies the ordinary meaning of the term 'custody' to conclude that Mr. Abbott gained rights of custody . . . as a result of the Chilean court's *ne exeat* order." *Id.* The District Court took special notice of certain facts including that "[u]pon the Chilean Court's rendering of the *ne exeat* order, Ms. Abbott continued caring for [her son] and maintained

control over the daily decisions regarding raising [her son,] including determining [his] place of residence." *Id*. The District Court concluded that the *ne exeat* order "did nothing to affect Mr. Abbott's say (except by leverage) about any childbearing issue other than the child's geographical location in the broadest sense.'" *Id*.

Addressing *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), the case central to Mr. Abbott's cert petition here, the District Court found it to be *factually* inapposite. Pet. App. 21a. Specifically, the Court concluded that under the Norwegian Children Act, the foreign law at issue in *Furnes*, the father with visitation rights also enjoyed "joint parental responsibility," including the right "to make decisions for the child in personal matters" and issues "that affect the child's care." *Id*. (quoting *Furnes*, 362 F.3d at 714). The same is not true under Chilean law. Pet. App. 21a. Thus, the District Court concluded that "[u]nlike the father in *Furnes*, Mr. Abbott does not have statutorily protected rights to make decisions affecting [his son's] care" and the *ne exeat* order did not create "rights of custody" within the meaning of the Hague Convention. *Id*.

The Fifth Circuit affirmed. The Court reasoned that Mr. Abbott "possessed only rights of access to the child, and not rights of custody." Pet. App. 14a. The Court also noted that *Furnes* did not decide the same issue that this case presents because the Eleventh Circuit's opinion "refers to 'rights of custody' as derived from a *ne exeat* right in combination with rights of 'joint parental responsibility.'" Pet. App. 10a n. 7 (quoting *Furnes,* 362 F.3d at 720). Mr. Abbott, in contrast, could point solely to the *ne exeat* order,

which other Circuits had agreed created no "rights of custody." Pet. App. 6a.

REASONS FOR DENYING THE PETITION

The "intractable" conflict in U.S. law hypothesized by the Petition does not exist because no Circuit court or state court of last resort has held that a *ne exeat* clause standing alone constitutes "rights of custody" under Article 5(a) of the Convention. So while the Petition is correct that the Second, Fourth, Fifth, and Ninth Circuits stand together in answering "no" to the question presented, no Circuit or state has answered it "yes." This is not a conflict.

The Petition's attempt to conjure a split of authority depends on its argument that the Eleventh Circuit's *Furnes* decision irreconcilably conflicts with the prevailing view adopted here by the Fifth Circuit. But the ease with which the Fifth Circuit and the district court distinguished *Furnes* belies the argument. *Furnes* simply, and self-consciously, does not resolve the question presented. Without *Furnes,* the Petition has little to cling to by way of a split: three Circuit Court decisions that even Petitioner admits do not address the significance of *ne exeat* provisions under the Convention and three decisions of lower state courts that pre-date the first Circuit court decision addressing the issue, *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), and will therefore never be followed.

Absent the longed-for split among our own courts, the Petition takes on a different cast. The Court must intervene, Petitioner argues, because U.S. courts are out of step with the rest of the world on a question crucial to effective enforcement of the

Convention. But here again the Petition exaggerates. First, what Petitioner tries to portray as the monolithic view of the rest of the world is in reality a hodge-podge of decisions, some of which actually agree with the Fifth Circuit's conclusion, and others of which simply do not address the issue. Second, what Petitioner attempts to portray as a crucial question that threatens to undermine the entire Convention is in reality a narrow issue that affects few petitions for return filed under Article 12.

The arguments Petitioner puts forward in support of his interpretation of the Convention term "rights of custody" have been considered and rejected by the four Circuits to have decided the question presented in this Petition. And it is likely that the remaining Circuits will do the same because a *ne exeat* power cannot properly be characterized as a right of custody. The power of *ne exeat* can be employed in the service of both "rights of custody" (for which the Convention provides the remedy of return) and "rights of access" (for which it does not). But it replaces neither. Indeed, a parent can have the power of *ne exeat* without any custody rights at all. The Fifth Circuit – like the Second, Fourth, and Ninth before it – correctly analyzed the power of *ne exeat* as lacking the indicia of custody in and of itself and have declined to amend the Convention unilaterally in a manner inconsistent with its drafting and negotiation.

The Petition, properly scrutinized, demonstrates no compelling reason for this Court's involvement and should be denied.

I. The Handful Of U.S. Courts To Decide The Question Presented Have Done So Uniformly.

The Petition is premised on the hypothesis that the Circuits are "intractably divided" over whether a *ne exeat* provision in a statute or court order establishes "rights of custody" as that term is defined in Article 5(a) of the Convention. Pet. 7. The premise is flawed, however, because in reality the only four Circuits to resolve the question have done so the same way. The Petition is correct insofar as it posits that the Second Circuit was the first to decide this issue, holding in *Croll* that a *ne exeat* provision did not, in and of itself, confer "rights of custody" for purposes of the Convention. 229 F.3d 133, 139. And it is also correct insofar as it posits that the Ninth Circuit in *Gonzales v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002), the Fourth Circuit in *Fawcett v. McRoberts,* 326 F.3d 491 (4th Cir. 2003), and now the Fifth Circuit in the instant case have elected to follow *Croll.* But the Petition is incorrect – and its hypothesis falls flat – when it proposes that other Circuits have held otherwise.

Petitioner's asserted Circuit split relies entirely on its characterization of the Eleventh Circuit's decision in *Furnes v. Reeves,* 362 F.3d 702 (11th Cir. 2004), as contrary to the Second Circuit's holding in *Croll*. But *Furnes* is clear that its holding depends on additional rights granted to the petitioning parent under Norwegian law, not simply on the interpretation of a *ne exeat* provision. As the *Furnes* court stated, "Our case involves Norwegian law and is different from *Croll* because Plaintiff Furnes's *ne*

exeat right must be considered in the context of his additional decision-making rights by virtue of his joint 'parental responsibility' under Norwegian law." 362 F.3d at 719. Thus, while the *Furnes* court certainly criticized *Croll* in dicta, it recognized that its decision was ultimately distinguishable from, not contrary to, the Second Circuit's: "In contrast to the agreement in *Croll,* the Agreement here granted Plaintiff Furnes joint parental responsibility, which under the Norwegian Children Act granted Furnes the right to share decision-making authority with [the other parent]." 362 F.3d at 720. Unlike Petitioner, the Fifth Circuit and district court in the instant case recognized the fact that *Croll* and *Furnes* address different questions and easily distinguished *Furnes* on that ground. Pet. App. 12a.

With *Furnes* placed in its proper and intended context, Petitioner's proposed split vanishes. Indeed, the next argument – that three Circuits have "suggested" they would find a *ne exeat* provision to confer "rights of custody" (Pet. 12) – is thin on its face and becomes even thinner when one realizes that none of the cited cases seriously considered or even had cause to seriously consider the *ne exeat* question.

The Petition proposes that *Shealy v. Shealy*, 295 F.3d 1117 (10th Cir. 2002), "appeared to assume that violation of a *ne exeat* order would constitute a breach of 'rights of custody'…." Pet. 12. But *Shealy* never confronted the question of how to interpret a pure *ne exeat* clause at all. Rather, the court dealt with an order from a German court prohibiting the mother, a member of the U.S. military, from taking her child out of the country except in case of military necessity. 295 F.3d at 1120. Finding that military necessity

existed, the *Shealy* court concluded that the order was not violated on its own terms and that, as a result, the father's limited *ne exeat* rights were not violated. *Id.* at 1122-23. *Shealy* consequently never had to reach the question of whether a violation of *ne exeat* rights constituted a violation of "rights of custody" under Article 5(a). Tellingly, the *Shealy* court found *Croll* simply inapplicable. *Id.* at 1122.

Petitioner's attempt to glean support from the Seventh Circuit's decision in *Vale v. Avila*, 538 F.3d 581 (7th Cir. 2008), and the Sixth Circuit's decision in *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996) *(Friedrich II),* is equally unavailing and for the same reason. *Vale* held that the petitioning parent had "rights of custody" under the Convention based on the right of *patria potestas* granted to both parents in the Venezuelan divorce decree*,* not based on *ne exeat* rights.[1] 538 F.3d at 586-87. Again, the question presented was never reached: "We need not decide whether the doctrine of *ne exeat* creates custody rights, for in none of the cases that answer the question in the negative did the plaintiff also have the right of *patria potestas." Id.* at 586; *see also id.* at 587 ("The rights and duties of *patria potestas* are so extensive that a parent given them is thereby denoted a fit custodial parent (as may not be the case when the parent is merely given the right of

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[1] *Patria potestas* is a doctrine descended from Roman law that continues to exist in a much-modified form in many civil law countries. *Vale,* 538 F.3d at 584, 587; *Whallon v. Lynn*, 230 F.3d 450, 456-59 (1st Cir. 2000). Though the details of the doctrine differ from country to country, it generally refers to a collection of rights and duties that both parents have with respect to the care and upbringing of the child.

ne exeat)….”). *Friedrich II* is even less relevant as the case did not even *involve* a *ne exeat* provision, resting instead on the straightforward conclusion that German law gave the petitioning father joint custody of the child at the time of removal. *Friedrich II,* 78 F.3d at 1064; *see also Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993) *(Friedrich I).*

Finally, with no discernible conflict between circuits, Petitioner resorts to arguing that the Fifth Circuit’s decision “cannot be reconciled with the decisions of three state courts….” Pet. at 13 (citing *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999), *cert. denied*, 531 U.S. 811 (2000); *David S. v. Zamira*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991); and *D’Assignies v. Escalante*, No. BD 051876 (Cal. Super. Ct. Dec. 9, 1991)). Petitioner’s citation to three intermediate state courts underscores the fact no state courts of last resort have addressed the *ne exeat* question. Regardless, none of the decisions post-dates *Croll,* and the Petition offers no reason to think that state courts will interpret the Convention in contradiction to the holdings of four federal Circuit courts.

The Petition argues that the Court’s intervention is necessary to heal a “division of authority [that] is considered, mature, and entrenched.” Pet. 13. But the Petition fails to deliver any basis on which it could be concluded that such a split does or ever will exist. Since the Second Circuit decided *Croll* in 2000, every Circuit to address the question presented has decided it the same way, and there is no reason to think that the eight Circuits and fifty state courts of last resort that have yet to decide the question will do otherwise. Simply put, there is no conflict among

U.S. courts on the question presented that warrants this Court's intervention.

II. The Petition Inaccurately Portrays U.S. Courts As Out Of Step With The Rest Of The World On An Issue Critical To Enforcement Of The Convention.

The Petition next makes the in-vogue argument that the United States is out of step with the rest of the world on questions of international law. Other signatories to the Convention, says Petitioner, have uniformly held that *ne exeat* "rights" are "rights of custody," and U.S. courts are undermining the Convention by concluding otherwise. Pet. 17-24. Both prongs of this argument are greatly exaggerated. First, the "virtual consensus" among signatories to the Convention posited by the Petition does not exist. Second, the class of cases in which the question presented is dispositive is so narrow that any differences in how signatories choose to resolve it do not seriously threaten the Convention's effective enforcement.

A. Contrary To The Petition, There Is No Consensus Among Signatory Nations Regarding The Interpretation Of *Ne Exeat* Rights.

The Petition asserts that outside of the United States there is "virtual consensus in favor of treating *ne exeat* rights as rights of custody." Pet. 18. As a threshold matter, the assertion of "consensus" is difficult to square with the fact that, even according to Petitioner's own tally, courts in just eleven of the eighty-one signatories to the Convention have

considered the question and the fact that two of those countries' courts – including the Supreme Court of Canada – have *agreed* with the conclusion reached by the Fifth Circuit in this case. Even putting that aside, Petitioner's claim of uniformity ignores the complex reality of the foreign jurisprudence that does exist. In reality, few signatories have finally resolved whether *ne exeat* rights amount to rights of custody under the Convention, with many of the cited decisions coming from lower courts and/or turning on factors other than the interpretation of *ne exeat* provisions. Consequently, even if a "consensus" among foreign courts justified this Court's intervention – a proposition the Petition fails to establish – no such consensus has been established.

First, the Petition glosses over the fact that the Supreme Court of Canada has twice concluded that a *ne exeat* right is *not* in and of itself sufficient to constitute "rights of custody" under the Convention. In *Thomson v. Thomson,* [1994] 3 S.C.R. 551 (Can.), the Court, looking to the text and drafting history of the Convention, refused to hold that the "Convention applies to every case where a child is removed from one country to another where a court order prohibits it." *Id.* ¶ 50. Accordingly, the Court concluded that a Scottish court's interim order granting the father access rights and containing a *ne exeat* provision did not vest the father with "custody rights" sufficient to compel the child's return to Scotland under the Convention. *Id.* ¶ 68. The Court observed that *ne exeat* provisions are intended to ensure access and are "not intended to be given the same level of protection by the Convention as custody." *Id.* ¶ 69. The Canadian Supreme Court's decision is not dicta,

as Petitioner suggests; it definitively rejected the father's Convention claim on this basis. *Id.* ¶ 77. The fact that there was an alternative basis under Canadian law to order return of the child does not transform the decision on the Convention claim into dicta.

The Canadian Supreme Court reached a similar conclusion again two years later in *D.S. v. V.W.*, [1996] 2 S.C.R. 108, ¶¶ 75-77 (Can.). This time the Court noted that the Convention "cannot be interpreted in a way that systematically prevents the custodial parent from exercising all the attributes of custody, in particular that of choosing the child's place of residence, but, on the contrary, must be interpreted in a way that protects their exercise." *Id.* ¶ 33. In light of this intention, the Court held, a reading of the Convention that would allow a parent who merely holds access rights protected by a *ne exeat* order to compel return of the child "would contradict the very object of the [Convention], namely to protect rights of custody and the exercise of the attributes thereof, including the choice of the child's place of residence." *Id.* ¶ 38.

Petitioner's response to this authority is to argue that there is doubt regarding whether these two decisions represent the view of Canadian courts. That argument should be accorded the same weight as an argument that two decisions of *this* Court do not represent *its* views. But even if there was doubt, that doubt would still undermine, not repair, the "consensus" on which Petitioner's argument relies. The same is true of the divergent opinions of the French courts, which the Petition reluctantly acknowledges. *Compare Ministere Public v. Mme. Y.,*

Tribunal de grande instance [T.G.I.][ordinary court of original jurisdiction] Périgueux, Mar. 17, 1992, D.S. Jur. 1992 (Fr.) (concluding that a *ne exeat* provision in the custody arrangement did not create custody rights when petitioner had only access rights) *with Ministre Public c. MB,* Cour d'appel [CA] [regional court of appeal] Aix-en-Provence, Mar. 23, 1989, *reprinted in* 79 Rev. crit. 529 (1990) (an intermediate appellate court concluding that a *ne exeat* order does create rights of custody).

Second, only seven out of the twenty-one foreign cases cited by Petitioner are judgments by the highest court of those nations, and three of those are from Canada. *See M.S.H. v. L.H.,* [2000] 3 I.R. 390 (Supreme Court of Ireland); *Sonderup v. Tondelli*, 2000 (1) SA 1171 (CC) (S. Afr.); Bundesverfassungsgericht [BVerfG] [Fed. Const. Ct.] July 18, 1997, 2 BvR 1126/97 (F.R.G.); *D.S. v. V.W.,* [1996] 2 S.C.R. 108 (Can.); *Goertz v. Gordon*, [1996] 2 S.C.R. 27 (Can.); *Thomson v. Thomson,* [1994] 3 S.C.R. 551 (Can.); Oberster Gerichtshof, [OGH] [Supreme Court] Feb. 05, 1992, 2 Ob 596/91 (Austria). The remainder of the cases cited are from family courts, trial courts, or intermediate courts of appeal. *See, e.g., In re Marriage of Jose Garcia Resina and Muriel Ghislaine Henriette Resina,* Appeal No. 52, 1991 (Fam.) (Austl.) (decision from Australian Family Court); *C. v. C.,* [1989] 1 W.L.R. 654 (Eng. C.A.) (decision from English intermediate appellate court); *Secretary for Justice v. Abrahams,* Family Court at Taupo, Sept. 3, 2001 (N.Z.) (decision from New Zealand family court). As a result, Petitioner's contention that signatory countries have *decided* the question presented is overstated.

Third, even if the cited cases could be interpreted as articulating the view of the nations in which they were decided, a number of them would not be relevant because of differences in the rights asserted. In the New Zealand case on which Petitioner relies, for example, the "custody rights" of the petitioning parent consisted not just of a *ne exeat* order but also co-guardianship granted by the South African court order. *Secretary for Justice v. Abrahams*, Family Court at Taupo, Sept. 3, 2001 (N.Z.) (explaining that the custody rights vested in the mother of children produced in an Islamic marriage as a matter of South African law survive in any subsequent court order modifying custody).

The South African case of *Sonderup v. Tondelli*, 2000 (1) SA 1171(CC) (S. Afr.), also does not support Petitioner's claim of a conflict. The *Sonderup* court ordered a child's return on the basis of an *interim* custody agreement between the parties in which they agreed that respondent would return to finalize the issues of custody and access. *Id.* ¶ 24; *see also M.S.H. v. L.H.*, [2000] 3 I.R. 390 (ordering the return of children removed during pending custody proceedings). The South African court explicitly distinguished the case from one in which a final custody order has been entered and specifically stated that it did not find the English appellate court in *C. v. C.*'s adoption of Judge Sotomayor's approach in *Croll* persuasive because the facts in *Croll* were inapposite. *Id.* The case Petitioner cites from the German Federal Constitutional Court is not on point either. Pet. 20. There, the German Court held that the petitioner had "rights of custody" under the Convention because under Argentinean law he had

the right to jointly decide questions relating to health, education, the child's emancipation and right to marry, and the child's ability to join defense or security forces. Bundesverfassungsgericht [BVerfG] [Fed. Const, Ct.] July 18, 1997, 2 BvR 1126/97, ¶¶ 13-15 (F.R.G.).

Finally, it should also be noted that even if foreign decisions did uniformly contradict the Fifth Circuit's rule, this would not require the Court to grant the Petition, much less reverse. While sister signatories' jurisprudence is "entitled to considerable weight" in interpreting treaty provisions, *Air France v. Saks*, 470 U.S. 392, 397 (1985), it is far from dispositive. The Court has made plain that the interpretation of a treaty does and must derive primarily from the ordinary meaning of its text. *See Medellín v. Texas*, 128 S. Ct. 1346, 1357 (2008); *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988); *Air France,* 470 U.S. at 397. If that text is ambiguous, it may then be necessary to look to other sources; however, even then the drafting history and intent of the signatory parties should be accorded more weight than any sister signatories' judicial interpretation. *Chan,* 490 U.S. at 134; *see also Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534-35 (1991); *Volkswagenwerk,* 486 U.S. at 700. Thus, while the Petitioner suggests that the Fifth Circuit should have deferred to the decisions of foreign courts as a matter of course, this Court has rarely resolved questions of treaty interpretation with reference to foreign case law, and where it has done so, it has hesitated to follow the

opinions of intermediate appellate courts and emphasized that distinguishing factual circumstances must be carefully considered. *Olympic Airways v. Husain*, 540 U.S. 644, 655 n. 9 (2004).

B. The Petition Exaggerates The Significance Of The Question Presented.

The Petition's foreign-jurisdiction argument is flawed for another reason. Even if there were consensus among foreign courts that a *ne exeat* prohibition is a "right of custody," the fact that U.S. courts have concluded otherwise would not threaten the effective enforcement of the Convention. To read the Petition one would think that every wrongful removal petition filed under the Convention turns on a *ne exeat* provision. But as the discussions of U.S. and foreign case law above illustrate, the resolution of such petitions depends more often on other factors, including the details of the particular divorce decree or court order at issue, unique foreign statutes, or the affirmative defenses that the Convention provides. As a result, resolution of the question presented would affect only a narrow class of cases.

The cases cited in the Petition aptly illustrate the diverse range of factors that bear on whether a petition for removal is granted. *Shealy,* for example, turned exclusively on whether the district court had correctly decided that the mother, a member of the U.S. military, had left Germany because of "military necessity." *Shealy,* 362 F.3d at 1123. *Vale,* 538 F.3d at 586, and *Whallon v. Lynn,* 230 F.3d 450, 459 (1st Cir. 2000), turned on the current meaning ascribed to the ancient doctrine of *patria potestas.* And

Friedrich II turned on whether the father's contact with the son was sufficient to constitute the active "exercise" of his legal custody rights for purposes of the Convention. 78 F.3d at 1064. A petition for removal is also subject to four affirmative defenses, including that there is a risk of physical or psychological harm to the child or that return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Convention arts. 12, 13a, 20; 42 U.S.C. § 11603(e)(2)(A),(B). As a result, the number of legal and factual circumstances that can arise is dizzying and, as the Petition betrays, albeit unintentionally, it is a rare case indeed that will turn on the existence of a *ne exeat* order. Significantly, the Petition does not suggest that U.S. courts are out-of-step with other countries on these issues or that the United States is considered to be an ineffective or reluctant enforcer of the Convention.

III. This Case Is A Poor Vehicle For Resolving The Question Presented Because The *Ne Exeat* Provisions of Chilean Law Vest No Rights In The Father.

While the *ne exeat* laws of other countries may sometimes grant a noncustodial parent the right to veto whether a child may be taken abroad, Chilean law does not. Thus, this case is a poor vehicle for resolving any purported conflict in authority.

Chilean law vests the power of veto only in the family court. The requirement that a custodial parent seek authorization from a parent with visitation rights is simply a mechanism to avoid invocation of the court's jurisdiction where there is no

dispute over the interests of the child or the abridgement of visitation rights. But denial of consent does not equate to veto of the departure of the child; it simply makes the custodial parent go to court to seek approval, whereupon the family court will determine if "good reason" exists to prevent the departure. Minors Law 16,618 of Chile, art. 49 (Pet. App. 62a). The *ne exeat* order of the Chilean court in this case has the same effect. *Id*. Because under Chilean law it is the family court, and not the parent with visitation rights, that holds the power to veto the custodial parent's departure decisions, this Court cannot resolve the question presented in any way that will meaningfully affect the development of law interpreting the Convention.

Furthermore, this Court's resolution of the question presented will not affect the ultimate outcome of the case. To begin, the Petitioner's claim is subject to a defense of *res judicata* because the same issue – the return of the Abbotts' son to Chile – between the same parties has been finally adjudicated by the Hays County court. Pet. App. 17a. The District Court has yet to reach the issue. Pet. App. 25a. The District Court has also never reached the question of whether Petitioner was actively "exercising" any "rights of custody" he may have had at the time of removal. This is an element of a return claim that Petitioner must prove by a preponderance of the evidence. 42 U.S.C. § 11603(e)(1)(A). And any re-opening of the fact-finding process will potentially

implicate subsequent events such as the Abbotts' son's intervening attainment of the age of consent.[2]

IV. Further Development Is Required On The Question Of Whether And How A *Ne Exeat* Right Can Be Continuously "Exercised" As A Right of Custody At The Time Of Removal.

Even if *ne exeat* rights were at issue here, the decisional law is too undeveloped at this time to warrant the Court's intervention. Petitioner attempts to formulate the question presented as a simple exercise in parsing definitions. He contends that if a parent has the right, pursuant to a *ne exeat* provision, to prevent a child from leaving the country, the parent thereby holds a "right to determine the child's place of residence," which is an element of a "right of custody" mentioned in the Convention. Convention art. 5. But the question presented cannot be fully answered by such a simple analysis.

An applicant for a return order under the Convention must show not merely that he possessed

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[2] Article 13 of the Convention provides that the court "may also refuse to order the return of the child if it finds that the child objects to being returned and has obtained an age and degree of maturity at which it is appropriate to take account of its views." Section 153.008 of the Texas Family Code provides that "[a] child 12 years of age or older may file with the court in writing the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child, subject to approval by the court." *See also* TEX. FAM. CODE ANN. § 153.009 (Vernon Supp. 2008). (requiring court to interview child 12 or older upon proper application to determine his wishes with respect to residence). The Abbotts' son is now 13. Pet. App. 1a.

custody rights, but also that he was "exercising the custody rights at the time of removal or retention." Convention art. 13. Thus, "rights of custody" are necessarily rights that can be actively and contemporaneously exercised at the time of removal. *Ne exeat* "rights" cannot meet that definition.

Consent to a child's departure from his country of residence pursuant to a *ne exeat* prohibition does not always involve residence decisions, for example when the child is taken abroad for family visits, vacations, or health care. Consequently, the exercise of a *ne exeat* right is not coextensive with the exercise of the "right to determine the child's place of residence" (Convention art. 5), and thus does not always involve the exercise of custodial rights under any definition. Indeed, even if *arguendo* a *ne exeat* right sometimes operates as a custodial right when residence is at issue, the exercise of *ne exeat* rights would constitute the exercise of custodial rights at the time of removal only in rare circumstances: *i.e.*, when the custodial parent seeks to establish a new residence for the child, and the non-custodial parent withholds consent to establishment of the new residence.

The necessity for active, contemporaneous exercise confirms that *ne exeat* rights are not "rights of custody" within the meaning of the Convention at all. It is inconceivable that the Convention intended the wrongfulness of a child's removal or retention, and the remedy of mandatory return, to depend on such a rare happenstance as when consent is specifically withheld from a request to establish an extrajurisdictional residence.

Neither the Petition nor the cases on which it relies attempt to reconcile the unique character of *ne exeat* rights with the Convention's core requirement that the applicant be actively "exercising" his custodial rights "at the time of removal" in order to have a return remedy. This Court should await further development of the law, in which courts deal directly with these intertwined questions. It should not resolve the misleadingly simplified question presented in the Petition.

V. The Fifth Circuit Correctly Concluded That A *Ne Exeat* Right, Standing Alone, Does Not Trigger The Hague Convention's Remedy Of Return.

Petitioner contends that certiorari is further warranted because the Fifth Circuit's decision is incorrect. However, the various arguments Petitioner puts forward in support of that proposition have now been rejected by four Circuit courts, of which the Fifth Circuit is just the most recent. The Fifth Circuit's interpretation of the Convention is consistent with this Court's jurisprudence and is correct.

The ordinary meaning of a treaty's text is the primary source for interpretation. *Medellín v. Texas,* 128 S. Ct. at 1357; *Chan,* 490 U.S. at 134; *see Air France,* 470 U.S. at 396-400. The records of drafting and negotiation are also helpful to "elucidate" the meaning of that text. *Chan,* 490 U.S. at 134; *Air France,* 470 U.S. at 400. If the text is not clear, the primary sources to which the Court looks are the context in which the words were written and the intent of the parties at the time of negotiation.

Eastern Airlines, 499 U.S. at 534-35; *Chan,* 490 U.S. at 134; *Volkswagenwerk*, 486 U.S. at 699. Where, as here, the treaty's text and drafting history are clear, the Court need not look to post-ratification interpretations of other contracting parties such as the Special Commission Proceedings heavily cited in the Amicus Brief filed by the Hague Conference. *See Eastern Airlines,* 499 U.S. at 534-35; *Volkswagenwerk*, 486 U.S. at 700 (other rules of construction are only necessary for "difficult" passages).

The Convention explicitly defines the difference between "rights of custody" and "rights of access." Convention art. 5. The drafters intentionally created the clear distinction between the two sets of rights, and they are thus treated quite differently by the Convention. Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ("*Perez-Vera Report*"), *in* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTES ET DOCUMENTES DE LA QUARTORZIEME SESSION, TOME III, p. 428, 443 (1980).[3] The Chilean custody order granted to Petitioner "the right to take a child for a limited period of time to a place other than the child's habitual residence," which falls squarely within the Convention's definition of "rights of access." Convention art. 5(b).

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[3] *See Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10494, 10503 (1986) ("[Professor Perez-Vera's] explanatory report is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it.").

Holders of custody rights are entitled to a special remedy whenever a "wrongful removal" of a child occurs, namely, the return of the child to the nation of his or her habitual residence. Convention art. 12. A removal is "wrongful" under the terms of the Convention only if it violates "rights of custody." Convention art. 3. Removal of a child that interferes with "rights of access" is not "wrongful" and therefore the Article 12 remedy does not attach. The majority view of Convention drafters, and that adopted in the final version of the Convention, was that a breach of access rights, "especially where the child was taken abroad by its custodian," was not within the category of wrongful removals that the Convention seeks to prevent. *Perez-Vera Report* at 445.

A proposal to extend Article 3's protection to holders of "rights of access" was considered and overwhelmingly rejected during Convention negotiations. *Procès-verbal No 3 in* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTES ET DOCUMENTES DE LA QUARTORZIEME SESSION, TOME III, p. 263, 267 (1980). In the view of one delegate, "the purpose of article 3 was to protect custodial parents against the wrongful removal of children, whereas the purpose of article 17 [later article 21] was to protect non-custodial parents who possessed rights of access which had been breached by the custodial parent." *Id.* at 266. Access rights are afforded some protections under the Convention, *see* art. 21, but the Article 12 right of return is not one of them. The Fifth Circuit correctly relied on this distinction between custody rights and access rights. Pet. App. 14a.

The Petition places great weight on the comments of two delegates who, in discussion of this failed proposal, opined that access rights coupled with a *ne exeat* clause would qualify for the Convention's protections. Pet. 31. It mischaracterizes the discussion by claiming that "participants agreed" that the child would have to be sent back in such a situation, when in reality the statements only amount to comments by two individual delegates, in support of a proposal that was overwhelmingly rejected by the majority of negotiating parties. *Procès-verbal No. 3* at 266.

Because it is clear that access rights do not entitle the Petitioner to Article 12's remedy, he argues that the *ne exeat* provision in the Chilean court's order alone grants him the requisite "rights of custody." However, both the Convention's text and its negotiating history lead to the conclusion that a *ne exeat* clause alone does not fall within the rights protected by the Convention's remedy for wrongful removal.

Both the consistent language and the drafting history make it clear that the drafters considered custody rights as plural, a cluster of rights amounting to the right to care for and protect a child. Both the *Croll* court and the Fifth Circuit below accurately recognized this concept. *Croll,* 229 F.3d at 138-39; Pet. App. 7a-8a. The Convention never once refers to a singular "custody right," but speaks only of "rights of custody." The "right to determine the child's place of residence" is only one specific right contained within that cluster: it is a "particular" manifestation of the broader right to care for the child. It is especially noted in Article 5's definition of custody

rights because it directly relates to the central object and purpose of the Convention, which is to protect custodial parents from violation of their custodial rights by illegal removal of the child from the residence they chose. *Perez-Vera Report* at 451-52. Article 5 "includes" the right to determine residence within the definition of custody rights, but in no way does it indicate that veto power under a *ne exeat* provision alone rises to the level of rights that are protected by the prohibition on wrongful removal.

Furthermore, as the Fifth Circuit and *Croll* correctly recognized, consent power under a *ne exeat* provision do not empower an access-rights holder to "determine a child's residence." At most, that parent simply has the opportunity to veto a choice of residence independently made by the custodial parent. Pet. App. 8a; *Croll,* 229 F. 3d at 139-40. The power to frustrate the custodial parent's exclusive right to determine residence is not the same as a shared custody right. Accordingly, the Chairman of the Hague Conference at the time of the Convention's negotiation has since publicly stated that Article 5's definition of custody rights should not include "a right simply to give or to withhold consent to changes in a child's place of residence." A. E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L. Q. 537, 546 (July 1981).

Petitioner has provided the Court with cherry-picked passages from the negotiating history in an attempt to portray the Convention's purpose broadly and vaguely enough so that it can include his position. In reality, however, the primary object and purpose of the Convention is simple and clearly established in the travaux preparatoires. At the

"head of [the] objectives" of the Convention is "the restoration of the *status quo*;" in other words, to prevent "conduct…which changes the family relationships which existed before or after any judicial decision, by using a child and thus turning it into an instrument and principal victim of the situation." *Perez-Vera Report* at 429, 442. The drafters specifically had in mind a situation where the abductor disturbed the status quo of the child's existing custodial relationship by, for example, unlawfully retaining the child during a period of temporary residence with a non-custodial parent who holds access rights. *Id.* at 429-30, 442.

To recognize a *ne exeat* clause as worthy of Article 12's protections would in fact run directly contrary to this primary objective. In most cases, including the one at hand, a parent or other individual that has been awarded access rights along with a *ne exeat* clause has already been determined unfit to exercise custody rights over the child by a court in his or her own nation of habitual residence. To allow such an individual to demand return of the child to a country from which the custodial parent has left and, in many cases, will not be permitted to return, flies in the face of the drafters' intent. The position Petitioner espouses destroys, rather than protects, the status quo of the existing custodial relationship, and fails to treat the child's interests as "of paramount importance." Convention, pmble.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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