No. 08-645

IN THE

Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,

Petitioner,

v.

JACQUELYN VAYE ABBOTT,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Under the Hague Convention on the Civil Aspects of International Child Abduction, a child who has been "wrongfully removed" from his country of habitual residence must be returned. Hague Convention art. 12. A "wrongful removal" is one that occurs "in breach of rights of custody." *Id.* art. 3. The question presented is:

Whether a ne exeat clause (that is, a clause that prohibits one parent from removing a child from the country without the other parent's consent) confers a "right of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction.

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BRIEF FOR THE PETITIONER

Petitioner Timothy Abbott respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a) is published at 542 F.3d 1081. The district court's opinion (Pet. App. 15a) is published at 495 F. Supp. 2d 635.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 2008. Pet. App. 1a. Petitioner filed a timely petition for a writ of certiorari on November 14, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT TREATY AND STATUTORY PROVISIONS

The Hague Convention on the Civil Aspects of International Child Abduction (Pet. App. 27a), the International Child Abduction Remedies Act (Pet. App. 46a), and Minors Law 16,618 art. 49 (Chile) (Pet. App. 61a) are reproduced in the Petition Appendix.

STATEMENT OF THE CASE

1. The United States is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention"), Oct. 25, 1980, T.I.A.S. No. 11670, which came into force in the United States on July 1, 1988. Congress implemented the Convention in the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 et seq.

The Convention is the primary source of international law governing the return of children who have been abducted by a parent to another country. It was negotiated and adopted "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." Pet. App. 27a.

Article 12 of the Convention requires signatory countries to return any children who are wrongfully removed from, or retained outside of, their country of habitual residence. Pet. App. 32a. Article 3 of the Convention outlines two requirements that must be met for a removal or retention to be considered wrongful. First, the removal or retention must occur "in breach of rights of custody . . . under the law of the State in which the child was habitually resident immediately before the removal or retention." Pet. App. 28a. Second, "at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." *Id.* Under Article 3, rights of custody may arise "by operation of law or by reason of a judicial or administrative decision, or by

reason of an agreement having legal effect under the law of that State." *Id.*

In turn, Article 5(a) of the Convention defines "rights of custody" as including "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Pet. App. 28a. The term "rights of custody" is to be construed "autonomously" – that is, not by looking at how the particular country at issue has described the right, but rather by determining whether the substance of a parent's rights under the law of the country of the child's habitual residence amounts to "rights of custody" under the Convention. Perm. Bureau of the Hague Conf. on Priv. Int'l Law, *Overall Conclusions of the Special Commission of Oct. 1989 on the Operation of the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction* 3 (1989).[1]

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[1] The Convention carves out four narrow exceptions to the automatic return remedy. Three of those exceptions can be found in Article 13, which provides that the child's return is not required if (1) the custody holder either "was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention"; (2) "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 (3) the authorities in the country to which the child was abducted determine "that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." Pet. App. 33a. The fourth exception is found in Article 20, which authorizes a signatory state to decline return when it "would not be permitted by the fundamental principles of the requested State

In contrast with the automatic return remedy for breaches of "custody" rights, the Convention does not require the return of a child whose removal or retention breaches rights of "access," which the Convention defines in Article 5(b) as including "the right to take a child for a limited period of time to a place other than the child's habitual residence." Pet. App. 28a. Instead, a parent holding access rights may seek assistance in "securing the effective exercise" of those rights. *See* Pet. App. 35a.[2]

The Convention reflects the judgment that the best interests of children collectively are served by returning wrongfully removed children to the country of their habitual residence. PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 29-30 (1999); *see also* Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ("Pérez-Vera Report"), *in* ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 431, ¶ 23 (1982).[3]

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relating to the protection of human rights and fundamental freedoms." Pet. App. 35a.

[2] Each Convention signatory must designate one or more Central Authorities "to discharge the duties which are imposed by the Convention." Pet. App. 29a. The Central Authorities are responsible for "co-operat[ing] with each other and promot[ing] co-operation . . . to secure the prompt return of children and to achieve the other objects of this Convention." *Id*.

[3] The Pérez-Vera Report is recognized "as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention." U.S. Dep't of State, *Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10,494, 10,503 (Mar. 26, 1986).

Thus, in the view of the Convention's signatories, a court faced with a Convention claim should generally refrain from determining whether the best interests of a particular child will be served by his return. *See* BEAUMONT & MCELEAVY, *supra*, at 29 & n.8.

In particular, the Convention was intended to be a "reciprocal" convention, pursuant to which signatories mutually agree to return abducted children so that the courts in the child's country of habitual residence can resolve any disputes regarding custody. "[T]his duty of co-operation . . . makes the Convention an effective instrument to stop the cycle of kidnappings and re-kidnappings" that often prevailed in the absence of an international remedy. Perm. Bureau Germ. Const'l Ct. Memo., 35 I.L.M. 529, 538, ¶ 9 (1996).

2. Petitioner Timothy Abbott, a British citizen, married respondent Jacquelyn Vaye Abbott, a U.S. citizen, in England in 1992. Pet. App. 1a. Mr. Abbott's work as an astronomer specializing in detector science and telescope management took the couple to Hawaii, where their son A.J.A. – who is a citizen of both the United States and the United Kingdom – was born in 1995. *Id.* After a three-year stay in the Canary Islands, the Abbotts moved to Chile, where Mr. Abbott had accepted a new job. *Id.*

In March 2003, Mr. and Mrs. Abbott separated. Pet. App. 1a. During the next two-and-a-half years, they litigated various issues relating to their son in a Chilean family court, ultimately leading to a series of orders by that court. This included a ne exeat order, issued on January 13, 2004 at Mrs. Abbott's request, which prohibited either parent from removing A.J.A. from Chile without the court's written authorization.

Pet. App. 2a. Pursuant to the other orders, Mrs. Abbott retained daily care and control of A.J.A., but Mr. Abbott had a "direct and regular" relationship with his son, Pet. App. 16a-17a, that by February 2005 included visitation every other weekend, one evening per week, and for one month during A.J.A.'s summer vacation, J.A. 40.

In addition to the January 13, 2004 ne exeat order entered by the Chilean family court, Mr. Abbott also held a ne exeat right under a Chilean statute that requires written authorization from a parent having visitation rights before the other parent may take a child out of Chile. Minor's Law 16,618 art. 49 (Chile) (Pet. App. 61a). If the parent having visitation rights either cannot authorize the child's departure from the country or denies authorization "without good reason," the Chilean family court may give permission for the child to leave the country. Pet. App. 62a.

In July 2005, as disputes over the care and control of A.J.A. continued, Mr. Abbott returned to the Chilean family court seeking a protective order that would have expanded his rights with respect to his son. *See* Pl.'s Dist. Ct. Tr. Br. ¶ 20, *reprinted in* C.A. R. 48; J.A. 56; *see also* Pet. App. 2a. The visitation-rights case in the family court was also re-opened, and a hearing was scheduled for September 5, 2005. *See* J.A. 56.

On August 26, 2005, while proceedings in the Chilean family courts were still pending, Mrs. Abbott boarded a flight in Santiago, Chile, taking with her A.J.A. – who was then ten years old. Pet. App. 17a. Without Mr. Abbott's knowledge or consent, and in violation of both the Chilean ne exeat order and

Chilean law, Mrs. Abbott took A.J.A. to the United States, *id.*, where they remain today. According to the police report, Mrs. Abbott presented airport officials in Santiago with a copy of the family court's November 2004 decision, which awarded daily care and control of A.J.A. to her and indicated only that Mr. Abbott's visitation rights had been "already determined" in an earlier proceeding. Report of Int'l Police of Santiago Airport, Order No. 1257-1 (Oct. 17, 2005) (English trans.), *reprinted in* Plaintiff's Dist. Ct. Ex. 1, C.A. R. Excerpts, Tab 37, at 11-12. Mrs. Abbott also provided officials with a copy of a provisional settlement regarding visitation, entered in August 2003, that applied only for eight weeks. *Id.* She failed to provide copies of either the January 2004 or February 2005 orders granting Mr. Abbott a "direct and regular" relationship with his son, including visitation. And although Chilean immigration officials had entered the ne exeat order in their database in January 2004, a data entry error prevented airport officials from discovering the ne exeat order when they conducted a search of the database. *Id.*

Petitioner hired a private investigator and, four months after the removal, located his son in Texas. Pet. App. 2a. In February 2006, Mrs. Abbott filed a petition for divorce in Texas state court. J.A. 44-51. In addition to a divorce from Mr. Abbott, Mrs. Abbott asked the court to issue a new custody order that would modify the terms of the orders issued by the Chilean family court to expand her own rights with regard to A.J.A., while diminishing those of Mr. Abbott. J.A. 46-49. She sought, among other things, to be appointed as A.J.A.'s "sole managing

conservator" under Texas law, J.A. 46, an appointment that would give her the exclusive right to designate A.J.A.'s primary residence, to consent to certain medical and psychiatric treatments for him, and to make decisions concerning his education, Tex. Fam. Code § 153.132.[4] She also sought an order requiring that any visitation by Mr. Abbott with his son occur in Texas and under supervision, as well as a declaration that the United States was A.J.A.'s country of habitual residence. J.A. 48. The case remains pending in the state district court, which has issued only one order in the proceeding, upholding Mr. Abbott's special appearance pursuant to Texas Rule of Civil Procedure 120a. *See* J.A. 59-61.

2. In May 2006, petitioner filed this suit in federal district court in Texas, seeking to have his son returned to Chile pursuant to the Convention and ICARA on the ground that the ne exeat right conferred by Chilean law and the January 13, 2004 court order constituted "rights of custody" for purposes of the Convention. J.A. 53. In her answer, Mrs. Abbott countered that her removal of A.J.A. from Chile without Mr. Abbott's consent did not breach any "rights of custody" for purposes of the Convention. J.A. 64. And in any event, she posited, the Chilean court orders could be "render[ed] . . . meaningless" by any orders entered regarding A.J.A. in the divorce proceedings that she had initiated. J.A. 66.

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[4] Under Texas law, it is generally presumed to be in the best interest of the child to have both parents appointed as joint managing conservators. Tex. Fam. Code § 153.131.

The district court denied Mr. Abbott's request for his son's return. Pet. App. 15a. Although Mrs. Abbott had specifically conceded that her removal of A.J.A. violated Chilean law (and in particular the ne exeat order), Pet. App. 6a, 19a-20a, and the court acknowledged that her removal of A.J.A. without Mr. Abbott's consent or knowledge "violated and frustrated the Chilean court's order," Pet. App. 24a, the court nonetheless concluded that the removal was not "wrongful" within the meaning of the Convention because Mr. Abbott's ne exeat right was not a right of custody. Pet. App. 26a.[5]

On appeal, the Fifth Circuit affirmed. Framing the "dispositive question" before it as whether Mr. Abbott "possessed 'rights of custody' as defined by the Hague Convention," Pet. App. 5a, the court of appeals declined to follow the Eleventh Circuit's decision in *Furnes v. Reeves*, 362 F.3d 702 (11th Cir.), *cert. denied*, 543 U.S. 978 (2004), holding that "a ne exeat right alone is sufficient to constitute a custody right," Pet. App. 10a (footnote omitted), or the dissent in *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001), which also deemed the ne exeat right at issue in that case a "right of custody." Instead, the Fifth Circuit reasoned, "[t]he

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[5] In light of its holding, the district court declined to consider whether Mr. Abbott's Convention suit was barred by res judicata by virtue of his earlier state court suit seeking temporary enforcement of the Chilean visitation order. *See* Pet. App. 17a, 25a. Similarly, the Fifth Circuit did not address this issue on appeal.

ne exeat order . . . gave [Mr. Abbott] a veto right over his son's departure from Chile, but it did not give him any rights to determine where in Chile his son would live." Pet. App. 13a. Moreover, "the Chilean family court, in its second order, expressly denied the father's request for custody rights and awarded all custody rights to the mother." *Id.* Thus, the panel held, "ne exeat rights, even when coupled with 'rights of access,' do not constitute 'rights of custody' within the meaning of the Hague Convention." Pet. App. 14a.

Mr. Abbott filed a timely petition for certiorari. On May 28, 2009, pursuant to this Court's invitation, the Solicitor General filed a brief expressing the United States' view that the decision below was erroneous because the ne exeat right was a right of custody, and that the petition should be granted. On June 29, 2009, the Court granted certiorari. 129 S. Ct. 2859 (2009).

SUMMARY OF THE ARGUMENT

The question before this Court is easily resolved by the plain language of the Convention: a ne exeat right is a "right of custody" because it gives the parent holding the right decision-making authority over the country in which the child will live and thus constitutes a "right to determine the child's place of residence." This is so even under a narrow construction of the term "place of residence" that focuses on the specific address or city in which the child lives, because the parent holding the ne exeat right enjoys the joint right to make such determinations whenever the other parent seeks to live outside the child's country of habitual residence –

i.e., in precisely the circumstances with which the Convention is concerned.

Holding that a ne exeat right is a right of custody is also most consistent with the context and purpose of the Convention. The Convention's signatories adopted an automatic return remedy to ensure that courts in the country of the child's habitual residence should decide questions relating to the merits of custody disputes. This case is a perfect example of this principle. Under the Chilean court orders and Chilean law, Mr. Abbott had the right to a direct and regular relationship with his son and the shared right to determine the country in which his son would live; Mrs. Abbott had day-to-day care and control of A.J.A. but, by virtue of Mr. Abbott's ne exeat right, was limited to exercising those rights in Chile absent Mr. Abbott's authorization to leave the country. When Mrs. Abbott absconded to the United States with A.J.A., in acknowledged violation of both the ne exeat order and Chilean law, she not only prevented the Chilean family court from resolving the pending proceedings before it – in which Mr. Abbott sought to expand his rights with regard to A.J.A. – but then also went to court in Texas seeking to further expand her own rights, at Mr. Abbott's expense. Construing the ne exeat right as a right of custody, thereby requiring A.J.A.'s return to Chile, will ensure that the Chilean family courts can resolve the pending disputes and any others that may arise.

Because the text and purpose of the Convention make clear that a ne exeat right is a right of custody, no further inquiry is necessary. But even if the text were ambiguous, the post-ratification understanding of the Convention's signatories confirms that a ne

exeat right is a right of custody. First, two Special Commissions – meetings convened to review the operation and implementation of the Convention – have specifically addressed the issue, with both concluding that the right is a right of custody. Second, the overwhelming weight of authority in our sister signatories agrees that the ne exeat right is a right of custody. By contrast, not a single other signatory can be characterized as having squarely taken the position adopted by the Fifth Circuit in this case.

ARGUMENT

I. The Plain Language And Context Of The Convention Demonstrate That A Ne Exeat Right Is A Right Of Custody

In interpreting a treaty, this Court has made clear that courts should "begin with the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991) (quotation marks omitted); *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999). This approach to treaty interpretation is consistent with the Vienna Convention on the Law of Treaties, which establishes a "[g]eneral rule of interpretation" for treaties.[6] First, it instructs that "[a] treaty shall

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[6] Although the United States has not ratified the Vienna Convention on the Law of Treaties, the Department of State has indicated both that "the Convention is already generally recognized as the authoritative guide to current treaty law and practice," Dep't of State, Letter of Submittal to the President, S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971), and that "[m]ost

be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, Art. 31, 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1969). In determining the meaning of the treaty's terms, "[a] special meaning shall be given to a term if it is established that the parties so intended." *Id.* The plain text of the Convention establishes that petitioner's ne exeat right constitutes a "right of custody."

A. The Text Of The Convention Confirms That A Ne Exeat Right Is A Right Of Custody

The question presented by this case is simple, and the inquiry can begin and end with the text: because a ne exeat right gives decision-making authority over the country in which the child lives to the parent holding the right, it constitutes a right to determine the child's place of residence and is thus a "right of custody" for purposes of the Convention.

Article 3 of the Convention provides that "[t]he removal or the retention of a child is to be considered wrongful," thereby triggering the automatic return remedy, when the removal or retention occurs "in breach of rights of custody attributed to a person . . . either jointly or alone." Pet. App. 28a. Article 5 expressly states that "rights of custody" "*include*

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provisions of the Vienna Convention, including Articles 31 and 32 . . . are declaratory of customary international law," Letter from Roberts B. Owen, Legal Advisor of the Dep't of State, to Sen. Adlai Stevenson III (Sept. 12, 1980).

rights relating to the care of the person of the child and, *in particular*, the right to determine the child's place of residence." *Id.* (emphases added). Thus, even though the Convention does not provide a comprehensive definition of these rights, the text singles out decision-making authority over the child's place of residence as a paradigmatic example of rights of custody.

To be sure, the Convention does not expressly define the scope of the phrase "place of residence," but – critically – the Convention is concerned with attempts to remove children to other countries, not with how parental rights operate within the borders of a single country. Thus, it was "designed to provide a remedy not for whether" a child may live in one place or another within a country, "but for whether [the parent] should be able to take [the child] across international borders." *See Furnes v. Reeves*, 362 F.3d 702, 715 (11th Cir.), *cert. denied*, 543 U.S. 978 (2004); *see also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984) ("The frame of reference in interpreting treaties is naturally international, and not domestic."). Moreover, holding that the ne exeat right confers a right to determine the child's place of residence, and is therefore a right of custody, is consistent with this Court's admonition that "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *Stuart v. United States*, 489 U.S. 353, 366 (1989).

Even if the term "place of residence" is construed more narrowly – as a specific address or city, rather

than as a country – the parent holding the ne exeat right still has the power to determine the specific place where the child will live whenever the other parent seeks to live outside the child's country of habitual residence. This is because the parent holding a ne exeat right "enjoys the power not only to deny consent to [the child's] moving abroad, but also the power to *grant* consent subject to whatever *conditions* he chooses" – including the city or even the specific place outside of the country in which the child will live. *Furnes*, 362 F.3d at 715. Thus, even if the parent holding the ne exeat right does not share the right to determine precisely where the child will live within the country of habitual residence, he nonetheless has a joint right to determine at least in part the child's place of residence. For example, if Mrs. Abbott had – as required by Chilean law – sought Mr. Abbott's authorization to take A.J.A. out of Chile rather than absconding with the child, Mr. Abbott would have the right to determine either that A.J.A. would remain in Chile or where outside of Chile he would live. That the right is a partial one does not make it any less of a right under the Convention: "[j]ust as there is no requirement in the Convention that a custody right be exercised exclusively by the parent seeking return, there is no requirement that the right be exercised predominantly by that parent." *Id.* at 716.

In addition to constituting a right to determine the child's place of residence, the ne exeat right also effectively confers the right to play a role in making other important decisions about the child, thereby constituting a right "relating to the care of the person of the child" – part of the definition of "rights of

custody" given in Article 5(a) and applicable to Article 3. For example, by requiring that a child remain in the country of habitual residence, a parent holding a ne exeat right can exercise significant influence over the child's language, education, nationality, and cultural identity. *See Furnes*, 362 F.3d at 716 ("By requiring that Jessica remain in Norway, Furnes can ensure that Jessica will speak Norwegian, participate in Norwegian culture, enroll in the Norwegian school system, and have Norwegian friends. That is, Plaintiff Furnes effectively can decide that Jessica will *be Norwegian*. The right to determine a child's language, nationality, and cultural identity is plainly a right 'relating to the care of the person of the child' within the meaning of the Convention.").[7] A parent holding a ne exeat right can similarly exercise influence over the child's upbringing by consenting to the child's relocation overseas but imposing conditions on the move. Such conditions are not necessarily limited to where outside the country of habitual residence the child lives, but instead also may bear on the child's cultural identity, the schools attended, the languages spoken by the child, and the child's access to specialized medical care.

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[7] *See also Lieberman v. Tabachnik*, No. 07-cv-02415-WYD, 2008 WL 1744353, at *11 (D. Colo. Apr. 10, 2008) ("Petitioner['s] ne exeat right provides him with additional decision making authority over the children's care. By requiring the children remain in Mexico, Petitioner can ensure that the children participate in Mexican and Jewish culture, that they are enrolled in Mexican and/or Jewish schools, and that they have Mexican [and/or] Jewish friends.").

Holding that a ne exeat right is a right of custody is also most consistent with the Convention's open-ended definition of "rights of custody." The Convention indicates that "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." This was a deliberate choice, intended to protect "*all* the ways in which custody of children can be exercised" through "a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration." Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, *in* ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 446 (1980) (emphasis in original).

By contrast, the Fifth Circuit's cramped construction of the phrase "rights of custody" rests on a definition of "custody" gleaned solely from U.S. dictionaries – an approach that cannot be reconciled with the drafters' decision to promulgate "an autonomous concept" that is "not necessarily coterminous with rights referred to as 'custody rights' created by the law of any particular country or jurisdiction," Perm. Bureau of the Hague Conf. on Priv. Int'l Law, *Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention* 3, ¶ 9 (1989), rather than favoring any one signatory's conception of custody rights, Linda Silberman, *Interpreting the Hague Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1068-70 (2005).

2. The textual arguments to the contrary – advanced in cases such as *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001), and

by the Fifth Circuit in this case to support the contention that a ne exeat right cannot be a right of custody – are unavailing.

a. First, in *Croll*, the majority concluded that a ne exeat right is not a right of custody because it does not confer a right to determine the child's place of residence but is instead simply a right to veto the other parent's plan to relocate the child overseas. 229 F.3d at 139; *see also* Pet. App. 13a. However, because (as noted above) the Convention defines "rights of custody" as specifically including "the right to determine the child's place of residence," a parent holding a ne exeat right has, at a minimum, a shared right relating to the determination of the child's place of residence. Pet. App. 28a (art. 3) (providing that rights of custody may be exercised "either jointly or alone"); *see also Furnes*, 362 F.3d at 720 (recognizing that each parent possesses such a right). And even if it were nothing more than a veto or negative right, that "does not diminish its status as a right." *See Croll*, 229 F.3d at 148 n.3 (Sotomayor, J., dissenting).

b. Nor is there any merit to the argument – made by the majority in *Croll*, *see* 229 F.3d at 140 – that a ne exeat right cannot be a right of custody because it cannot be "exercised." First, Article 3 involves two separate inquiries: (1) whether the removal occurred in breach of "rights of custody"; and (2) whether the rights of custody were actually exercised or would have been exercised but for the breach. Thus, courts should only reach the question whether someone was actually exercising rights of custody if they find that there was indeed a custody right. *See, e.g.*, *Lieberman*, 2008 WL 1744353, at *13 (turning to question whether father had exercised his

rights only after determining that father's ne exeat right was right of custody).

Second, courts confronting cases with similar facts have presumed that a left-behind parent such as Mr. Abbott would have exercised his right to object to the child's removal if given the opportunity, such that Article 3(b) is easily satisfied. *See, e.g.*, *Furnes*, 362 F.3d at 720. Such an presumption follows from the plain text of Article 3(b), which provides not only that a removal is considered wrongful as long as rights of custody "were actually exercised," but also makes clear that it is similarly wrongful if the right of custody "would have been so exercised but for the removal or retention."[8]

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[8] In any event, a parent such as Mr. Abbott can easily meet the burden imposed by Article 3(b), which was intended as a "safety mechanism," PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 83 (1999), to ensure that a parent who "ha[d] not played any meaningful role in the pre-removal or retention life of the child" cannot rely on the Convention's summary return mechanism, *id.* at 86. Courts have interpreted Article 3(b) to require only a minimal showing by the left-behind parent: "[A] person who has valid custody rights to a child under the law of the country of the child's habitual residence . . . cannot fail to 'exercise' those custody rights . . . short of acts that constitute clear and unequivocal abandonment of the child." *Bader v. Kramer*, 484 F.3d 666, 671 (4th Cir. 2007).

This test is easily met here: Mr. Abbott filed suit under the Hague Convention seeking A.J.A.'s return; moreover, at the time of Mrs. Abbott's departure from the country, he had filed a suit in the Chilean family court seeking to expand his rights. A contrary approach – that is, one which required the court in the country to which the child was removed to assess the "adequacy of one parent's exercise of custody rights" – would, as the Sixth

Finally, the argument that a ne exeat right cannot be a right of custody because it cannot be exercised is erroneous because it also assumes that this is an all-or-nothing proposition – that is, that a ne exeat right cannot be a right of custody because it cannot be exercised when the child is removed from the country without the left-behind parent's permission. *See, e.g.*, *Croll*, 229 F.3d at 140. But such an assumption is based on the premise that the abducting parent will seek to remove the child, in violation of a court order and/or a statute, without seeking the left-behind parent's permission. However, there are many other ways to exercise the right. For example, an abducting parent may leave the country after having unsuccessfully sought permission from the left-behind parent. Or the left-behind parent may consent to the child's departure subject to conditions (*i.e.*, allowing the child to leave with the other parent for a brief vacation), but the abducting parent will then decide to stay overseas permanently.[9]

c. The argument that the Convention refers to a "bundle" of rights relating to custody, such that

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Circuit has explained, come "dangerously close to forbidden territory: the merits of the custody dispute." *Friedrich v. Friedrich*, 78 F.3d 1060, 1065 (6th Cir. 1996).

[9] *See, e.g.*, *Pasten v. Velasquez*, 462 F. Supp. 2d 1206, 1211 (M.D. Ala. 2006) (left-behind parent objected to removal; court allowed child to go abroad temporarily for mother's studies, but neither mother nor child returned); *Garcia v. Angarita*, 440 F. Supp. 2d 1364 (S.D. Fla. 2008) (left-behind parent consented to travel to U.S. for brief visit with relatives but did not consent to move to Miami).

having just one right – a ne exeat right – cannot trigger the automatic return is also unavailing. *See, e.g.*, *Croll*, 229 F.3d at 139. Nothing in either the Convention or its drafting history indicates that "rights of custody" cannot be separated out into different rights, or that the automatic return remedy could not be invoked by the holder of a single right of custody. To the contrary, the text of the Convention expressly contemplates that some rights will be held jointly. *See* Pet. App. 28a (art. 3(a)). Here, although Mrs. Abbott had day-to-day care and control of A.J.A., she and Mr. Abbott shared the right to determine the child's place of residence.

Moreover, the Pérez-Vera Report explicitly indicates that a parent can seek a child's return even if he possesses only a subset of the "bundle" of custody rights.[10] In a discussion of the term "care

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[10] Mr. Abbott's understanding that the Convention's return remedy may be invoked by a parent who possesses even one "right of custody" – such as a ne exeat right – is shared by the member states of the European Union. In 2003, the Council of the European Union enacted a regulation which confirms that the right to determine the child's place of residence, standing alone, establishes joint rights of custody. Like the Convention, Council Regulation (EC) No. 2201/2003 of 27 November 2003, which was intended to "complement[]" the Convention, *see* ¶ 17, defines "rights of custody" as including "in particular the right to determine the child's place of residence," *id.* art. 2.9; it then goes on to specify that "[c]ustody shall be considered to be exercised jointly when . . . one holder of parental responsibility" – which is in turn defined to include parents holding access rights, *id.* art. 2.7 – "cannot decide on the child's place of residence without the consent of another holder of parental responsibility," *id.* art. 2.11(b).

and control of the child," the Report explained that "[t]he Convention seeks to be more precise by emphasizing, as an example of the 'care' referred to, the right to determine the child's place of residence." Acknowledging that in some signatory states a child, "although still a minor at law, has the right itself to determine its own place of residence," the Report emphasizes that in such cases "the substance of the custody rights will have to be determined in the context of other rights concerning the person of the child." Pérez-Vera Report, *supra*, at 452, ¶ 84.[11]

Finally, even if the Convention did require the parent seeking a child's return to hold a "bundle" of custody rights, rather than just one right of custody, a parent holding a ne exeat right would nonetheless be able to compel the child's return because a ne exeat right in fact confers a multitude of rights. These rights are not limited to the right to prevent his child from being removed from the country without his authorization, but also include the right to authorize the child's departure from the country, subject to whatever conditions he regards as appropriate, and the right to influence the child's education and cultural identity. *See supra* at 16-17.

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[11] *See also* Commonwealth Secretariat, The Hague Convention on the Civil Aspects of International Child Abduction: Explanatory Documentation Prepared For Commonwealth Jurisdictions 16 (1981) (noting that there "is nothing to suggest that such rights [of custody] cannot be separated" and adding that "if the right to day to day care is vested in A and the right to determine the child's place of residence in A and B, both A and B have rights of custody under the Convention").

B. The Context And Purpose Of The Convention Also Demonstrate That The Ne Exeat Right Is A Right Of Custody

1. That a ne exeat right is a right of custody is also demonstrated by the broader context of the Convention and its purposes. The "implicit[]" foundation of the Convention is "the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal." Pérez-Vera Report, *supra*, ¶ 19, *reprinted at* Pet. App. 65a.

Construing a ne exeat right as a right of custody, the breach of which requires the child's return, secures these goals in two ways. First, it deters individuals from taking children across international borders in search of a friendlier forum, by depriving that action "of any practical or juridical consequences." Pérez-Vera Report, *supra*, at 429.[12] Second, it guarantees that custody arrangements ordered by the courts in one member state are respected by the courts in others by "re-establish[ing] a situation unilaterally and forcibly altered by the abductor." *Id.* at 430. Moreover, the Convention's interests in deterrence and reciprocal respect for custody arrangements apply just as fully to a ne exeat right as to a physical custody right. A ne exeat order signals – no less clearly than an explicit joint

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[12] *See also Croll*, 229 F.3d at 147 (Sotomayor, J., dissenting) (citing *Blondin v. Dubois*, 189 F.3d 240, 245-46 (2d Cir. 1999)).

custody order – a court's determination that a child should not be taken from the country absent each parent's consent.

Relatedly, construing a ne exeat right as a right of custody is most consistent with the principle that the courts in the country of habitual residence should decide questions relating to the merits of custody disputes. Specifically, by allowing the parent holding a ne exeat right to ensure both that the child will remain in the country of habitual residence unless he consents to the child's departure and that the child will be returned to the country of habitual residence if he is removed in violation of that right, the parent can ensure that custody disputes will be resolved by the courts in the country of habitual residence, rather than the courts in any country chosen by the abducting parent. Thus, construing a ne exeat right as a "right of custody" under the Convention "is the only means of ensuring fairness to all the parties involved," BEAUMONT & MCELEAVY, *supra*, at 87, because "this is the only means of ensuring that the rights of all those concerned are given due consideration in a forum with which all should be familiar," *id.* at 80.

This case illustrates these principles perfectly. Under the orders entered by the Chilean family court, Mr. Abbott had a "direct and regular" relationship with his son, including extensive visitation, and was seeking to expand his rights with respect to his son; Mrs. Abbott abducted A.J.A. from Chile just a few days before a hearing scheduled in one of those proceedings. *See* J.A. 56. In so doing, she not only prevented the Chilean courts from resolving the pending dispute, but she subsequently

filed her own suit in Texas state court, seeking to modify the orders issued by the Chilean courts to expand her own rights, *see* J.A. 46-49. Construing the ne exeat right as a right of custody, thereby requiring A.J.A.'s return to Chile, will ensure that the Chilean family court – which is the most familiar with the family's situation, having had various disputes before it for several years before A.J.A.'s abduction – can resolve this and any subsequent disputes that may arise.

2. By contrast, holding that a ne exeat right does not trigger the Convention's automatic return remedy would defeat the purposes of the Convention. First, such a holding would undercut the Convention's deterrent effect by enabling the abductor to "unilaterally and forcibly alter[]" unsatisfactory custody arrangements. Indeed, because virtually all Hague Convention signatories to consider the question treat ne exeat orders as conferring a "right of custody" and will order the child's return when such an order is violated, *see infra* at 32-38, under the Fifth Circuit's approach would-be abductors have a strong incentive to seek haven in the United States. Second, as then-Judge Sotomayor explained in her dissent in *Croll*, *see* 229 F.3d at 147, by failing to accord any respect to the foreign court's expressly stated interest in preserving jurisdiction, the Fifth Circuit's approach effectively nullifies the initial custody determination. Third, the Fifth Circuit's approach undermines the reciprocity on which the Convention is based, raising the prospect that other countries will follow the U.S. and decline to order the return of children originally living in the U.S. whose

U.S.-resident parents' rights have been decided by our courts.

Moreover, given the extent to which both ne exeat rights, *see* Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT'L L. & POL. 221, 246 (2000), and international travel have become commonplace, the detrimental effects of such a holding will be widespread. If this Court were to affirm the Fifth Circuit's restrictive approach, it would create a gaping hole in the operation of a Convention that was negotiated and adopted precisely to ensure that custody disputes are resolved by courts in the child's country of habitual residence.

3. In her brief in opposition, Mrs. Abbott contended that construing a ne exeat right as a right of custody would be inconsistent with the purpose of the Convention because it might somehow alter the custodial relationship (and thus, the status quo), BIO 30, by requiring the child's return even if the abducting parent, who may have been responsible for the child's daily care and control, has no obligation to return and the left-behind parent has no obligation to care for the child upon his or her return. *See also Croll*, 229 F.3d at 141.

This argument rests on a misunderstanding of the purpose of the Convention. As the Pérez-Vera Report (at 429, ¶ 16) makes clear, to deter abductions, "the Convention . . . places at the head of its objectives the restoration of the *status quo*," which it seeks to accomplish "by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State'." Thus, the restoration of the "*status quo*" envisioned by the Convention

involves the child's return to the country of habitual residence, which can then make a final decision regarding custody, *id.* – a decision that may or may not alter the existing custodial relationship.

In this case, ordering A.J.A.'s return to Chile is independent of whether Mrs. Abbott should ultimately enjoy daily care and control of A.J.A., as she has not previously alleged that she would be unable to accompany A.J.A. back to Chile pending the resolution of the custody disputes there. *Accord Furnes*, 362 F.3d at 717. Nor would A.J.A.'s return in fact alter the custodial relationship that existed prior to her abduction of A.J.A. from Chile: absent Mr. Abbott's authorization to take A.J.A. out of Chile, Mrs. Abbott's own rights of custody could be exercised only in Chile. Relatedly, Mrs. Abbott has also not previously suggested that she would not receive a fair resolution of the pending custody disputes in the Chilean family court. Moreover, no evidence of either grave risk to the child or an intolerable situation – which, if found, could give the court the discretion to decline to order the child's return pursuant to Article 13(b) of the Convention – has been introduced into evidence in this case.

Finally, an argument against the child's return that rests on the abducting parent's absence from the country of habitual residence also seems strange at best: the drafters of the Convention surely did not envision that a parent would be able to take her child out of the country without the left-behind parent's permission and then rely on her own absence as a reason not to return the child.

II. Other Rules Of Interpretation Also Demonstrate That A Ne Exeat Right Is A Right Of Custody

When the text of a treaty is "difficult or ambiguous," "[o]ther general rules of construction may be brought to bear." *Volkswagen Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988) (emphasis omitted). In particular, because treaties should be "construed more liberally than private agreements," *Air France v. Saks*, 470 U.S. 392, 396-97 (1985), a court may "traditionally consider[] as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties." *El Al Israel Airlines v. Tseng, Ltd.*, 525 U.S. 155, 167 (1999) (emphasis in original) (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)).[13]

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[13] Here too this approach is consistent with the Vienna Convention. Article 31.3 of the Convention instructs courts to consider "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation," while Article 32 outlines the "[s]upplementary means of interpretation" on which courts may rely "to confirm the meaning resulting from the application of article 31[] or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure" or, alternatively, "leads to a result which is manifestly absurd or unreasonable." In particular, Article 32 indicates, courts may consult "the preparatory work of the treaty and the circumstances of its conclusion."

In this case, even if the text of the Convention were ambiguous as to the status of ne exeat rights – which is the most that Mrs. Abbott can possibly argue – the history of the Convention and the post-ratification understanding of the Convention's signatories confirm that a ne exeat right is a right of custody.

A. The Subsequent Understanding Of The Convention Signatories

Both post-ratification Special Commission meetings and the decisions of foreign courts reflect the understanding of Convention signatories that a ne exeat right is a right of custody for purposes of the Convention.

1. Meetings Of The Special Commissions Confirm That A Ne Exeat Right Is A Right Of Custody.

Because there is no supranational tribunal "to provide uniform interpretation of the Child Abduction Convention, the Special Commissions are a valuable resource in developing 'best practices' and interpretations of the Child Abduction Convention." Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT'L L. & POL. 221, 228-29 n.28 (2000). Since the Convention entered into force in 1983, two Special Commission reports have specifically addressed the ne exeat issue, with both confirming that a ne exeat right is a right of custody.

The 1989 Special Commission Meeting. The first Special Commission meeting convened to review the implementation and operation of the Convention

was held in 1989. *See* Perm. Bureau of the Hague Conf. on Priv. Int'l Law, *Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (1989). At that meeting, the delegates specifically discussed the meaning of the term "rights of custody." The report that followed the meeting emphasized that "'rights of custody' as referred to in the Convention . . . constitute an autonomous concept, and thus such rights are not necessarily co-terminous with rights referred to as 'custody rights' created by the law of any particular country or jurisdiction thereof." *Id.* ¶ 9. Moreover, the report noted, "it is necessary to look to the content of the rights and not merely to their name" to determine whether a parent held "rights of custody" for purposes of the Convention. *Id.*

To illustrate this point, the report cited an example involving a ne exeat right, making clear that the Special Commission regarded the right as a right of custody. Thus, the report explained,

> in Australia it is customary for "custody" to be granted to one parent, but even in such case Australian law leaves "guardianship" of the child in the hands of both parents jointly; the parent who has not been awarded "custody" under this legal system nonetheless has the right to be consulted and to give or refuse consent before the child is permanently removed from Australia. . . . [I]t was hoped that the inclusion of this description might serve to sensitize the

> Central Authorities in other countries to the fact that the award of what is called "custody" to only one parent under domestic law, does not necessarily mean that all rights of custody within the intent of the Hague Convention have been granted to that parent.

Id.

The report then reiterated that a ne exeat right is a right of custody by providing an example of an actual case from an intermediate appellate court in France involving a ne exeat right. *See also infra* at 37-38. The report described the court as having held that "the right of the mother to give or refuse consent to removal of the children, coupled with the father's award of 'custody,' had created a form of joint custody within the meaning of the Convention, since 'rights of custody' as contemplated there referred specifically to the right to determine the child's place of residence." *Id.* ¶ 10. The report noted that the "result and the reasoning of the [French court] . . . were broadly approved as being in the spirit of the Convention." *Id.*

The 1993 Special Commission Meeting. The report issued after the second Special Commission Meeting, held in January 1993, again confirmed the delegates' understanding that a ne exeat right constitutes a right of custody. At that meeting, delegates discussed the decision of a French trial court (*see infra* at 37-38) "to the effect that an order of the court granting custody which prohibited the custodian from removing the child from the court's jurisdiction without consent of the other parent constituted only a 'modality' attached to the right of

custody and not a situation of joint custody." *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction* 11 (1993). The report reflected the consensus among the delegates that ne exeat rights are rights of custody, noting that the French court's conclusion "gathered no support" at the meeting. *Id.*[14]

2. Courts In Other Signatory States Have Overwhelmingly Construed The Ne Exeat Right As A Right Of Custody

As this Court has frequently recognized, "the opinions of our sister signatories [are] entitled to considerable weight" in construing the terms of a treaty. *See Air France*, 470 U.S. at 404. This is particularly true here: Congress has expressly recognized the importance of a "uniform international interpretation of the Convention," 42 U.S.C. § 11601(b)(3)(B).

(i) Outside of the United States, the vast weight of authority agrees that a ne exeat right constitutes a right of custody for purposes of the Convention: of the eleven other signatories whose courts have

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[14] Although Mrs. Abbott, in her supplemental brief filed at the certiorari stage, sought to downplay the significance of the Commission's 1993 report by noting (at 2) that "[o]nly 23 signatory States even sent representatives to the 1993 Special Commission meeting," she failed to mention that as of that date the Convention had only twenty-eight signatories. *See* U.S. Dep't of State, Hague Convention Country List, *available at* http://travel.state.gov/family/abduction/hague issues/hagues issues 1487.html (last visited Sept. 14, 2009).

addressed the issue, nine (including six courts of last resort) agree that the ne exeat right does confer a right of custody. In the remaining two signatories, courts have issued conflicting opinions. Thus, not a single other signatory has expressly taken the position adopted by the Fifth Circuit.

One of the first cases confronting the significance of a ne exeat right arose in England. In *C v C*, (1989) 1 W.L.R. 654 (Eng. C.A.), a consent order entered after the parents' divorce in Australia provided that the mother had custody, both parents were joint guardians, and neither could remove the child from Australia without the other's consent. When the mother took the child to England without the father's consent, the father filed suit seeking the child's return under the Convention. Considering the question whether the father had rights of custody, Lady Justice Butler-Sloss acknowledged that although the father lacked "the right to determine the child's place of residence within Australia," he nonetheless "has the right to ensure that the child remains in Australia or lives anywhere outside Australia only with his approval." 1 W.L.R. 654. She concluded that the ne exeat right was therefore a right of custody and, thus, the child had been wrongfully removed. *Id.*

In 2006, judges of the House of Lords confirmed that a ne exeat right constitutes a right of custody for purposes of the Convention in *In re D (A Child)*, (2007) 1 A.C. 619, ¶ 37 (H.L. 2006). In that case, the child's mother brought him to England from Romania without the knowledge or consent of the father, who did not have a ne exeat right. In her opinion holding that the Convention did not require the child's return

to Romania, Baroness Hale of Richmond began by noting that "[h]itherto, . . . both in England and Scotland, the courts have regarded travel restrictions as giving rise to rights of custody." *Id.* ¶ 31. Following those courts, as well as "what appears to be the majority of the common law world," she emphasized that she "would hold that a right of veto does amount to 'rights of custody' within the meaning of article 5(a)." *Id.* ¶ 37.

Lord Hope of Craighead agreed. In his view, "a right to object to the child's removal to another country is as much a right of custody . . . as a right to determine where the child is to live within the country of its residence," and the absence of such a right was "decisive in this case." And citing cases from the United Kingdom holding that a ne exeat right is a right of custody, he deemed "[t]he issue . . . settled, so far as the United Kingdom is concerned." 1 A.C. 619, ¶ 10.

Five other courts of last resort – in Israel, South Africa, Ireland, Austria, and Germany – have similarly concluded that a ne exeat right is a right of custody. *See, e.g.*, H.C. 92 *Tournai v. Mechoulam* [1993] IsrSC (father had right of custody when mother "required the permission of the Court, not only to change her place of residence to Israel without the husband's consent, but even to leave for a visit to Israel"); CA 5271/92 *Foxman v. Foxman* [1992] IsrSC (father's right of custody breached when mother removed children from Canada to Israel in violation of agreement providing that "each parent needs the consent of the other to every significant change in the children's residency"; court emphasized that "every case of removing children from one

country to another without the consent of the parent who had a right to give or not give consent would be an abduction"); *Sonderup v. Tondelli* 2000 (1) SA 1171 (CC) (S. Afr.) (ne exeat right that generally prohibited both parents from removing the child from British Columbia without the other's consent constituted a right of custody); *M.S.H. v. L.H.*, 2000 3 IR 390 (Ir.) (father had rights of custody because father's right of joint parental responsibility under English law gave him the right to ensure that his children were not removed from the country without his consent); Oberster Gerichtshof [OGH] [Supreme Ct.] May 2, 1992, 2Ob596/91 (Austria) (court order preventing parents from taking children out of England without consent of the other parent was a right to determine the children's place of residence and thus a partial right of custody for Convention purposes); Bundesverfassungsgericht [BVerfG] [Fed. Const'l Ct. of Germany] July 18, 1997, 2 BvR 1126/97 (F.R.G.) (when father's consent required for children to leave the country with their mother, he had a joint right of custody).

In three additional signatory states, intermediate appellate courts have held that a ne exeat right constitutes a right of custody. Considering these cases is consistent with this Court's practice, particularly because they are directly on point. *See Air France*, 470 U.S. at 404 (relying on decision by French intermediate appellate court); *see also Olympic Airways v. Husain*, 540 U.S. 644, 662 n.2 (2004) (Scalia, J., dissenting) ("I note that our prior Warsaw Convention cases have looked to decisions of intermediate appellate foreign courts as well as supreme courts.").

Thus, in Australia, the Full Court of the Family Court of Australia held that the father had a right of custody when his child was taken to France in violation of a court order "restraining each of the parties from removing either of the children from the State of Western Australia and the Commonwealth of Australia." *In the Marriage of José Garcia Resina and Muriel Ghislaine Henriette Resina* (1991) App. No. 52, 1991 (Fam.) (Austl.). The Australian court followed the English Court of Appeal's decision in *C v C*, emphasizing the desirability of uniform interpretations of the Convention, the Convention's goal of ensuring the prompt return of children to the country of habitual residence, and the irony that would result if "the Court of Appeal in England declared the Australian Court to be one thing and the Australian court declared it to be another." *See also AJ v. FJ* [2005] CSIH 36 (Scot.) (agreeing that "rights of custody for the purposes of the Convention include rights of contact by virtue of the fact that [Scottish law] confers upon the contact parent the right to grant or withhold consent to the child's removal from the United Kingdom"); *Gross v. Boda* (1995) 1 NZLR 569 (C.A. Wellington) (N.Z.) (holding that father's "reasonable rights of visitation" conferred a joint right to determine the child's place of residence).

(ii) Mrs. Abbott's arguments that a ne exeat right is not a right of custody purportedly find support from decisions arising in just two countries, France and Canada. Notwithstanding her reliance on these decisions, however, the French decisions in fact lean in Mr. Abbott's favor: although a lone trial-level court has indicated that a ne exeat right is not a right of custody, a French appellate court has held to

the contrary. And in Canada, the arguments favoring Mrs. Abbott's position are merely dicta.

France. In Decision of 23 Mar. 1989, *Public Ministry v. M.B.*, C.A. Aix-en-Provence, 6e ch., Mar. 23, 1989, Rev. crit. dr. internat. Privé 79(3), juill.-sept. 1990, 529, 533-35, note Lequette, the father had custody of children pursuant to an English court order, which also included a ne exeat right; he subsequently took the children to France without having obtained the mother's consent. The appellate court determined that the mother had rights of custody and ordered the children's immediate return to England. It explained that "by attributing to the mother the right to accept or refuse the removal of the children's residence outside of a certain region, the decision of 27 November 1987 organized a joint exercise of rights of custody within the meaning of the Hague Convention."

Despite the decision in *M.B.*, a lone trial court in a different region of France subsequently rejected an analogous claim. In *Attorney for the Republic at Périgueux v. Mrs. S*, T.G.I. Périgueux, Mar. 17, 1992, Rev. cr. dr. internat. Privé 82(4) oct.-déc. 1993, 650, 651-53, note Bertrand Ancel, D. 1992, note G.C., the mother had "custody" of the children but was required by a U.K. divorce decree to raise her children in either England or Wales. After the mother took the children to France, the father filed a suit there for the children's return. The mother countered that the father lacked custody rights and that under the European Convention on Human Rights she was "free to leave any country." The court rejected the father's Hague Convention claim. It reasoned that the Convention was intended to apply

only when "non-custodial parents tak[e] the child to another State," and it suggested that the father had in any event consented to the child's move. Finally, the court agreed with the mother's European Human Rights Convention claim, reasoning that requiring the child's return "would end up denying [her] fundamental liberty in that the mother would have to follow her child within the framework of a forced return to England and Wales."

Canada. The Supreme Court of Canada has not expressly addressed whether a ne exeat right in a permanent custody order constitutes a "right of custody" for purposes of the Convention. While some cases do contain language that might be read to express skepticism about the status of ne exeat rights as a right of custody, decisions by lower courts and executive-branch officials directly addressing the issue show that this language is at most dicta.

In *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (Can.), the mother had interim custody, the father had interim access (visitation) rights, and an interim Scottish court order prohibited the child from being taken out of Scotland. After the mother took the child to Canada, the father filed suit under the Convention to seek the child's return. The court ordered the child's return, deeming it "clear that the non-removal clause was inserted into the custody order . . . to preserve jurisdiction in the Scottish court to decide the issue of custody on its merits in a full hearing at a later date," and that the Scottish court thus held "rights of custody" for purposes of Article 3. That the clause would preserve the father's access rights, the court continued, "would be merely a corollary effect of the clause."

In his opinion for the Court, Justice La Forest emphasized "the purely interim nature of the mother's custody in the present case." In particular, he explained, he "would not wish to be understood as saying the approach should be the same in a situation where a court inserts a non-removal clause in a permanent order of custody." In the latter scenario, he explained, the ne exeat clause is "usually intended to ensure" access rights, which were "not intended to be given the same level of protection by the Convention as custody."

Two years later, in *D.S. v. V.W.*, [1996] 2 S.C.R. 108 (Can.), the Canadian Supreme Court rejected a parent's claim for her child's return that was based on an *implicit* ne exeat right. In so holding, the court acknowledged that "*Thomson* did not determine whether an implicit restriction on removing a child under a court order or statute confers rights of custody within the meaning of the Act on either the court or the non-custodial parent," but in its view the *Thomson* court's "limitation of the effect of an express non-removal clause in a permanent custody order casts serious doubt on the validity of the respondent's argument."

Six of the nine justices in *D.S.* expressed only qualified support for the opinion's reasoning; in another opinion issued that same day, Justice McLachlin – joined by five others – rejected the argument that the parent responsible for the child's day-to-day care "has the 'right' to move where he or she pleases and should not be restricted in doing so by the desire of the access parent to maintain contact with the child." *Gordon v. Goertz*, [1996] No. 24622,

1996 Can. Sup. Ct. LEXIS 48, at *57-*58 (Can. May 2, 1996).

Decisions in Canada's lower courts, where courts that have specifically considered the question have held that a ne exeat right *is* a right of custody, further confirm that the language in the Canadian Supreme Court's opinions on which Mrs. Abbott relies is simply dictum. For example, in *S.T. v. J.D.H./J.T.* [1997] 1997 BCAC 35 (Can.), a court order provided that the children would "live with" the mother, while the father had a ne exeat right. The mother took the children out of the U.K. without the father's consent. In the suit that followed, the court rejected the mother's argument that the father lacked rights of custody. It acknowledged the Supreme Court's decision in *Thomson*, but it reasoned that "a 'right of custody', i.e. the right to determine the child's place of residence, was reserved by the English court to be exercised with the consent of the respondent or by leave of the court." *See also Hewstan v. Hewstan* [2001] 2001 BCSC 368 (Can.) (agreeing that "one of the father's rights of custody is the right to veto the removal of the child from the jurisdiction, and the removal of the children without his consent is a breach of his rights of custody").[15]

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[15] Even if the Canadian Supreme Court had definitively held that a ne exeat right in a permanent custody order is not a right of custody, such a holding would be entitled to little deference because it would rest on flawed reasoning.

First, the distinction between interim and permanent ne exeat rights makes little sense given the nature of custody disputes, which – as this case illustrates perfectly – often

Equally telling is the reaction of some Canadian Central Authorities to the Court's decisions in *Thomson* and *D.S.* As of 2000 – that is, five years after the Court's decision in *Thomson* – the Central Authorities of Ontario and British Columbia reported

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involve a series of proceedings. Here, at the time of A.J.A.'s abduction, the Chilean family court had before it two pending proceedings in which Mr. Abbott was seeking to expand his rights with regard to his son. There was no need for that court to issue an interim ne exeat order, however, because two such provisions were already in place under Chilean law and the January 13, 2004 order.

Second, the Canadian Supreme Court's holding in *Thomson* that an interim ne exeat order was a right of custody presumably relied on a determination that the ne exeat right conferred the right to determine the child's place of residence. But there is no reason why a permanent right to determine the child's place of residence is less of a "right of custody" than the same right on an interim basis. All that matters is that at the time of the child's abduction, the parent or court had the right to determine the child's place of residence.

Third, the Canadian court's assumption that courts are only concerned with preserving jurisdiction while custody disputes are pending before them cannot be reconciled with the purposes of the Convention, which rests on the premise that courts in the child's country of habitual residence are almost always best suited to resolve the merits of custody disputes, whether they were pending at the time of the child's abduction or not.

Fourth, the Canadian court's supposition that the permanent ne exeat right is merely intended to ensure that a parent will have access to his child is simply erroneous. As discussed *supra* at 16-17 & 22-23, a ne exeat right also allows a parent to play a significant role in shaping the child's upbringing and cultural identity.

that, in the absence of a contrary decision, they treated "non-removal clauses in final orders as creating rights of custody under the Convention." Martha Bailey, *Canada's Implementation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction*, 33 N.Y.U. Int'l J. L. & Pol. 17, 31 (2000).

B. The Negotiating History (*Travaux Préparatoires*) Of The Convention

1. The history of the Convention makes evident that the factual scenario presented by this case was in fact one of the earliest problems the Convention was designed to resolve. The very first document in the Convention's official *travaux préparatoires* is a questionnaire prepared by the Permanent Bureau's First Secretary for distribution to the members of the Hague Conference on Private International Law. *See* Adair Dyer, *Questionnaire and Report on International Child Abduction by One Parent*, *in* HAGUE CONFERENCE ON PRIV. INT'L LAW, ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 9 (1980). The questionnaire began by describing "five types of situations which are considered to constitute 'child abduction' for the purposes of this questionnaire"; the fifth scenario was one in which "[t]he child was removed by a parent from one country to another in violation of a court order which expressly prohibited such removal." *Id.*

Discussions during the negotiations leading up to the Convention further confirm that although the drafters of the Convention declined to provide an automatic return remedy for violations of access rights, they nonetheless intended the term "rights of

custody" to be broadly defined to include the ne exeat right.

First, delegates at both the March and November 1979 preparatory Special Commission meetings reiterated that all five scenarios described in the Dyer Questionnaire – including the removal of a child in violation of a ne exeat right – constituted "abductions" that should be covered by the Convention. *See* TOME III, *supra*, at 163 & 183. Notably, no one suggested at either of these meetings that the ne exeat scenario should be treated any differently than the other scenarios described in the questionnaire, all of which would be regarded as clear violations of rights of custody. *See id.* at 9 (describing scenarios).

Second, the Preliminary Draft Convention, adopted by the Special Commission preparatory meeting in November 1979, contained a draft Article 3 that was, as relevant here, virtually identical to the final version of Article 3: the draft provided that a removal was wrongful "when it is in breach of rights of custody actually exercised by a person [or institution], either jointly or alone," TOME III, at 166, while the final version provides that a removal is wrongful when "(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone . . . and (b) at the time of removal . . . those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." Pet. App. 28a.

At the diplomatic conference convened in October 1980 to adopt a final text, the Canadian delegation proposed adding the words "or access" after the words

"breach of rights of custody" in the draft Article 3, TOME III, at 262 – a change that would have also required the child's automatic return if the left-behind parent's access rights had been breached. One of the Canadian delegates, Allan Leal, explained that such a proposal was intended to ensure that the return remedy would apply to a scenario in which the father holds a ne exeat right but the mother nonetheless takes the child out of the country without the father's permission. *Id.* at 266.

A representative from the Netherlands, C.D. van Boeschoten, responded that such an example "coincided with an actual case in which he had been professionally involved." He emphasized that, "in such a case and under the present terms of the Convention the abducted child would have to be sent back immediately." TOME III, at 266.

And John Eekelaar, a representative from the Commonwealth Secretariat, an intergovernmental association based in the United Kingdom, *see The Commonwealth@60, Who We Are, at* http://www.thecommonwealth.org/Internal/191086/191247/the_commonwealth/ (visited Aug. 18, 2009), expressed concern regarding "the potentially very wide scope" of the Canadian delegation's proposal, but shared the delegation's desire to ensure that the return remedy would be available for "cases similar to Mr. Leal's . . . hypothesis." He suggested, however, that "a possible solution to this problem lay in the terms of article 5 which could cover cases where the non-custodial parent had a right to be consulted." TOME III, at 266.

Crucially, there were no objections to the comments by either van Boeschoten or Eekelaar, and

the Canadian proposal to expand the Convention's return remedy to include access rights was soundly defeated. *See* TOME III, at 267. The comments by van Boeschoten and Eekelaar, the defeat of the Canadian proposal, and the fact that the text of the draft remained (as relevant here) unchanged all lead to the conclusion that delegates at the meeting understood the text of the draft to encompass ne exeat rights as a right to determine the child's place of residence and, thus, a right of custody requiring automatic return.[16] *Accord* Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT'L L.J. 41, 46 (2003).

2. In *Croll*, the Second Circuit relied heavily on the statement by A.E. Anton, the chair of the Hague Conference Commission, suggesting that the Commission had "rejected" the view that ne exeat rights fall under "rights of custody," *Croll*, 229 F.3d at 141-42 (citing A. E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP.

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[16] Indeed, just a few months later, Eekelaar wrote that a wrongful removal would occur "if the court had specifically stated that a child should not be removed from the jurisdiction without the consent of one parent (or the court)." He reasoned that "although the expression 'custody' may not have been used, that parent would possess a right to determine the child's place of residence which falls within the protection of the Convention." Commonwealth Secretariat, The Hague Convention on the Civil Aspects of International Child Abduction: Explanatory Documentation Prepared For Commonwealth Jurisdictions 16-17 (Feb. 1981).

L.Q. 537, 546 (1981)). However, Mr. Anton's statement does not undermine the conclusion that the drafters intended a ne exeat right to constitute a right of custody. First, as the majority in *Croll* acknowledged, Anton actually indicated that the issue "is less clear," because Article 5 only "suggests" such a view. Anton, *supra*. Second, Anton wrote the article purely in his personal capacity, *id.* at 537 n.*, and there is no reason to favor the personal views of a single drafter over the actual drafting history of the official Commission members. *See supra* Part I.B (discussing history of Convention).[17]

But to the extent that courts are inclined to credit the personal views of those who participated in the negotiations, they must also take into consideration the contrary views of John Eekelaar, who opined unequivocally that a ne exeat right is a "right of custody." *See supra* n.16.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fifth Circuit should be reversed.

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[17] Indeed, Anton's views were not shared even by the courts in his own country. Rather, as discussed *supra* at 33-36, courts in the United Kingdom have consistently held that a ne exeat right does constitute a right of custody.

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