

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 OF THE NATIONAL CENTER FOR
MISSING AND EXPLOITED CHILDREN
AS *AMICUS CURIAE*
IN SUPPORT OF REVERSAL**

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INTEREST OF *AMICUS CURIAE* ¹

The National Center for Missing and Exploited Children (“NCMEC”) was established by Congress in 1984 as a private, non-profit 26 U.S.C. § 501(c)(3) organization to assist law enforcement and families in the prevention of child abductions, the recovery of missing children, and the provision of services to combat child sexual exploitation. NCMEC works in cooperation with and is funded by the United States Department of Justice’s Office of Juvenile Justice and Delinquency Prevention.² NCMEC has been designated by Congress as “the official national resource center and information clearinghouse for missing and exploited children”³ and works with federal, state, and local law enforcement agencies, state missing children clearinghouses, and international law enforcement agencies. NCMEC also works frequently with foreign government entities, including the formally designated Central Authorities of Hague Convention contracting states, on cases of international family abduction.⁴ This network enables NCMEC to transmit information regarding missing and exploited children

¹ Pursuant to Supreme Court Rule 37.6, counsel for the *amicus curiae* attests that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. U.S. Sup. Ct. R. 37.6 (2009). No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties received notice at least ten days prior to the due date of NCMEC’s intention to file this brief. Respondent’s consent letter is on file with the Clerk of Court, and Petitioner’s consent letter is being filed with this brief.

² 42 U.S.C. § 5773(b) (2009).

³ *Id.* at § 5773(b)(1)(B).

⁴ 42 U.S.C. § 5771(5)(C) (2009).

to law enforcement and other international agencies around the world. Pursuant to the mandate of Congress, NCMEC tracks numbers of missing children cases, including international family abductions, and reports these numbers annually to Congress.⁵

Beginning in 1995, NCMEC processed cases under the Hague Convention on the Civil Aspects of International Child Abduction⁶—both incoming (those in which a parent abducts a child into the United States from a contracting state) and outgoing (those in which a parent abducts a child from the United States to a contracting state). NCMEC’s work on incoming cases was performed on behalf of the United States Department of State pursuant to a cooperative agreement among the United States Department of State, the United States Department of Justice, and NCMEC. In April 2008, the United States Department of State assumed primary responsibility over all incoming Convention abduction cases, but NCMEC continues to handle outgoing Convention cases.

From 1995 to April 2008, NCMEC handled approximately 5,600 incoming Convention cases and over 2,300 outgoing Convention cases. NCMEC has assisted left-behind parents with assembling their applications for relief under the Convention, securing legal counsel, obtaining law enforcement and social services as needed, and obtaining clarification of foreign custody laws from foreign authorities. During its long involvement in working on Convention cases, NCMEC has established relationships with Central Authorities, legal representatives, and other agencies

⁵ 42 U.S.C. § 5773(b)(1)(F) (2009).

⁶ See Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. (hereinafter “the Convention”).

in many Convention contracting states. These relationships are essential to NCMEC's ongoing work in ensuring the prompt return of children abducted from the United States to foreign countries.

The resolution of the issue presented in this case will have a profound effect on the efficacy and practical operation of the Convention and on the ability of left-behind parents to obtain return of their abducted children through the international civil remedy provided by the Convention. NCMEC has a strong interest in ensuring that contracting states interpret the Convention consistently and that children who are "wrongfully removed" or "wrongfully retained" within the meaning of the Convention are returned to their countries of habitual residence.

SUMMARY OF ARGUMENT

The purpose of this brief is twofold:

First, this brief describes the extent to which the Convention is built upon close cooperation among Convention contracting states. That cooperation necessitates reciprocity and uniformity in interpretation of the Convention.

Second, this brief argues that the *ne exeat* right—a right recognized in many contracting states—is a "right of custody" within the meaning of the Convention. The Convention's text, drafting history, and post-ratification treatment demonstrate that *ne exeat* is a right of custody. This is the emerging consensus among other contracting states. In the face of this consensus, a failure to recognize *ne exeat* as a right of custody would contradict the principles underlying the Convention. It would also deny many left-behind parents a unique international civil remedy intended

to be widely applicable. Finally, it would run counter to the Convention’s animating principle: that a child’s country of habitual residence has the final word in the resolution of custody disputes.

For these reasons, this Court should join the courts of other contracting states in their well-reasoned analysis of the Convention and hold that the *ne exeat* right is a right of custody under the Convention.

ARGUMENT

I. THE CONVENTION FUNCTIONS THROUGH THE COOPERATIVE EFFORTS OF ALL CONTRACTING STATES, AND INCONSISTENT INTERPRETATION OF *NE EXEAT* RIGHTS UNDERMINES THOSE EFFORTS

A. The Convention Is Designed to Return Wrongfully Removed Children to the Forum of Habitual Residence for Adjudication of Custody Disputes

The central purpose of the Convention and its implementing legislation, the International Child Abduction Remedies Act (“ICARA”),⁷ is to return internationally abducted children to their countries of habitual residence for a determination of custody.⁸

⁷ 42 U.S.C. § 11603 (2009).

⁸ Elisa Pérez-Vera, *Explanatory Report: Hague Conference on Private International Law*, 3 Acts and Documents of the 14th Session, 426, 429 ¶16 (1980) (translation of the Permanent Bureau) (hereinafter “Pérez-Vera Report”). The Pérez-Vera Report is recognized as an authoritative source for interpreting the Convention’s provisions and as “the official history and commentary on the Convention.” *Croll v. Croll*, 229 F.3d 133, 137 n.3 (2d Cir. 2000) (citing *Blondin v. Dubois*, 189 F.3d 240 (2d Cir. 1999); see also U.S. Dep’t of State, Hague International

In accordance with this purpose, the Convention directs the court in which a Convention action is filed not to consider the merits of any underlying child custody dispute, but simply to determine the jurisdiction in which the parties must pursue resolution of the custody dispute. See Convention arts. 16, 19. This directive is predicated on a commitment to reciprocity and an understanding that courts of contracting states will enforce the Convention uniformly when presented with similar circumstances.

The Convention provides for the return of children who are “wrongfully removed” from their country of habitual residence. A child is “wrongfully removed” where the removal is in breach of “rights of custody.” *Id.* at art. 3. 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.”⁹ *Id.* at art. 5. Rights of custody “may arise in particular 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” in which the child was habitually resident immediately before the removal or retention. *Id.* at art. 3.

Thus, the trial court is not empowered to resolve the custody dispute; rather, it must determine whether the petitioner has sufficient rights and obli-

Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10503 (Mar. 26, 1986).

⁹ “Rights of access,” for which other, more limited remedies are available, are defined to 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. The return remedy is not available for breach of rights of access. See Convention arts. 12, 21.

gations “under the law of the State in which the child was habitually resident” to give rise to “rights of custody” as defined by the Convention. *Ibid.* On such a finding (and absent the determination of any substantive defenses permitted under the Convention) the court must order prompt return of the child. *Id.* at art. 12.

B. In Practice, the Convention Is Facilitated by Cooperation Among Contracting States

The Convention is intended to create “a system of close co-operation among the judicial and administrative authorities of the Contracting States.”¹⁰ This cooperation is achieved in part through the contracting states’ designated Central Authorities. See Convention art. 7. The Central Authorities are charged with exchanging information concerning a wrongfully removed or retained child, investigating the whereabouts of the child, adopting necessary provisional measures to prevent harm to the child, and, ultimately, providing appropriate administrative arrangements to facilitate the voluntary return of the child or otherwise securing an amicable solution. *Ibid.*

The United States has established cooperative relationships with the Central Authorities of other contracting states.¹¹ When a child is abducted from

¹⁰ Pérez-Vera Report at 435, ¶ 35.

¹¹ United States Response: Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (2006). Available at http://www.hcch.net/index_en.php?act=conventions.publications&dtid=33&cid=24. See also U.S. Dep’t of State, 2009 Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction (“Compliance Report”) (Apr. 2009) at 16 (Brazil), 18 (Chile), 19 (Greece).

the United States to another contracting state, the United States Central Authority (“USCA”) facilitates efforts to secure the return of the child.¹² In this regard, both NCMEC and the USCA may work with parents to file a return application,¹³ contact the relevant foreign Central Authority directly to transmit application documents, and request assistance in locating the abducted child.¹⁴ The foreign Central Authority will examine the return application and, if it accepts the application, will work with various local authorities to locate the abducted child before judicial or administrative proceedings pursuant to the Convention begin. In cases where a child is abducted to the United States, the Central Authority of the country of origin plays a corresponding role.

Once judicial proceedings under the Convention have commenced, the courts of the contracting states take the central role in determining whether the child should be returned. The collaborative spirit of the Convention continues at this stage, as courts may seek help from a foreign Central Authority in deter-

Available at <http://travel.state.gov/pdf/2009HagueAbductionConventionComplianceReport.pdf>.

¹² U.S. Dep’t of State Office of Children’s Issues website at http://travel.state.gov/family/abduction/country/country_3056.html.

¹³ U.S. Dep’t of State Office of Children’s Issues website at http://travel.state.gov/family/abduction/Solutions/Solutions_3850.html

¹⁴ United States Response: Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (2006). Available at http://www.hcch.net/upload/abd_2006_us.pdf. While the USCA generally submits Hague applications directly to the relevant foreign Central Authority, on occasion the USCA will work through American embassies abroad to transfer information to other Central Authorities. *Ibid.*

mining the meaning and content of that state's custody laws. The Convention requires each Central Authority to take "all appropriate measures" to "provide information of a general character as to the law of their State in connection with the application of the Convention." Convention art. 7(e). The Central Authorities may also help applicants obtain from a court of the child's habitual residence "a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention." *Id.* at art. 15. Such decisions can be submitted to the foreign court that is evaluating the Convention petition for return.

Contracting states' courts are charged with deciding cases in a timely manner, correctly applying the Convention's legal requirements, and enforcing decisions for return or access. See Compliance Report at 12. Consistent application of Convention principles is therefore particularly important, for no supranational body polices the Convention or adjudicates disputes over the meaning of the text. In recognition of this principle, courts frequently consider other contracting states' judicial decisions when rendering decisions under the Convention. See, e.g., *Furnes v. Reeves*, 362 F.3d 702, 714 (11th Cir. 2004); *Fawcett v. McRoberts*, 326 F.3d 491, 500 (4th Cir. 2003); *Gonzalez v. Gutierrez*, 311 F.3d 942, 952 (9th Cir. 2002); *Croll v. Croll*, 229 F.3d 133, 143 (2d Cir. 2000); *Sonderup v. Tondelli* 2000 (1) SA 1171 (CC) at 24-25 (S. Afr.); *In the Marriage of: Jose Garcia Resina and Muriel Gislaine Henriette Resina*, Appeal No. 52, 1991, at 14 (Fam.) (Austl.).

C. Inconsistent or Erroneous Interpretation of *Ne Exeat* Rights Undermines the Operation of the Convention

Because the Convention operates as intended only if it is uniformly enforced, contracting states note faulty or inconsistent compliance with the Convention.

The United States Department of State, for instance, annually reviews contracting states' compliance with the Convention and identifies states that fail to consistently apply the tenets of the Convention. The resulting compliance report publicizes return statistics as well as the deficiencies of certain contracting states that are determined to be non-compliant with the Convention. The most common deficiency is judiciaries incorrectly adjudicating underlying custody disputes rather than returning the child to his or her country of habitual residence for resolution there. See, *e.g.*, Compliance Report at 15.

Contracting states can become frustrated when others apply the Convention inconsistently. For instance, in 2006 the Central Authority for Argentina complained, in response to the Questionnaire Concerning the Practical Application of the Hague Convention, that foreign courts' failures to recognize custody rights established by Argentinian law have been an obstacle to enforcement.¹⁵

The courts of contracting states likewise comment on other states' failure to uniformly apply the Convention. In *Doise v. Doise*, [1993] Carswell BC

¹⁵ Argentina Response: Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (2006). Available at http://www.hcch.net/upload/abd_2006_ar.pdf.

1600 (B.C.S.C. Dec. 10, 1993), a Canadian judge criticized a German court for not enforcing a Canadian court order granting interim custody of the children to the father. The Canadian judge commented that based on the evidence presented to the court, the proceedings in Germany could be described as “a most unfortunate legal misadventure.” *Id.* at ¶ 29. Similarly, in *M.A.M.D. v. C.F.H.L.*, [1999] Q.J. No. 4130, 60-63 (Quebec Super. Ct.) (Can.) a Canadian judge criticized the Austrian courts for not enforcing a *ne exeat* order. The Canadian court explained that the Austrian court had “failed to take into account that the mother did not have the right to remove the child from the jurisdiction of the province.” *Id.* at ¶ 63. The Canadian court further commented that the Austrian courts’ decisions were “contrary to the purpose of the Convention” and encouraged “recourse to illegal acts.” *Id.* at ¶ 61.

United States courts also have complained of lapses by foreign courts in interpreting the Convention. In *Carrascosa v. McGuire*, 520 F.3d 249, 262-63 (3d Cir. 2008), the Third Circuit faulted a Spanish court for applying Spanish law to a Convention case involving a child wrongfully removed from the United States. The district court had termed the Spanish court’s refusal to apply New Jersey law a “complete disregard of the principles of international comity.” *Carrascosa v. McGuire*, No. 07-0355, 2007 WL 496459, at *10 (D.N.J. Feb. 8, 2007). The Third Circuit, agreeing, held that American courts therefore had no obligation to enforce the Spanish judgment. *Carrascosa*, 520 F.3d at 263. On a practical level, courts may be influenced by another contracting state’s track record of noncompliance when deciding whether to return a child to its country of origin. See, e.g., *Croll*, 229 F.3d at 143 n.6 (noting the “lack

of uniform interpretation,” as evidenced by the high number of returns from the United States compared to the much lower rate of returns to the United States, in support of its decision not to return the child to her country of origin).

The Convention’s purpose cannot be realized if it is inconsistently applied among contracting states. As the Reporter for the Convention wrote, “a system based on co-operation could work only if there existed amongst the Contracting Parties a sufficient degree of mutual confidence.” Pérez-Vera Report at 437, ¶ 41. The need for uniformity is therefore an appropriate consideration when determining whether a *ne exeat* right constitutes a “right of custody.”

II. THE NATURE AND SOURCES OF THE *NE EXEAT* RIGHT

The *ne exeat* right at issue here is commonly litigated in Convention cases. In its simplest form, *ne exeat* is a right held by one or both parents to prevent the other parent from removing a child from a jurisdiction without the consent of both parents. Many of the precedential decisions regarding *ne exeat* rights arise out of court orders containing *ne exeat* rights—see, e.g., *Croll*, 229 F. 3d 133, *Furnes*, 362 F.3d 702—but depending on the law of the state at issue a *ne exeat* right also may arise through private agreements or operation of law.

United States courts historically have recognized and applied *ne exeat* rights in civil disputes “to effectuate a remedy by keeping a party within the jurisdiction of the court.” *In re People ex rel. B.C.*, 981 P.2d 145, 148 (Colo. 1999) (citing 57 Am. Jur. 2d *Ne Exeat* § 2 (1988) and 65 C.J.S. *Ne Exeat* § 1.b (1986)); see also *Siravo v. Siravo*, 670 So. 2d 983, 984-85 (Fla.

4th Dist. Ct. App. 1996) (“Certainly utilization of this writ is a valuable resource in the arsenal of remedies available to a trial court in order to secure alimony and support.”); *Chancer v. Chancer*, 124 N.E.2d 283, 285 (N.Y. 1954) (describing application of “this ancient writ” to secure defendant’s presence at alimony proceedings). Although United States courts today rarely invoke *ne exeat* in non-familial matters, many United States jurisdictions permit the use of *ne exeat* orders to aid enforcement of domestic custody determinations by forbidding removal of a child from the jurisdiction. See, e.g., *Goldman v. Greenwood*, 748 N.W.2d 279, 282 (Minn. 2008) (affirming validity of “locale restriction” in custody order); *In re People ex rel. B.C.*, 981 P.2d at 148 (holding writ may be used to enforce custody determinations); *Carrascosa*, 520 F.3d at 256 n.17 (describing New Jersey custody statute akin to *ne exeat* order); *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008) (relating that Alabama court issued *ne exeat* order); *Wheeler v. Mazur*, 793 A.2d 929, 931-32 (Pa. Super. Ct. 2002) (describing issuance of *ne exeat* order).

Numerous foreign jurisdictions also recognize the *ne exeat* right. Indeed, the five contracting states with the highest incidence of abductions to the United States provide for *ne exeat* rights: Mexico, in which 121 new abductions to the United States were reported for 2008; Germany with 27 new incoming cases; the United Kingdom with 21; Canada with 19; and France with 13.¹⁶

¹⁶ Compliance Report at 11. For examples of *ne exeat* rights in these countries, see, for Mexico, *Gonzalez v. Gutierrez*, 311 F.3d 942, 947 (9th Cir. 2002) (recognizing a *ne exeat* clause arising by divorce agreement); Germany, *Shealy v. Shealy*, 295 F.3d 1117, 1120 (10th Cir. 2002) (recognizing a *ne exeat* right

Rights of *ne exeat* may arise by statute. In Canada, for example, the *ne exeat* right is established by the Criminal Code, which prohibits one parent from removing a child from the country without permission of the other parent.¹⁷ These provisions apply irrespective of an existing custody order.¹⁸ In the United Kingdom, the *ne exeat* right is conferred by a statute that precludes a parent from removing a child from the country for more than 28 days without the consent of both parents.¹⁹ Furthermore, the judiciary in the United Kingdom may enforce *ne exeat* rights pursuant to Section 8 of the Children Act 1989.

In Argentina, the Civil Code establishes that when one parent has custody of a child, the consent of the other parent must be obtained before that child may be removed from the country.²⁰ Similarly, in Hungary, even where parents do not hold “joint custody” under Hungarian law, both parents are entitled to decide jointly substantial questions concerning the

conferred by family court order); United Kingdom, *Navani v. Shahani*, 496 F.3d 1121, 1125 (10th Cir. 2007) (acknowledging a *ne exeat* right arising from family court custody order); Canada, *David S. v. Zamira S.*, 632, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991) (recognizing a *ne exeat* order from the secular courts of Ontario); France, *In re D.D.*, 440 F. Supp. 2d 1283, 1295 (M.D. Fla. 2006) (acknowledging *ne exeat* rights arising from French Civil Code art. 371-3).

¹⁷ See Canadian Criminal Code R.S.C. 1985 c. C-46, §§ 282-283.

¹⁸ See *id.*, § 283.

¹⁹ Section 1, Child Abduction Act of 1984 (c. 37) (U.K.).

²⁰ *Codigo Civil* [Cod. Civ.] art. 264 (Arg.). According to the United States Department of State, Argentina was involved in 14 new cases in 2008, including 11 outgoing cases to Argentina and three incoming cases to the United States. Compliance Report at 40.

child, including the child's place of residence.²¹ Consequently, the removal of a child abroad by one parent is unlawful even where the removing parent is the primary caregiver; such removal is considered a breach of the left-behind parent's right to jointly decide the child's place of residence.²² The *ne exeat* right also arises by statute within the Greek Civil Code and prohibits the removal of a child from the country by the custodial parent absent the consent of the other parent.²³ In the Dominican Republic, the *ne exeat* right arises by operation of law, and courts require that permission for travel abroad of minor children or adolescents be given by both parents.²⁴

Given the widespread existence of *ne exeat* rights, it is not surprising that such rights frequently are at issue in Convention cases litigated in the United States. Courts in the United States have issued opinions involving *ne exeat* rights arising in, for example, Hong Kong, Norway, Scotland, Panama, Belize, Colombia, Chile, Venezuela, Mexico, Germany, France,

²¹ Hungarian Family Code art. 72(B) §§ 1-2. According to the U.S. Department of State, Hungary was involved in four new cases in 2008, including two outgoing cases to Hungary and two incoming cases to the United States. Compliance Report at 40.

²² Civil Board of the Supreme Court of the Republic of Hungary, Opinion no. 284(b)

²³ Art. 1520, Greek Civil Code; see also art. 950, ¶ 2 of Greek Civil Procedure Code. According to the United States Department of State, Greece was involved in one new incoming case to the United States in 2008. Compliance Report at 40.

²⁴ Law 136-03: Code for the Protection of the Rights of Children and Adolescents, art. 204 (Dominican Republic). According to the United States Department of State, the Dominican Republic was involved in 34 new cases in 2008, including 25 outgoing cases to the Dominican Republic and nine incoming cases to the United States. Compliance Report at 40.

Hungary, Greece, and Canada.²⁵ A lack of uniformity in the recognition of this widespread right as a “right of custody” could fundamentally weaken the Convention.

III. THE *NE EXEAT* RIGHT IS A RIGHT OF CUSTODY UNDER THE CONVENTION

In interpreting the Convention this Court should give effect to the shared expectations of its signatories. Determining this intent requires an evaluation of the Convention’s text, drafting history, and post-ratification treatment. *Air France v. Saks*, 470 U.S. 392, 397-400 (1985); see also *El Al Isr. Airlines v. Tseng*, 525 U.S. 155, 167 (1999) (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)). These sources establish that the Convention’s contracting states intended *ne exeat* to constitute a right of custody.

²⁵ See *Croll*, 229 F.3d at 135 (Hong Kong); *Furnes*, 362 F.3d at 714 (Norway); *Fawcett*, 326 F.3d at 500 (Scotland); *Lalo v. Malca*, 318 F. Supp. 2d 1152, 1156 (S.D. Fla. 2004) (Panama); *In re Leslie*, 377 F. Supp. 2d 1232, 1246 (S.D. Fla. 2005) (Belize); *Aguirre v. Calle*, No. 08-2613, 2008 WL 4461931, at *5 n.7 (E.D.N.Y. Oct. 3, 2008) (Colombia); *Villegas Duran v. Arribada Beaumont*, 534 F.3d 142, 147-48 (2d Cir. 2008) (Chile); *Vale v. Avila*, 538 F.3d 581, 584 (7th Cir. 2008) (Venezuela); *Gonzalez*, 311 F.3d at 947 (Mexico); *Shealy v. Shealy*, 295 F.3d at 1120 (Germany); *In re D.D.*, 440 F. Supp. 2d at 1295 (France); *Viragh v. Foldes*, 612 N.E.2d 241, 248 (Mass. 1993) (Hungary); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 846 (Ky. Ct. App. 1999) (Greece); *David S. v. Zamira S.*, 632, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991) (Canada).

**A. The Convention's Text Evinces an
Intent to Treat *Ne Exeat* Rights as
Rights of Custody**

Interpretation of a treaty begins 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, 534-35 (1991) (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988)); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 534 (1987); *Air France*, 470 U.S. at 397. The meaning of the Convention's terms should be assessed “in the light of [the Convention's] object and purpose.” Vienna Convention on The Law of Treaties, May 23, 1969, art. 31.1, 1155 U.N.T.S. 331, 340.²⁶

*1. The Convention's Definition of “Rights of
Custody” Expressly Includes the Right to
Determine Place of Residence*

Under 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) (emphasis added). Several aspects of this definition are notable. “Rights of custody” are defined very broadly, as rights “relating to” the care of the child. A parent need not be a child's primary caregiver in

²⁶ The United States has not ratified the Vienna Convention on the Law of Treaties, but it has been “generally recognized as the authoritative guide to current treaty law and practice.” United States Dep't of State, Letter of Submittal to the President, S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971). More importantly, this Court has independently adopted much of the Vienna Convention's basic framework for treaty interpretation. Compare Vienna Convention on the Law of Treaties, arts. 31.3, 32 with *El Al*, 525 U.S. at 167.

order to have “rights of custody” within the meaning of the Convention as long as the parent has rights “relating to” the child’s care. Indeed, the Convention elsewhere recognizes that rights of custody need not be held solely by one parent, but may be held and exercised by more than one person. *Id.* art. 3(a) (recognizing that rights of custody can be held jointly). The result is an expansive definition of “rights of custody” that is specific to the Convention. These rights are not necessarily identical to, and may be more inclusive than, whatever rights are thought of as custody rights within any individual state’s legal system.²⁷

Most critically for purposes of this case, the definition of “rights of custody” in Article 5(a) specifically includes “the right to determine the child’s place of residence.” This is precisely the right that a *ne exeat* order affords. The holder of a *ne exeat* right may unilaterally decide that the child will reside in the country of habitual residence and not in any other.

One might argue that the right to determine the country in which the child will live cannot be read as a right to determine the “place of residence” because the parent cannot determine the specific location within that country. But in the context of the Convention, which is concerned with the country of residence, that argument is unavailing; given the international context of the Convention, “place of

²⁷ See Hague Conference on Private International 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, 29 I.L.M. 219, ¶ 9, at 222 (1990).

residence” necessarily refers to the country of residence. The court in *Furnes* explained:

In light of the context of the Hague Convention, we believe that the right to determine whether the child lives within or outside Norway constitutes a right to determine the child’s place of residence. The Hague Convention was designed to provide a remedy not for whether Jessica should live in Bergen or Oslo within Norway (Reeves’s right), but for whether Reeves should be able to take Jessica across international borders. Thus, in our view, the only logical construction of the term “place of residence” in the Convention would necessarily encompass decisions regarding whether Jessica may live outside of Norway. *Therefore, what country a child lives in, as opposed to what city or house within Norway, constitutes a right to determine a child’s place of residence under Article 5 of the Convention and thus a right of custody under the Convention.*

Furnes, 362 F.3d at 715 (emphasis added). See also *Lieberman v. Tabachnik*, 625 F. Supp. 2d 1109, 1123 (D. Colo. 2008) (“The Convention is not concerned with where a child resides within the country of their habitual residence. Thus, I find that the only logical construction of the term ‘right to determine place of residence’ in the Convention must encompass decisions regarding whether a child may live outside of their country of habitual residence.”).

Furthermore, the “veto” nature of the right allows the holder of the right to specify the precise circumstances under which the holder will refrain from exercising the right. The holder of the right may, for example, specify that the other parent may take the

child abroad on the condition that they live in a particular foreign country. See, *e.g.*, *Croll*, 229 F.3d at 145 (Sotomayor, J., dissenting) (holder of the right “can use his veto power as leverage to influence [the other parent’s] selection of the destination country”). Indeed, although a right to determine the country of residence sufficiently establishes a right of custody, the holder of a *ne exeat* right potentially could determine not only the country of residence, but also the city, town, or even the neighborhood of residence. See *Furnes*, 362 F.3d at 715 (noting that petitioner could condition the child’s removal on her living “in a particular city or near a particular airport, or even on the condition that she live in a particular house” in the other country); see also *C v. C*, [1989] 1 W.L.R. 654 at 5 (England C.A.) (“The other parent [with the *ne exeat* right] would have some control over not only the child leaving the jurisdiction but also as to the place to which the child was going, and not only the country; for instance, to live in London in suitable circumstances.”).

That the *ne exeat* right amounts to less than complete control over a child’s place of residence is immaterial under the Convention, for a right of custody may be shared between parents. Where a *ne exeat* order is in place, *neither* parent has an unlimited right to determine a child’s place of residence; the rights to determine residence are held jointly—a possibility that the Convention explicitly acknowledges and that in no way diminishes the *ne exeat* right’s status as a “right of custody.” See Convention art. 3(a) (stating that rights of custody may be held “either jointly or alone”). In this respect, the right of determination arising under a *ne exeat* order resembles many other common custodial arrangements in which neither parent has sole decision-making power.

For example, under joint legal custody arrangements, parents share decision-making rights and responsibilities. See, e.g., *Zitnay v. Zitnay*, 875 A.2d 583, 587 (Conn. App. Ct. 2005) (stating that joint legal custody involves “equal sharing of decisions regarding a child’s welfare, such as education, religious instruction and medical care”); *Johnson v. Johnson*, 865 S.W.2d 412, 417 (Mo. Ct. App. 1993) (explaining that under the statutory definition of “joint legal custody,” parents share the decision-making relating to the education, health and welfare of the child).

2. *Under the Convention, the Ne Exeat Right Is a “Right of Custody” Not a “Right of Access”*

A comparison of “rights of custody” with “rights of access” also supports the conclusion that the *ne exeat* right is a right of custody. “Rights of custody” under the Convention “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.” “Rights of access” 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. 5.²⁸

The *ne exeat* right is not a right to take the child temporarily from his or her habitual residence; the holder of a *ne exeat* right may not even have visitation rights. The remedy for a violation of access rights—allowing a parent access to the child, as provided in Article 21 of the Convention—does not cure the violation of a *ne exeat* right. Only the

²⁸ The United States Department of State has characterized “rights of access” as mere “visitation rights.” United States Dep’t of State, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494 (Mar. 26, 1986).

remedy provided for violation of rights of custody—namely, return of the child to the country of habitual residence—addresses the specific harm done by a removal in violation of a *ne exeat* order and restores the left-behind parent’s rights.

**B. The Convention’s Drafting History
and Opinions of Courts from Other
Contracting States Demonstrate that
Ne Exeat Is a Right of Custody**

To the extent the language of the Convention is ambiguous, the Court may consider the Convention’s drafting history and post-ratification treatment. *Air France* 470 U.S. at 397, 400; see also *El Al*, 525 U.S. at 167 (quoting *Zicherman*, 516 U.S. at 226).

*1. The Drafting History Demonstrates the
Drafters’ Intent that “Rights of Custody”
Encompass the Ne Exeat Right*

The drafting history suggests that the first Convention signatories believed *ne exeat* rights would be protected by a right of return. In reference to a hypothetical situation parallel to the underlying facts in this case, Convention drafters believed that the right of return was available. During negotiations of the Convention, the Canadian representative observed that under his reading of the Convention, when a *ne exeat* order is in place, “[i]f the mother nevertheless leaves the jurisdiction [with the child] without [the father’s] consent, that constitutes wrongful removal.” Hague Conference on Private International Law, *Actes et Documents de la Quatorzième Session*, Tome III, at 266 (1980). The participants agreed that “under the present terms of the Convention, the abducted child would have to be sent back immediately.” *Ibid.*

The drafters also contemplated that the right to care for the person of the child could be vested in one person, while another held the right to determine a child's residence—with both rights recognized as “rights of custody” under the Convention. *Id.* at 271 (Mr. Eekelaar, the representative for the Commonwealth Secretariat, stated that the right to care for a child and the right to determine place of residence might be held by different people, but that the drafters' intent was to protect the custody rights of each), 344 (Mr. Dyer, first secretary at the Permanent Bureau, stated that the Convention allowed two individuals to separately maintain custody rights).

2. *The Preponderance of Contracting States' Courts to Have Considered the Issue Have Held that the Ne Exeat Right Is a Right of Custody*

Examination of other states' interpretations of “rights of custody” is particularly appropriate given the Convention's cooperative framework. Congress acknowledged “the need for uniform international interpretation of the Convention,”²⁹ a goal that cannot be achieved without reference to international decisions.

Foreign precedents support the position that the *ne exeat* right is a right of custody. In its *Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice*, the Permanent Bureau of the Hague Conference on Private International Law stated that “the preponderance of the case law supports the view that a right of access combined with a veto on the removal of a child from the juris-

²⁹ 42 U.S.C. §11601(b)(3)(B) (2009).

diction constitutes a custody right.”³⁰ The Permanent Bureau observed that these cases are based on the wording of Article 5(b) and a concern that an alternative rule “would seriously weaken the Convention.” *Ibid.* According to the Permanent Bureau, this alternate interpretation, that the *ne exeat* right is not a right of custody, “does not command widespread support.” *Ibid.*

In *Sonderup v. Tondelli*, 2000 (1) SA 1171 (CC) (S. Afr.), a South African court considered a *ne exeat* decree issued by a Supreme Court of British Columbia. In ordering that the child be returned to British Columbia, the South African court relied explicitly on the *ne exeat* decree, which it construed as a “right to determine the child’s place of residence.” *Id.* at 24-25. The South African court also cited favorably to Judge Sotomayor’s dissent in *Croll*, stating that “when a parent takes a child abroad in violation of *ne exeat* rights, that parent effectively nullifies the custody order of the country of habitual residence—exactly the mischief the Convention seeks to avoid.” *Id.* at 25. Similarly, in *Oberster Gerichtshof* [OGH] [Superior Appellate Court] May 2, 1992, 2 Ob 596/91 (Austria), the Superior Appellate Court of Austria determined that a divorce order granting full custody to the mother but holding that the children could not leave England without a court order or consent of the father was sufficient to constitute a right of custody according to Articles 3 and 5 of the Convention. *Id.* at 4.

³⁰ *Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice*, Permanent Bureau of the Hague Conference on Private International Law § 9.3 (2008), available at http://www.hcch.net/upload/guidecontact_e.pdf.

An English court discussed the issue in depth in *C v. C*, [1989] 1 W.L.R. 654 (Eng. C.A.). In that case, a mother who had been granted primary custody of the child brought the child from Australia to England in violation of a *ne exeat* decree. In holding that the child should be returned to the father, Lady Justice Butler-Sloss specifically held that the *ne exeat* order gave the father “the right to determine that the child should reside in Australia or outside the jurisdiction at the request of the mother” and that this right constituted a right of custody under the Convention. *Id.* at 5.

A similar case from Scotland relied in part on *C v. C* in reaching the same conclusion. In *A.J. v. F.J.* 2005 CSIH 36 (Scot), the Scottish Court of Session, Second Division, held that a statutory *ne exeat* right bestowed on the mother the right to determine the children’s place of residence, despite the fact that the father was given primary custody. Lord Clarke therefore held that the mother had “custody rights” for the purposes of Article 3 of the Convention. *Id.* at ¶¶ 12-13.

In *M.S.H. v. L.H.*, [2000] 3 I.R. 390 (July 27, 2000) (Ir.), the Supreme Court of Ireland considered the rights of a father who had been imprisoned for several years and had very limited contact with his children in England. After the mother removed the children to Ireland, the father sought their return on the grounds that a *ne exeat* decree imposed as part of the parties’ divorce action prohibited the children from being removed from England. Justice McGuinness determined that the father’s rights under the *ne exeat* order constituted custody rights and were not nullified by the fact he was not playing a large part in the physical day-to-day care of the

children. *Id.* at 2. Justice McGuinness cited various other examples where a parent might have a low-level input into the day-to-day care of a child: where a parent was disabled, incapacitated by sickness or accident, or in a job that necessitated long absences from home. The fact that the father saw the children infrequently did not divest him of the custody rights conferred under the *ne exeat* order. *Ibid.*

Courts also have taken into account the desirability of maintaining a uniform approach when determining that a *ne exeat* right is a right of custody. In *In the Marriage of: Jose Garcia Resina and Muriel Gislaine Henriette Resina*, Appeal No. 52, 1991 (Fam.) (Austl.), for example, the Family Court of Australia cited favorably to *C v. C* in finding that a *ne exeat* right constituted a right of custody such that a court must order the return of a child to the country of habitual residence. In considering the rights conferred by the *ne exeat* order, the court acknowledged the international spirit of the Convention and ordered that the children should be returned to their father in Australia, stating that “[t]he reasoning adopted by the Court of Appeal in *C v. C* should be applied in Australia both for reasons of uniformity of interpretation and having regard to the spirit and intendment of the Convention. Consequently, the injunctive order of April 1990 constituted a ‘right of custody.’” *Id.* at 14. See also *Sonderup*, 2000 (1) S.A. 1711 at ¶ 21 (stating that “it has been held by courts in several jurisdictions that such a non-removal provision can, depending on the circumstances, confer a right of custody within the meaning of the Convention”).

Respondent asserted in her Brief in Opposition that there is no consensus among contracting states because of certain court decisions in Canada and France. See Opp. Br. 15-16. But as explained in the Brief for the United States as *Amicus Curiae* in support of the petition for certiorari, the Canadian courts' comments about *ne exeat* orders were not part of their holdings, since neither court was faced with the issue of a parent violating a *ne exeat* order after a final custody determination. See U.S. Br. 14-16. The French decision cited by Respondent conflicted with a prior French appellate court decision. See U.S. Br. 15-16. Accordingly, these decisions fail to support Respondent's description of a serious divide among contracting states about whether *ne exeat* rights are rights of custody.

International decisions thus support the treatment of *ne exeat* rights as rights of custody. The countries rendering these decisions are active Convention partners of the United States: in 2008, Australia was involved in 27 cases with the United States (18 outgoing to Australia, nine incoming to the United States); the United Kingdom was involved in 63 (42 outgoing and 21 incoming); South Africa, 11 (five outgoing and six incoming); and Israel, 17 (12 outgoing and five incoming).³¹ The need for uniformity is highlighted by the prospect of one interpretation of custody rights applied by foreign courts to the cases of children abducted *to* these countries, and a different interpretation applied by courts in the United States governing abductions *from* these countries.

³¹ Compliance Report at 40.

**C. Recognition of the *Ne Exeat* Right as
a “Right of Custody” under the Con-
vention Furthers the Convention’s
Goals of Uniformity and Reciprocity**

“International law is founded upon mutuality and reciprocity.” *Hilton v. Guyot*, 159 U.S. 113, 168 (1895). Reciprocity is embodied in the Convention’s day-to-day workings, as the Convention relies on contracting states to share information about missing children and about their own custody laws through their Central Authorities, and to develop a uniform body of international law applying the Convention through their courts.

Multilateral treaties that are dependent on contracting states to interact and engage reciprocally are more effective when those states agree on the treaties’ interpretation and definitions. Congress has explicitly recognized “the need for uniform international interpretation of the Convention,”³² and courts have been mindful of this requirement. See, e.g., *Mozes v. Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001); *Carrascosa*, 520 F.3d at 259; *Gitter v. Gitter*, 396 F.3d 124, 131 (2d Cir. 2005). Foreign courts also have emphasized the significance of uniformity in the application of the Convention. See, e.g., *Hunter v. Murrow*, [2005] EWCA Civ 976 at ¶ 47 (Eng. C.A.) (observing that, with regard to the meaning of “rights of custody,” “the Hague Convention cannot be construed differently in different jurisdictions: it must have the same meaning and effect under the laws of all Contracting States”).

No supranational body oversees the application of the Convention. The contracting states themselves

³² 42 U.S.C. § 11601(b)(3)(B).

are responsible for ensuring that the Convention is interpreted consistently in all states, so that all left-behind parents have access to a uniform civil remedy to seek the return of their internationally abducted children. This imposes a responsibility on courts to interpret the Convention with reference to decisions in other states. In this case, uniformity would be promoted by recognizing that the holder of a *ne exeat* right is entitled to return of the child wrongfully removed in violation of that right.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated and the case remanded for further proceedings consistent with the position set forth in this brief.

Respectfully submitted,

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