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 RESPONDENT

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QUESTION PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction requires that a child be returned to his country of habitual residence if he has been "wrongfully removed" from that country. Removal is "wrongful" under the Convention if it occurs in breach of "rights of custody," but not if it occurs in breach of "rights of access." The question presented is:

If a *ne exeat* statute or order requires a custodial parent to seek judicial permission to take a child out of the country without a noncustodial parent's consent, does that provision create "rights of custody" in a noncustodial parent who only has access rights?

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INTRODUCTION

The 1980 Convention on the Civil Aspects of International Child Abduction provides for the mandatory return of children removed to foreign countries in breach of "rights of custody." Hague Convention on the Civil Aspects of International Child Abduction art. 12, Oct. 25, 1980, T.I.A.S. No. 11670 [hereinafter Convention]. To warrant mandatory return, these custody rights must have been attributed by the law of the state of the child's habitual residence, and "actually exercised" by the person having "care of the person of the child." Convention arts. 3, 12, 13. No such remedy is provided for removals in breach of rights of access.

Petitioner Timothy Abbott has no custody rights over his son under Chilean law. The child's mother, Respondent Jacquelyn Abbott, has sole and exclusive custody. Petitioner has not had custodial care of his son at any relevant time, and he has not actually exercised *any* right with regard to his son other than access rights. Petitioner nonetheless claims the Convention's term "rights of custody" means something other than the well-accepted ordinary sense of the term, even though the Convention contains an express definition capturing that ordinary meaning. He contends that the Convention supersedes the allocation of custody rights under Chilean law. He further contends that the Convention recognizes *ne exeat* provisions as a species of "joint custody rights" within the meaning of the Convention, even though the Convention delegates defeated a proposed amendment to extend

remedies to access rights protected by *ne exeat* orders. Finally, even though the Convention's purpose is to protect the child's emotional security by preserving existing custodial relationships, Petitioner asserts that the Convention mandates his son's return to Chile even if it means severing the son's relationship with Respondent, the only person who has had custody of him since 2003.

The plain language, structure, and purpose of the Convention, and the *travaux preparatoires*, foreclose Petitioner's interpretation, as most federal courts of appeals (including the Fifth Circuit below) and the best-reasoned foreign decisions hold.[1] This Court should affirm the judgment below.

STATEMENT OF THE CASE

I. Background on the Convention

The Convention was adopted in 1980 by the Fourteenth Session of the Hague Conference on Private International Law. The Convention was aimed at alleviating the harmful impact on children of abductions that disrupt existing custodial relationships, which typically involved removal of a child by a noncustodial parent to a more favorable jurisdiction "to obtain a right of custody from the authorities of the country to which the child has been taken." Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* [hereinafter Pérez-Vera], in ACTES ET DOCUMENTS DE LA

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[1] *See* Pet. App. 1a; *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000); *Gonzales v. Guiterrez*, 311 F.3d 942 (9th Cir. 2002); *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003); *infra* at 53-58 (discussing foreign cases).

QUATROZIÈME SESSION, TOME III [hereinafter TOME III], 426-476, at 444-45 (1982).[2]

The Convention binds its signatories to return a child (up to the age of 16 years) who was wrongfully removed from the country of habitual residence, subject to enumerated exceptions. Convention arts. 4, 12, 13. Given the Convention's primary purpose to preserve the custodial *status quo*, the right-of-return remedy is triggered only by a breach of actually exercised custody rights. As result, the Convention draws a sharp distinction between "rights of custody" and "rights of access." *Id.* art. 5. Under Article 3 of the Convention, the removal of a child 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, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) 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.

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[2]"[Professor Pérez-Vera's] explanatory report is recognized by the [Hague] Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,503 (1986)

Convention art. 3.

Despite differences in terminology across legal systems, custody was understood to refer to "a complex of rights, duties and powers with the respect to the person of the child." Jacques Foyer, *General Report, Legal Representation and Custody of Minors, Proceedings of the Fourth Colloquy on European Law* (1974) (excerpted in Adair Dyer, *Questionnaire and Report on International Child Abduction by One Parent, Annex I)*, TOME III, 52-56, at 53 [hereinafter Foyer Report]. This complex of rights "included" a variety of concrete rights relating to physical care, "choice of the child's residence," education, medical care, discipline, contracting for employment of the child, and consent to marriage. *Id.* at 53-54.

Article 5 accordingly defines "rights of custody" to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Convention art. 5(a). "Rights of access," in contrast, "shall include the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention art. 5(b).

The Conference considered the problem of breaches of access rights, but chose not to extend the return remedy to such breaches. Pérez-Vera at 444-45. Holders of access rights are only entitled to have the "Central Authority" of the country to which the child has been removed help them "make arrangements for organizing or securing the effective exercise of access." Convention art. 21.

Even where a "right of custody" is implicated, "[t]he judicial duty to order return of a wrongfully

removed or retained child is not absolute." 51 Fed. Reg. at 10,509. The applicant must show that he actually exercised his right of custody at the time of removal, or would have done so but for the wrongful removal. Convention art. 3. Conversely, a person opposing the return may defeat the application by proving that "the person, institution or other body having the care of the person of the child 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." *Id.* art. 13(a). Thus, an applicant is not entitled to a mandatory-return remedy absent at least "some preliminary evidence that he actually took physical care of the child[.]" Pérez-Vera at 448; *see also* 51 Fed. Reg. at 10,507.

Return may also be refused if a mature child objects to it, or if return would expose the child to "a grave risk" of "physical or psychological harm or otherwise place the child in an intolerable situation," or if return would be inconsistent with human rights. Convention arts. 13, 20. Combined, these limitations reflect "the paramount importance" of "the interests of children ... in matters relating to their custody." Convention, pmble.

The Convention is implemented in the U.S. by the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11611.

II. Statement of Facts

A. The Abbotts' Custody Dispute in Chile

Respondent Jacquelyn Abbott is a United States Citizen. Pet. App. 1a. She married Petitioner Timothy Abbott, a British Citizen, in 1992. JA 55. Their only son, A.J.A., was born in Hawaii in 1995 and is a United States Citizen. JA 55. Petitioner's work as an astronomer took the family to Chile in 2002. JA 17, 55. In March 2003, Respondent and Petitioner separated and began litigating over A.J.A.'s custody in the Chilean courts. Pet. App. 1a-2a.

By law, Respondent gained custody of A.J.A. upon separation. CÓDIGO CIVIL DE CHILE art. 225 (Chile). Petitioner petitioned the Chilean family court "for a direct and regular visiting schedule." JA 9. Respondent opposed any visitation because she had "been the victim of domestic violence" and A.J.A. had "also been the victim of physical and psychic abuse by [his] father." JA 10. A psychologist testified that "the minor must be protected until it is clear that the father can control himself in conflictive situations." JA 11. She recommended that Petitioner undergo psychiatric evaluation and "receive appropriate assistance in regard to demonstrating his ability to control himself under pressure." JA 11-12. Respondent submitted evidence of injuries she had suffered and a copy of a criminal complaint against Petitioner from Hawaii. JA 12. She also submitted a complaint filed against Petitioner for violation of a Chilean domestic-violence statute (Law No. 19,325, Aug. 19, 1994 (Chile)). JA 12. A report from the

Family Orientation and Diagnostic Center, however, found that Petitioner did not pose a danger to the child and recommended that the father have visitation rights to maintain his bond with his son. JA 12-13.

The Chilean court granted Petitioner provisional visitation, and the parties agreed on a limited visitation schedule. JA 13. In January 2004, Petitioner refused to return A.J.A. to his home at the agreed-upon time, violating the provisional visitation agreement. *Id.* Believing that Petitioner had obtained a British passport for A.J.A. to take him to England, and stating that she feared for the child's safety, Respondent petitioned the court for an *orden de arraigo* (*ne exeat* order) prohibiting A.J.A. from leaving the country. Pet. App. 17a, 68a-70a. This proposed order was directed to the child's person, rather than at either parent. It contained no consent provisions. It simply asked that the court "immediately decree the ne exeat of the minor" and notify the police. Pet. App. 68a-70a; *see* JA 20-21. The court granted the order on January 13, 2004, and six days later awarded Respondent "immediate custody" of A.J.A., an order that was only enforced with police involvement. JA 13, 20-21, 33.

Expressing dismay that the parties "have even tried to take the law into their own hands," the court fixed its own visitation schedule, giving Petitioner visitation every other weekend and on Wednesdays after school until 8:00 pm. JA 15. The court cited A.J.A.'s legal right to maintain a relationship "with the parent who does not have custody." JA 14.

In this period, Petitioner filed a petition for custody. JA 17, 19-20. Citing A.J.A.'s interest as paramount, the court denied the petition, finding that "[t]he minor is significantly more emotionally tied to his mother, who has assumed his breeding in a totally satisfactory way." JA 28-29.

Due to visa restrictions, Respondent was unable to work or lease an apartment, and she did not receive timely support payments from Petitioner. JA 70 (adverting to 2005 Chilean court order finding that Petitioner owed $23,794 in back child support). On August 26, 2005, Respondent and A.J.A. relocated to Texas. *Id.*

B. Petitioner Attempts to Enforce His Visitation Rights in U.S. Courts

In January 2006, Petitioner filed an action in Texas state court under the Texas Family Code seeking enforcement of the Chilean court's visitation orders and possession of the child to remove him to Chile. Pet. App. 17a. Although state courts have concurrent original jurisdiction over actions arising under the Convention, Petitioner did not assert rights under the Convention. *See* 42 U.S.C. § 11603(a); Pet. App. 48a. Modifying the Chilean visitation-rights order, the court granted Petitioner "liberal periods of possession of A.J.A." while Petitioner remained in Texas, but otherwise denied his petition. JA 41-43; Pet App. 17a-18a.

Petitioner next filed a complaint in the U.S. District Court for the Western District of Texas. JA 52-58. Instead of seeking to enforce his visitation rights, Petitioner petitioned for an order returning A.J.A. to Chile under Article 12 of the Convention.

JA 53-54. Even though he conceded that Respondent "was granted daily care and control of [A.J.A.]" and that Petitioner had only been granted "access," Petitioner asserted that A.J.A.'s removal to the U.S. breached his "rights of custody" because it violated the *ne exeat* order and Article 49 of Chilean Minors Law 16,618. JA 53, 55-56.

Article 49 provides that a child may not depart Chile without authorization of a parent or third party in five circumstances. Pet. App. 61a. For legitimate children, authorization is required from both parents in the absence of a custody entrustment, or from the parent or third party to whom the judge had "entrusted custody." *Id.* If the judge has ordered visitation, "authorization of the father or mother who has the right to visit a child shall also be required." *Id.* If authorization is denied or unobtainable, "it may be granted by the Family Court Judge in the location where the minor resides." *Id.* 62a. Petitioner claimed that the requirement that the custodian seek authorization from the visitation-rights holder constituted "rights of custody" under the Convention. JA 56.

The District Court denied the application, concluding that it "defies the ordinary meaning of the term 'custody' to conclude that Mr. Abbott gained rights of custody in A.J.A. as a result of the Chilean court's *ne exeat* order." Pet. App. 23a. The court noted that "[Ms.] Abbott continued caring for A.J.A. and maintained control over the daily decisions regarding raising A.J.A., including determining A.J.A.'s place of residence." *Id.* The *ne exeat* order thus "did nothing to affect Mr. Abbott's say (except by leverage) about any child-rearing issue other than the

child's geographical location in the broadest sense." *Id.* The District Court further observed that "the clear intent of the Hague Convention is to distinguish between rights of access and rights of custody, furnishing greater protection for [the] parents with rights of custody." *Id.* Consequently, while the court believed that Respondent's relocation violated the Chilean court's *ne exeat* order and frustrated Petitioner's visitation rights, it recognized that this was irrelevant to whether the child's return was mandatory under the Convention. Pet. App. 24a.

The Fifth Circuit affirmed, relying on the extensive analysis of the treaty language and drafting history in *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000). Pet. App. 14a. It held that "the Hague Convention clearly distinguishes between 'rights of custody' and 'rights of access,'" and recognizing *ne exeat* provisions protecting rights of access as "'rights of custody'...would be an impermissible judicial amendment of the Convention." *Id.*

SUMMARY OF THE ARGUMENT

The 1980 Convention's goal is maintenance of the custodial *status quo*. It requires Contracting States to return a child to his country of habitual residence if the left-behind parent has rights of custody but not if he has only rights of access. Petitioner concedes that he has no rights of custody under Chilean law. Nevertheless, he argues that the *ne exeat* provisions designed to protect his access rights give rise to "rights of custody" under the Convention that entitle him to seek mandatory return of A.J.A. to Chile.

Petitioner's reading of the Convention, implausible on its face, is untenable. His claim that

the Convention "autonomously" defines custody rights, and entitles this Court to disregard the allocation of custody rights under Chilean law, defies Article 3's plain command that the Convention only protects custody rights "attributed ... under the law of the State in which the child was habitually resident." Convention art. 3.

Further, there is no basis for Petitioner's claim that the term "rights of custody" lacks its ordinary meaning, and thus even noncustodial laws can give rise to "rights of custody" so long as they constitute in some sense a "right to determine the child's place of residence." Convention art. 5. Treaty terms are presumed to have their ordinary meaning. In 1980, "rights of custody," in the ordinary sense of the term, referred to a complex of rights related to the care of the person, including the right to determine the child's place of residence. That is exactly the definition used in Article 5 of the Convention.

Moreover, the *ne exeat* clauses at issue here do not vest Petitioner with a "right to determine the child's place of residence." Article 5 refers to the affirmative right to determine residency incident to a right of custody in the ordinary sense. *Ne exeat* clauses are not sources of rights; they protect the court's jurisdiction over the person. Even if a *ne exeat* consent requirement were a "right," it would be a distinct right to block the child's departure from Chile. It is a confusion of terms to say that Petitioner's ability to exercise right A (blocking A.J.A.'s departure) to limit Respondent's exercise of right B (residency determination) means that Petitioner shares right B. In any event, the *ne exeat* clauses afford Petitioner no veto over the child's

departure from Chile; they simply require the matter to be decided by court.

Finally, Article 3 and 13 confirm that the Convention protects only custody rights in their ordinary sense. The rights must be "actually exercised" by the person "having care of the person of the child," which precludes any claim of custody rights by someone like Petitioner who has only access rights.

The *travaux preparatoires*, largely ignored by Petitioner and his *amici*, confirm that custody rights must be understood according to the plain meaning ascribed to them in Article 5. The reports accompanying the preliminary and final Convention drafts declare repeatedly that custody rights are those attributed by the Contracting State, are limited to rights of care in their ordinary sense, and must be actually exercised by the person having care of the child. Indeed, the delegates considered and resoundingly defeated a proposal to amend the Convention to grant remedies for access rights protected by *ne exeat* clauses.

Petitioner would convert the Convention into a jurisdictional convention for enforcing foreign court orders. But the First Commission specifically abandoned efforts to create a system for recognition of foreign jurisdiction, and the subsequent 1996 Convention that explicitly had that goal has attracted few signatories. The Convention should not be transformed by judicial amendment into a jurisdictional convention for the enforcement of *ne exeat* orders.

The Convention's limited purpose is to protect the child's interests by preserving the actual and existing custodial relationships that existed prior to removal. Granting a mandatory-return remedy to access-rights holders does not restore any custodial relationships; indeed, in many cases it will sever custodial relationships if (as may frequently happen) the sole custodian cannot re-enter the state to which the child is returned.

Because the Convention's text, purpose, and history foreclose Petitioner's theory, resorting to the other doctrines on which he relies is unnecessary. None supports him in any event. Court decisions and reports of the First Commission are not evidence of the contracting parties' post-ratification conduct, much less their original intent. And while foreign court decisions are sometimes entitled to weight, the foreign courts here are divided, and the persuasive decisions support Respondent. Finally, no deference is due to the State Department's newly announced position. The State Department offers no evidence relevant to contractual intent, and its original statements in support of ratification favor Respondent. This Court should affirm the judgment below.

ARGUMENT

I. *Ne Exeat* Clauses Do Not Give Rise to "Rights of Custody" Protected by the Convention.

Petitioner's textual argument relies on isolating eight words in Article 5 from the rest of the Convention. According to Petitioner, the "right to determine the child's place of residence" is a "right of

custody," Convention art. 5(a), and the Chilean *orden de arraigo* and Minors Law grant him a "veto" of Respondent's choice of residence for the child. Thus, even though the Chilean court granted Petitioner only access rights, he claims entitlement to an order from an American court returning A.J.A. to Chile. Petr. Br. 10-11.

Petitioner misconstrue Articles 5. Plain meaning cannot be derived from isolated textual phrases. *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 99 (1992) ("[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law.") (citation omitted). Treaty interpretation begins "with the text of the treaty and the context in which the written words are used." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988) (citation omitted). "[A]ll parts of the treaty are to receive a reasonable construction with a view to giving a fair operation to the whole." *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921); *see also United States v. Alaska*, 521 U.S. 1, 32 (1997) (rejecting interpretation that "makes a sensible application of other provisions of the Convention impossible").

The Convention's text, considered as a whole, belies Petitioner's claim that *ne exeat* clauses generate "rights of custody." That is contrary to the ordinary meaning of the term at the time of the Convention, when *not a single* Contracting State had identified a *ne exeat* clause as the source of custody rights.

A. The Convention Recognizes "Rights of Custody" Attributed by the State of Habitual Residence.

The premise of Petitioner's claim is that the Convention "autonomously" defines rights of custody, regardless of how the Contracting State of the child's place of habitual residence attributes custodial rights. Yet, they cite nothing in the text of the Convention (or even the *travaux preparatoires*) for that proposition; they cite only a 1989 First Commission report. Petr. Br. 3; U.S. Br 12.

The Convention explicitly protects only "the rights of custody" recognized by the Contracting State of habitual residence. Article 1 declares the "objects of the present Convention" to include "ensur[ing] that *rights of custody* and of access *under the law of one Contracting State* are effectively respected in other Contracting States." Convention art. 1(b) (emphasis added). The Convention proceeds to distinguish custody from access rights in defining wrongful removals redressed by the mandatory-return remedy. *Id.* arts. 3, 12. The removal is "wrongful" only if "it is in breach of *rights of custody attributed* to a person, an institution or any other body, either jointly or alone, *under the law of the State in which the child was habitually resident* immediately before the removal or retention." *Id.* art. 3(a) (emphasis added). The 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," but in all events the applicant must have been granted

custody rights by the Contracting State of habitual residence. *Id.* art. 3.

B. Article 5's Definition of "Rights of Custody" Does Not Depart From Ordinary Meaning and Does Not Encompass *Ne Exeat* Clauses.

The natural reading of Articles 1 and 3 is that a court should look to the custody laws of the state of habitual residence to determine whether "rights of custody" exist.

Petitioner argues that Article 5's definition of "rights of custody" supersedes the allocation of custody rights under the law of the Contracting States. In Petitioner's view, Article 5 serves as a charter for foreign courts to redefine *noncustodial* rights under the domestic law of the state of residence as *custodial* rights under the Convention. Petr. Br. 3. Petitioner misconceives both the meaning and purpose of Article 5.

The definition of "rights of custody" in Article 5 does not substantively expand what constitutes a right of custody "under the law of the State in which the child was habitually resident." *Id.* art. 3(a). It simply describes the term "rights of custody," which was not universally used in the legal systems of all Contracting States, consistently with its ordinary meaning to distinguish it from rights of access.

Treaties are to be interpreted according to "the received acceptation of the terms in which they are expressed." *United States v. D'Auterive*, 51 U.S. (10 How.) 609, 623 (1851). "The clear import of treaty language controls unless 'application of the words of

the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963)); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 128 (1989). Article 5 captures the accepted and ordinary understanding of "rights of custody" at the time of the Convention. It does not seek to define *ne exeat* orders protecting access rights idiosyncratically, converting them into custody rights.

All jurisdictions necessarily allocate custody rights. Children must be under the care of adults, and the law of the Contracting State must determine which adults have the legal right to exercise that care. But while all jurisdictions grant substantive legal "rights of custody," not all do so *eo nomine*.

> In some continental [European] States, legal representation was a broad concept encompassing protection both of the person and of the minor's property, custody ('*garde*') being merely one of the consequences of this institution. Furthermore, the concept was closely bound up, when the parents were living, with that of the '*patria potestas*' of Roman law, which as legal systems evolved had taken the form either of traditional paternal authority or of parental authority shared between father and mother[.]

Foyer Report at 53. Common law and Nordic countries, on the other hand, generally "distinguished between custody, which entailed powers in respect of the child's person, and guardianship, which was concerned essentially with property." *Id.*

Nonetheless, by the mid-1970's, the term custody rights had an accepted meaning. "A consensus appeared to have emerged regarding the definition of custody *as a complex of rights*, duties and powers *with respect to the person of the child*," to be "exercised in the child's interest, particularly in ensuring his physical, mental and social well-being." *Id.* (emphasis added). This complex of rights "included" a variety of concrete rights, including "choice of the child's residence." *Id.* at 53-54.

Article 5 simply defines "rights of custody" in keeping with this ordinary meaning. It provides that "rights of custody," whatever the nomenclature of the particular Contracting State, "*shall 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). This accords with the accepted understanding of the term discussed above. "'[C]ustody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc., or the (revocable) selection of other people or institutions to give these things.'" *Villegas Duran v. Arribada Beaumont*, 534 F.3d 142, 148 (2d Cir. 2008) (citation omitted); *Croll v. Croll*, 229 F.3d at 138 (quoting *Black's Law Dictionary*'s [390 (7th ed. 1999)] definition of "parental custody" as "'[t]he care,

control, and maintenance of a child awarded by a court'"). In keeping with the plain meaning, Article 5 refers to the right to determine the child's residence as a "particular" right of care, singled out because it is generally abridged by the removal of children to foreign countries.

The phrase "shall include" cannot be read to engineer a departure from the ordinary meaning of "rights of custody." The term "includes" often signifies the full breadth of the ordinary meaning of the term. *See, e.g.*, *NLRB v. Town & Country Elec., Inc.,* 516 U.S. 85, 90 (1995) ("The phrasing of the Act seems to reiterate the breadth of the ordinary dictionary definition, for it says '[t]he term "employee" shall include *any* employee.'"); *Snider v. All State Administrators, Inc.*, 414 U.S. 685, 686 (1974) (construing rule providing that "'Printing, as the term is used in these rules, *shall include* any process capable of producing a clear black image on white paper" as "requir[ing]" documents to be the product of such process) (emphasis added) (citation omitted).

Even if the rights enumerated in the definition are merely examples, the term "rights of custody" bears its ordinary meaning, unless the examples are clearly incompatible with the ordinary meaning. *See Boyle v. United States*, 129 S. Ct. 2237, 2243 & n.2 (2009); *Sumitomo*, 457 U.S. at 180. Here, there is no incompatibility; rights of care and in particular residence determination are encompassed within the ordinary understanding of rights of custody. Thus, the Convention's declaration that removal or retention of a child is wrongful if "in breach of rights of custody ... attributed ... under the law of the

[Contracting] State in which the child was habitually resident" in Article 3 clearly refers to those rights, however described in the State's law, that are substantively rights of custody in the ordinary sense.

Article 5 does not encompass *ne exeat* clauses that merely protect the access rights that a non-custodian like Petitioner holds. Indeed, Petitioner and his *amici* cite no evidence from before 1980 that *ne exeat* clauses were ever thought in any jurisdiction to give rise to "joint" rights of custody. This Court should not impute to the Contracting States the intent to have foreign courts fashion newfangled rights of custody never previously so recognized. *See, e.g., The Amiable Isabella*, 19 U.S. 1, 71 (1821) ("Neither can this Court supply a *casus omissus* in a treaty, any more than in a law.").

C. *Ne Exeat* Clauses Do Not Grant Any "Right to Determine the Child's Place of Residence."

Even if *arguendo* the Convention intended to divorce the "right to determine the child's place of residence" from ordinary custody rights, that phrase cannot encompass *ne exeat* clauses. In Article 5, "[t]he right specified is the 'right to *determine*' a child's place of residence, thereby implying an active power to choose (and change) the residential address, at will, as a matter of parental and personal judgment." *Croll*, 229 F.3d at 139 (emphasis added). "A parent with custodial rights has the *affirmative* right to determine the country, city, and precise location where the child will live." *Gonzalez v. Gutierrez*, 311 F.3d 942, 949 (9th Cir. 2002). To determine means "[t]o decide or settle conclusively

and authoritatively." *American Heritage College Dictionary* 379 (3d ed. 1997). The *ne exeat* clauses at issue here grant no such affirmative right.

To begin, Petitioner's continued reference to *ne exeat* "rights" as a type of substantive custody rights is doublespeak. A *ne exeat* order is, literally, an order "that he not leave"; it is a device to maintain jurisdiction and enforce substantive rights. *Ne exeat* clauses are not themselves sources of substantive rights.

Petitioner variously claims that the ability to "veto" or "influence" the custodian's determination of residence itself constitutes a "right to determine" residence. Petr. Br. 15-16. But, in ordinary usage, the right to determine something is the right to decide it, not to restrict or influence another's determination. The President's veto power is not a right to make laws. Similarly, a citizen's exercise of the First Amendment right to march may require seeking a municipality's consent, but that does not mean the municipality has "partial" First Amendment rights, even if its time, place, and manner restrictions limit the citizen's speech.

Even if a *ne exeat* consent provision creates a "right" in some sense, it is not a right to determine the child's place of residence. The term "child's place of residence" refers to the child's specific living quarters, which is why "rights of access" is 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(b). The *ne exeat* clauses vest no right to determine A.J.A.'s living

quarters; they vest at most a right to block the child's departure from Chile.

Petitioner argues that Petitioner's "right" to block A.J.A.'s departure from Chile limits Respondent's options in exercising her right to determine A.J.A.'s place of residence, and therefore he has a "shared" or "partial" right to determine residence. Petr. Br. 15. But Petitioner is guilty of a category mistake. It is false to contend that if right A can be exercised to limit the exercise of right B, then the holder of right A "shares" right B. Someone can invoke a copyright or a right of privacy to block what NBC broadcasts, but that does not mean that he enjoys a "shared" or "partial" right to broadcast over the spectrum exclusively assigned to NBC. Respondent, as the sole custodian, has the exclusive right to choose the actual place of A.J.A.'s residence. *Id.* Any separate "right" Petitioner may have to block A.J.A.'s departure from Chile, with the derivative effect that Respondent might not be able to exercise the right of residency determination in another country, does not mean that Petitioner shares the right to determine A.J.A.'s residence.

Regardless, Petitioner's contorted reading of Article 5 is of no avail to him. He has no right to veto the custodian's residency determination under the *orden de arraigo* or the Minors Law. The *orden de arraigo* grants no rights at all; it is directed to the person of the child and prohibits him from leaving the jurisdiction, with no exceptions for consent.[3] Pet.

[3] An *orden de arraigo* is authorized by Chile's criminal code and is generally used to prevent those being prosecuted from leaving the country. *See* CÓDIGO DE PROCEDIMIENTO PENAL CHILENO art. 305 bis A (Chile).

App. 69a-70a. As to the Minors Law, the parent with visitation rights cannot veto the child's departure from Chile by withholding consent. Rather, if the visitation-rights holder objects, authorization for the child's departure "may be granted by the Family Court of the jurisdiction in which the child resides." *Id* at 62a. Thus, Article 49 grants Petitioner no power other than (1) to acquiesce in the Respondent's determination, or (2) to force Respondent to seek court permission to take the child abroad. This is a far cry from vesting a right to determine the child's place of residence in Petitioner.

These and other *ne exeat* consent clauses function no differently from consent requirements that are ubiquitous in judicial procedure. They are mechanisms that allow the courts to avoid judicial process if the proposed action does not impair any party's interests. They are not substantive rights. Article 49, for example, is similar in kind to this Court's rule permitting *amici curiae* to file briefs in pending merits cases either with "the written consent of all the parties," or with leave of the court. Sup. Ct. R. 37(3)(a). It would be a confusion of terms to say that all parties to the case thereby "determine" if an *amicus* may file its brief. Rather, it is the *amicus* (if no party objects) or the court (if any party objects) that determines whether the brief will be filed. Consent provisions simply obviate a judicial decision where no party's interests are prejudiced.

Finally, even if *arguendo* the word "determination" in the abstract could somehow be stretched to encompass consent decisions under *ne exeat* clauses, that would not make it a reasonable gloss on Article 5. Treaties "are drawn by persons

competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties." *Rocca v. Thompson*, 223 U.S. 317, 332 (1912). If the signatories had intended to remedy *ne exeat* violations, "it would have been very easy to have declared that purpose in unmistakable terms." *Id.* For example, Article 3 could easily have been written to declare removals wrongful if in breach of custody rights, or of an order or law forbidding the custodian to remove the child from the jurisdiction. Absent any common usage that *ne exeat* clauses create joint-custody rights, "no sensible draftsman would use such strange 'shorthand'" instead of addressing *ne exeat* violations directly. *Chan*, 490 U.S. at 129 n.3.

D. The Actual-Exercise Requirements Confirm That "Rights of Custody" Bear Their Ordinary Meaning.

Other Convention provisions confirm the natural reading of Article 5 limiting "rights of custody" to their ordinary meaning of rights of care of the child. Article 3 describes two elements of proof of a "wrongful removal": (1) custody rights were breached, and (2) such "rights were *actually exercised*, either jointly or alone, or would have been so exercised but for the removal or retention." Convention art. 3(b) (emphasis added). The requirement of "actual exercise" makes sense only if the custody rights at stake are rights of care. This accords with the Convention's purpose of preventing disruption of the child's actual care arrangements. By contrast, any "right conferred by [a] *ne exeat* clause is not one that [an applicant] 'actually exercise[s prior to removal],'

and it is circular to say that [the applicant] would have exercised it but for [the child's] removal, because the right itself concerns nothing but removal itself." *Croll,* 229 F.3d at 140.

Article 13 expressly confirms that custody rights are only those exercised by persons with care of the child. If the requirements of Article 3 are met, then return of the child is mandatory. Convention art. 12. But Article 13 provides certain exceptions from that mandate. As relevant here, it provides that:

> The judicial or administrative authority of the requested State *is not bound to order the return of the child if* the person, institution or other body which opposes its return establishes that –
>
> a) *the person, institution or other body having the care of the person of the child was not actually exercising the custody rights* at the time of removal or retention ...

Id. art 13. Article 13 is crystal clear that the rights of custody defined in Article 5 are those exercised by the person having the care of the child. They do not include noncustodial *ne exeat* "rights" exercised by someone like Petitioner who has only access rights rather than "care of the person of the child."

Thus, the Convention's plain meaning protects the rights to custody, within the meaning of that phrase, that are attributed to a person under the law of the Contracting State of habitual residence. Those are

rights that relate to the personal care of the child, including in particular the right to determine the child's residence. But, as the Fifth Circuit held below, *"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. To rule otherwise, the court concluded, "would be an impermissible judicial amendment of the Convention." *Id.*

II. The *Travaux Preparatoires* Confirm that *Ne Exeat* Clauses Are Not Custody Rights.

Even if there were any ambiguity in the text of the Convention, the *travaux preparatoires* would lay it to rest. *See Air France v. Saks*, 470 U.S. 392, 400 (1985) ("In interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiation," and thus "courts frequently refer to [*travaux preparatoires*] to resolve ambiguities in the text.").

A. The Convention Does Not Define "Rights of Custody" Beyond Those Attributed by the Contracting State of Habitual Residence.

The *travaux* underscore that the Convention's return remedy extends only to rights of custody that are attributed by the law of the Contracting State of habitual residence. The authoritative Pérez-Vera Report, in discussing Article 3's wrongful-removal standard, states that the "relationships that the Convention seeks to protect"

> are based upon the existence of two facts, firstly, the existence of *rights of custody attributed by the State of the*

> *child's habitual residence*, and secondly, the actual exercise of such custody prior to the child's removal.

Pérez-Vera at 444 (emphasis added).

The first is "the juridical element," for "the Convention is intended to defend those relationships which *are already protected, at any rate by virtue of an apparent right to custody in the State of the child's habitual residence, i.e.,* by virtue of the law of the State where the child's relationships developed prior to its removal." *Id.* (emphasis added). "[T]his is a matter of custody rights" under that State's law. *Id.* The text of Article 3 discusses three sources of custody rights under the laws of Contracting States – rights arising by operation of law, by judicial or administrative decision, or by agreement – but these examples are "not exhaustive." *Id.* at 445-46.

Petitioner relies on this discussion and its call for a "'flexible interpretation of the terms used'" as support for his position, Petr. Br. 17, but ignores the critical passage. The Report, in line with Article 3's plain meaning, states that "the sources from which the custody rights which it is sought to protect derive, are all those upon which *a claim can be based within the context of the legal system concerned.*" Pérez-Vera at 446 (emphasis added). In other words, the sources of "rights to custody" protected by the Convention are only those that give rise to a claim *of custody* under the Contracting State's law. *Id.* The *ne exeat* clauses of Article 49 and the *orden de arraigo* protect custody or access rights already granted; they are not themselves the sources of custody rights under Chilean law.

The First Commission Report that accompanied the initial draft Convention is to the same effect. "[T]he existence of custodial rights must be determined in accordance with the national laws of the State where the child had his habitual residence," for "one can only talk of violation of custody, in legal terms, in the case where such custody has at least the protection of an apparently valid title." Elisa Pérez-Vera, *Report of the Special Commission* (1980), TOME III, 172-214, at 189 [hereinafter First Commission Report]. The Report further declares that Article 3, in referring to "rights of custody [attributed under] the law of the State in which the child was habitually resident," directly "requires ... that the *custody be granted under a specific legal system*." *Id.* at 190.

Indeed, the First Commission Report makes clear that the *orden de arraigo* was not within the contemplation of Article 3. The judicial order must give the custodian "proper legal title," and Article 3 "insists that such a custody order *be characterized as such under the law of the State of the child's habitual residence*." *Id.* at 191 (emphasis added). The *orden de arraigo* did not establish legal title to custody under Chilean law, and certainly not in Petitioner (instituted as it was to remedy his anticipated abduction of A.J.A.).

Thus, the *travaux preparatoires* directly refute Petitioner's claim that the Convention encompasses "rights of custody" that are not custody rights under the Contracting State's law. Rather, it is the "the legal system" of the State that "attribute[s] the custody rights," either under "the internal law of that State" or "the law which is indicated as applicable by its conflict rules." Pérez-Vera at 446-47. Far from

autonomously defining custody rights, "the Convention is not concerned with the law applicable to the custody of children." *Id.* at 435. The Convention is "of limited scope," and allows "the law of that [Contracting] State to determine" the "factual and lawful situations" protected by the Convention. First Commission Report, at 192.

Article 3 thus refers to the well-defined systems of law in every Contracting State that grant rights of custody, as that term is ordinarily understood, whether denominated custody rights or *patria potestas* or anything else. Indeed, the participating States were surveyed prior to the Convention's adoption regarding the "principles [that] govern the assigning of legal custody in your internal law." Adair Dyer, *Questionnaire and Report on International Child Abduction by One Parent*, TOME III, 9-51, at 10 [hereinafter Dyer] (Question 11). Significantly, in their detailed answers, not a single country identified *ne exeat* clauses as a source of custody rights in its jurisdiction. *Replies of the Governments to the Questionnaire,* TOME III, 61-129 [hereinafter Government Replies] (responses to Question 11). Indeed, in a separate response to Question 16, the United States characterized *ne exeat* orders simply as having "the purpose of preserving the jurisdiction of the state in the custody matter and of safeguarding the visitation rights of the other parent." *Id.* at 88.

B. The Signatories Understood Article 5 to Define "Rights of Custody" in Their Ordinary Sense.

The *travaux* also refute Petitioner's claim that Article 5 covers persons who lack custodial rights under Contracting State law, but whose access rights are protected by *ne exeat* clauses. Rather, the *travaux* make clear that Article 5 was intended to capture the ordinary meaning of "rights of custody."

The Convention participants were well aware of Jacques Foyer's 1974 Council of Europe report discussed above, which recited that even though some legal systems used terminology encompassing care of both the child's person and property, the accepted meaning of "rights of custody" referred to a complex of rights regarding care of the person of the child, including the concrete right to choose the child's residence. Foyer Report at 53-54. Excerpts of that report were annexed to the opening Conference report on international child abduction. *Id.*

This is the conception that carried forward into Article 5. As the Pérez-Vera Report states, Article 5's definition of "rights of custody" was added merely to clarify that rights to protect the child's *property* were not included, even if such rights were attributed to the custodian under domestic law:

> As regards custody rights, the Convention merely emphasizes the fact that it includes in the term "rights relating to the care of the person of the child," *leaving aside the possible ways of protecting the child's property.*

Pérez-Vera at 452 (noting that the Convention rejected the broader concept of "protection of minors" used in earlier Conventions).

Article 5 thus does not recognize freestanding residency-determination rights independent of the custodian's rights of care. Rather, the First Commission Report declares that "[f]or the requirements of the Convention, the phrase 'rights of custody' *refers only* to those rights which *involve all aspects of the care* of the child's person, leaving aside the possible mechanisms for protection with regard to his property." First Commission Report, at 194 (emphasis added). And the Pérez-Vera Report emphasizes that in Article 5 "the 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." Pérez-Vera at 452 (emphasis added); *id.* at 450 (the "right to choose one's own place of residence generally forms part of the right to custody").

In summary, Article 5 did not (as Petitioner supposes) simply declare two types of independent custody rights (care rights and residence-determination rights) as a matter of Convention law and otherwise leave the term indefinite. Rather, as Articles 3 and 5 in tandem make clear, the term "rights of custody" relates to the complex of rights (whether held solely or jointly) attributed by the law of the Contracting State of the child's habitual residence that includes "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).

C. The Signatories Understood the "Actually Exercised" Requirement to Apply to Custody Rights in Their Ordinary Sense.

The *travaux* also demonstrate that the "actually exercised" requirements of Articles 3 and 13 apply only to custody rights in the ordinary sense. The First Commission Report states that the wrongfulness of removal arises "from the fact that [it] ignores the rights of the other parent who is also protected by law, and the fact that it has interrupted the normal exercise of that other parent's custody." First Commission Report, at 190-91. So, for judicial orders such as are at issue here, the applicant must show "the existence of a custody decision relating to the child, combined with the effective exercise of custody" in "establishing the lawful nature of custody." *Id.* "[T]he custody which is covered by the Convention is that which is actually exercised." *Id.* at 193. The exercise of custody means the exercise of rights of care: to meet the actual-exercise requirement, the applicant "must *always* take responsibility *for care of the child's person*." *Id.* (emphasis added). The signatories clearly understood that the custody rights that had to be actually exercised under Article 3 were custody rights in their ordinary sense (not *ne exeat* "rights").

The same held true for the actual exercise clause in Article 13 (Article 12 in the preliminary draft). The First Commission Report states unequivocally:

> [T]he expression "actual custody," as in the whole of the Draft, must be interpreted in relation to the

> definition of custody rights given in Article 5. Consequently, there is an actual custody when *the custodian cares for the needs of child's person*, even, if for acceptable reasons in a concrete case, the child and the custodian do not live under the same roof.

Id. at 203. Thus, "care" of the child does not refer to the responsibilities for the child's feeding, safety, and hygiene incident to any temporary supervision (including during the exercise of access rights). It hearkens back to the "rights of care" that are the essence of custody rights under Article 5(a); the person "having care of the child," *i.e.*, legal custody, must actually exercise those custody rights to obtain the mandatory return of the child to a foreign country.

The Pérez-Vera Report sounds the same themes. It notes that the Convention "is limited to custody rights actually exercised," because its purpose is to protect the child's emotional and physical stability (*i.e.,* the child's care arrangements). Pérez-Vera at 448. Thus, under Article 3 and 13, the applicant must prove "that he actually took physical care of the child." *Id.* It is "the person who has care of the child" – *i.e.,* the person with custody rights within the meaning of the Convention – who must "actually exercise[] custody over [the child]." *Id.* at 449.

Thus, the custody rights protected are the legal rights of care of the child's person that were actually exercised. Petitioner never had rights of care, only access rights, under Chilean law. Petitioner weakly

claims that he meets the "actual exercise" test of Articles 3 and 13 because he did not abandon his claim, pointing to the suits he filed in Chile to convert his access rights into custodial rights, and in the U.S. to seek the child's return. Petr. Br. 19 n.8. But such acts do not show that Petitioner, "having the care of the person of the child," was "actually exercising the custody rights at the time of the removal or retention." Convention art. 13(a).

Nor is Petitioner aided by the clause in Article 3 that declares removal or retention wrongful if the custody rights "would have been so exercised but for the removal or retention." *Id.* art. 3(b). First, that exception is not present in Article 13. Thus, the natural reading of Articles 3 and 13 in tandem is that even if unexercised custody rights may in some circumstances make a removal wrongful, the court "is not bound to" order return of the child unless the rights were actually exercised. The remedy for an applicant with unexercised custody rights is discretionary. *See id.* art. 18 ("The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."). But even if *arguendo* the "would have been exercised" clause of Article 3(b) should be implied in so Article 13, and the articles should be read *in pari materia*, Pérez-Vera at 461, that simply means that the applicant must show that he would have exercised care of the child but for the removal, a showing Petitioner cannot make. "The Convention includes no definition of 'actual exercise' of custody, but this provision expressly refers to the care of the child." *Id.* at 460-61. The "would have been so exercised" clause covers "two types" of "hypothetical

situations": (1) where custody was exercised before being legally recognized, for in that circumstance there is comparable "disruption of normal family life after a reasonable lapse of time," and (2) where the court reassigns custody rights, but the abduction occurs before the new custodian can exercise them. *Id.* at 449. The "exercise" requirements of Articles 3 and 13 refer to rights of care, which Petitioner never had. They are not concerned with an access-rights holder's opportunity to consent to the child's removal from the jurisdiction.

D. A Proposal to Amend Article 5 to Cover Violations of *Ne Exeat* Clauses Was Rejected During Convention Negotiations.

Finally, the signatories *rejected* an attempt to expand Article 5 to cover removals of a child in violation of a *ne exeat* order protecting access rights.

The signatories were well aware of *ne exeat* orders. Informational questionnaires sent to participating governments stated that "for the purposes of this questionnaire" the term abduction would include a circumstance where "[t]he child was removed by a parent from one country to another in violation of a court order which expressly prohibited such removal." Dyer at 9. Countries were specifically asked whether "courts or administrative authorities in your country have the power to order the custodian to keep the child within your country," and to supply data on the frequency and efficacy of any such measures. *Id.* at 11. The Permanent Bureau of the Hague Conference solicited the data because abduction in violation of a court order was "a

special case" that was "the reverse of the usual child abduction case." *Id.* at 40. The Bureau did "not presently have reliable information as to the frequency and importance of the existence of such clauses and their violation on the international level." *Id.* at 41. It further noted that dealing with this "specific situation might create difficult drafting problems." *Id.*

The Governments' responses to Question 16 did not indicate a substantial international problem of *ne exeat* violations. Some countries replied that their courts and administrative agencies lacked the powers to prevent the removal of the child by a custodian; others opined that the power was rarely exercised; and none had significant data on the extent of the violations of such orders. *See, e.g.,* Government Replies at 62 (Germany), 71 (Belgium), 81 (Denmark), 103 (Israel), 108 (Japan), 114 (Netherlands), 116 (Portugal), 119 (Sweden), 127 (Turkey). A study conducted by the International Social Service identified only nine reported cases where the abduction involved violation of *ne exeat* orders, with no indication any involved orders protected access rights; the one example given involved breach of joint custody rights exercised under Greek law. *Summary of Findings on a Questionnaire Studied by International Social Service*, TOME III, 130-144, at 132, 138-39.

Indeed, when a Canadian delegate (Leal) sought to accommodate cases like Petitioner's, he proposed to *amend* Article 3 to add at the end of the phrase "in breach of rights of custody" the words "or access." *Documents de travail Nos 4 à 13,* TOME III, 261-63, at 262. Leal opined that "rights of access should be

accommodated more fully within the scope of the Convention" because they "could at times *attain almost the same level of importance as custody rights*." *Procès-Verbal No 3,* TOME III, 263-67, at 266 (emphasis added). He gave an example where "[c]ustody is given to the mother, but the order provides that the child cannot go out of the jurisdiction without the father's consent." *Id.*

Other delegates objected to expanding the mandatory-return remedies to access-rights holders (like Petitioner), noting that Article 17 (now Article 21) dealt with access rights, and more comprehensive protection was outside the scope of this Convention. *Id. at* 266-67. Ultimately, the proposal was defeated 19-3. *Id.* at 267.

Remarkably, Petitioner attempts to convert the rejection of a proposal that would have protected his rights into an affirmation of his theory. Petr. Br. 44-45. He relies on a statement of the Dutch delegate (van Boeschoten) that Article 3 already covers the example given above, as well as an ambiguous statement by a mere observer who did not even have a vote (Eeekelaar).[4] *Id* at 44. Petitioner's argument violates the cardinal rule that individual statements of legislators in floor debates are given no weight. *Garcia v. United States,* 469 U.S. 70, 76 (1984). That rule applies even when there were "no objections" to the comments (Petr. Br. 44-45). There is no basis to establish that the remaining delegates believed those

[4] Attendees could easily have understood Eekelaar's statement that a "possible" solution "could be found" within the terms of Article 5 as a recommendation to revise Article 5, rather than Article 3.

situations to be covered by the Convention, especially when a Canadian delegate and a U.S. delegate did not so interpret Article 3. *See* Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases,* 38 FAM. L.Q. 529, 539 n.33 (2005).

Significantly, the Chairman of the First Commission understood Article 3 not to protect *ne exeat* rights:

> [B]reach of a right simply to give or to withhold consent to changes in a child's place of residence is not to be construed as a breach of rights of custody in the sense of Article 3. A suggestion that the definition of "abduction" should be widened to cover this case was not pursued.

A.E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L.Q. 537, 546 (1981). The Pérez-Vera Report reiterates that the Convention could not agree on the difficult issue of protecting access rights, and

> [a] questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other.

Pérez-Vera at 444-45.

This is exactly the substitution of rights that Petitioner seeks. Respondent "was granted daily care and control of [A.J.A.]," whereas Petitioner had been granted mere rights of "access." JA 55. Petitioner had the burden of proof, and he never proved (and could not prove) that the *orden de arraigo* and Minors Law gave him substantive custody rights within the meaning of the Convention.

III. *Ne Exeat* Provisions Protect Jurisdiction, Rather Than Create Custody Rights, and Are Outside the Scope of the Convention.

Petitioner's theory is not only unfounded in the Convention's text and drafting history, but it is also conceptually flawed. *Ne exeat* is – and always has been – a power *of the state* designed to preserve its jurisdiction over a person or property, not a source of substantive rights. Thus, violation of a *ne exeat* statute or order frustrates the state's jurisdiction, not the custody right of a private individual.

Significantly, the 1980 Hague Conference disclaimed any intent to redress the violation of foreign court orders, deeming it too controversial and unlikely to gain the wide support thought necessary. Their reluctance was prescient. The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 35 I.L.M. 1391, 1396 [hereinafter 1996 Convention], which binds signatories to recognize the jurisdiction of one another's family law courts, has only 17 signatories, and the United States and Chile are not among them. Petitioner's attempt to convert the 1980 Convention

into a jurisdictional treaty for the enforcement of foreign *ne exeat* orders and statutes should be rejected out of hand.

A. *Ne Exeat* Is a Power Exercised by the State to Preserve Its Jurisdiction.

"A writ of *ne exeat* is not in itself a remedy. It is a means to effectuate a remedy, viz., by keeping a party within the jurisdiction of the court." *Judson v. Judson*, 8 F.R.D. 336, 337 (D.D.C. 1943); *see also Gredone v. Gredone*, 361 A.2d 176,179 (D.C. 1976) (*ne exeat* "prevent[s] the frustration of a plaintiff's equitable claims by ensuring the continued physical presence of the defendant within the court's jurisdiction").

Under the common law, "every man may go out of the realm for whatever cause he pleaseth," but the king had the right to command by writ of *ne exeat regnum* that the subject not leave the realm without the king's leave. Sir William Blackstone, *Commentaries on the Laws of England* *265-66 (Wm. Draper Lewis ed. 1922). In the late sixteenth century, use of the writ was expanded to enforce private rights, *id.* at *266 n.66; *see also Elkay Steel Co. v. Collins*, 141 A.2d 212, 445-46 (Pa. 1958), and became known as *ne exeat republica* in America, *Andersen v. Andersen*, 43 N.E.2d 176, 179 (Ill. App. Ct. 1942).

Modern domestic and international *ne exeat* orders operate consistently with the writ's historical tradition – to preserve jurisdiction of the court as a means to effectuate a remedy. Commonly used in tax or criminal proceedings, *see* I.R.C. § 7402(a); *United*

States v. Denedo, 129 S. Ct. 2213 (2009), *ne exeat* statutes and orders have come to be used in family law. Before 1980, U.S. state courts commonly issued *ne exeat* orders either as a matter of inherent equitable power or by statute. Government Replies at 90. Foreign courts and statutes likewise employ *ne exeat* provisions. *See, e.g., id.* at 77 (Canada), 104 (Israel), 125 (Czechoslovakia).

Because *ne exeat* provisions vindicate the court's jurisdiction rather than allocate custody rights, they generally operate without regard to the scope of the relationship between the non-custodial parent and the departing child. They also consistently vest the ultimate authority over removal in the court, thereby preserving the state's ability to make an independent determination based on the child's interests. In Louisiana, the parent with primary custody "shall obtain either court authorization to relocate, after a contradictory hearing, or the written consent of the other parent prior to any relocation." LA. REV. STAT. ANN. § 9:355.3. Many States follow a similar approach, usually requiring either court order or the other parent's consent. *See, e.g.,* N.J. STAT. ANN. § 9:2-2; MASS. GEN LAWS ch. 208, § 30; 750 ILL. COMP. STAT. 5/609(a); N.D. CENT. CODE § 14-09-07(1).

The purposes of these statutes are to protect a court's jurisdiction, *Jelsing v. Peterson*, 729 N.W.2d 157, 161 (N.D. 2007); *Farag v. Delawter*, 743 N.E. 2d 366, 368 (Ind. Ct. App. 2001), not to generate rights. They are "'not designed to burden unduly the custodial parent or to impede his or her decision-making authority as the primary care-taker.'" Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past*

and Present, 30 FAM. L.Q. 245, 286 (1996) (quoting *Long v. Long*, 381 N.W.2d 350, 356 (Wis. 1986)).

B. The Convention Is Not a Framework for Mutual Recognition of Family Law Court Jurisdiction.

The jurisdictional motivation claimed by Petitioner was explicitly rejected in the early stages of negotiation. As a result, the Convention is "certainly not a treaty on the recognition and enforcement of decisions on custody." Pérez-Vera at 435; First Commission Report, at 177. Ultimately, "[t]he insurmountable difficulties encountered in establishing, within the framework of the Convention, directly applicable jurisdictional rules" resulted in a Convention primarily geared to preserving the *status quo* rather than determining where custody decisions should be made. Pérez-Vera at 429. "It was decided ... to draft a Convention which would concern itself with custody *rights* rather than with custody *decisions*." Anton, *supra*, 30 INT'L & COMP. L.Q. at 542.

Sixteen years later, the jurisdictional approach was revived and explicitly adopted in the 1996 Convention. The 1996 Convention establishes the principle that jurisdiction over all "measures directed to the protection of the person or property of the child" is appropriately placed in the country of habitual residence for the child. 1996 Convention arts. 1, 5. It therefore provides a framework for determining the appropriate jurisdiction to address such measures after a "wrongful removal or retention of the child." *Id.* art 7. Thus, the 1996 Convention is designed to "supplement[] and strengthen[] the 1980

Child Abduction Convention by doing what the latter Convention was not designed to do": provide for the recognition and enforcement of custody and access orders of foreign jurisdictions. Gloria Folger DeHart, *The Relationship Between the 1980 Child Abduction Convention and the 1996 Protection Convention*, 33 N.Y.U. J. INT'L L. & POL. 83, 89-90 (2000). As the drafters of the 1980 Convention predicted, the 1996 Convention has met with resistance, attracting only 17 signatories (the 1980 Convention has 81), not including the United States and Chile. Hague Conference on Private International Law, Status Table, 1996 Convention, *available at* http://www.hcch.net/index_en.php?act=conventions.status&cid=70.

Petitioner cannot remake the 1980 Convention into a vehicle for enforcing foreign orders, like *ne exeat* orders and statutes. Giving the 1980 Convention its natural meaning does not require this court to condone violations of such orders (although this Court may recognize that such violations are often desperate acts taken out of concern for the safety of the child or mother or out of economic duress). *See* Bruch, *supra,* 38 FAM. L.Q. at 544-45. The Convention's concern is with preserving the existing custodial relationships so as to safeguard the child, not with punishing violations of foreign court orders or statutes.

C. Article 49 of the Minors Law Does Not Create Rights of Joint Custody.

The blanket rule Petitioner espouses makes every domestic *ne exeat* law or order with a consent provision into the source of custody rights, no matter

its design or purpose. The Convention attempts no such alchemy.

It makes no sense to make every *ne exeat* order with a consent clause *ipso facto* a source of custody rights. For example, courts issue *ne exeat* orders to protect persons with mere paternity claims. *Pielage v. McConnell*, 516 F.3d 1282, 1285-86 (11th Cir. 2008). Such orders maintain jurisdiction so that the court can decide the claimant's rights; they do not grant custody rights. It is inconceivable that such a paternity claimant (who has the same "right" to determine residency as Petitioner) has custody rights under the Convention entitling him to demand the child's return to a foreign country.

Similarly, Article 49 of the Chilean Minors Law should not be interpreted contrary to its purpose. Article 49 simply requires authorizations of either parents or third parties in various circumstances to protect the child's safety and maintain Chile's protective jurisdiction over him. Pet. App. 61a. It has nothing to do with custody rights. Indeed, many of the authorizations must be given by parents (or third parties) who already have custody by court order. *Id.* Nor can the other authorizations be plausibly read as attributions of custody rights. Take, for example, the provision forbidding departure of a "natural" (illegimate) child from Chile without authorization from parents who have "voluntarily acknowledged" the child. *Id.* Chile is not thereby attributing to a person with a mere paternity or maternity claim a "right of custody" to enable him to have "a substantial say in the child's care and development," and a right to determine the "child's

primary cultural identity – the languages she speaks, the games she plays." U.S. Br. 14.

Finally, the authorization Article 49 requires of a visitation-rights holder does not create custody rights. Article 49 assumes that he has none, by definition. It is pure artifice to construe Article 49 as creating a species of joint custody, when the custody court did not grant the visitation-rights holder any right of care or any "right to determine the child's place of residence," and when he concededly has no power to determine whether the child resides in downtown Santiago or a rural Andean village. Nor, if departure is authorized by the visitation-rights holder or the court, does he have any say in where the child resides abroad.[5] Article 49 is designed to protect Petitioner's visitation rights by keeping the child in Chile absent a court order "authorizing the departure of the minor," nothing more. Pet. App. 62a. This Court should resist the dubious notion that the Convention "autonomously" recognizes rights of custody arising from laws like Article 49 that were not meant to grant them.

D. Converting *Ne Exeat* Consent Provisions Into "Rights of Custody" Subverts the Purposes of the Convention.

Returning A.J.A. to Chile would accomplish precisely what the Convention was intended to

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[5] Petitioner claims the power to affect cultural identity, language, and education by attaching residency conditions to his consent, Petr. Br. 15-16, but any such conditions would be enforceable, if at all, as a matter of contract, not Article 49.

prevent: disruption of the custodial *status quo*. Respondent has continually exercised sole custody of A.J.A. from 2003. At no time has Petitioner been granted anything other than limited visitation, and his custody petition was denied.

1. Petitioner Misstates the Convention's Aims.

Petitioner claims that his position furthers the Convention's aims. But his arguments either presuppose what he is trying to prove (that he has custody rights), misconstrue the Convention as jurisdictional, or simply make no sense. For example, Petitioner argues that construing *ne exeat* orders as "right[s] of custody" would discourage parents "from taking children across international boarders in search of a friendlier forum," Petr. Br. 23, and "will ensure that the Chilean family court ... can resolve this and any subsequent disputes that may arise," Petr. Br. 25. But the Convention's concern in that respect was abduction by persons (either joint custodians or noncustodians) who disrupt the custodial *status quo* to seek alteration of *custody rights* by a foreign court. Pérez-Vera at 444-45. Holders of *sole* custody rights (like Respondent) have no such incentive.

The Chilean jurisdiction that Petitioner seeks to preserve by obtaining an Article 12 order is jurisdiction to convert his access rights into custody rights. There is no reason the Convention would privilege access rights protected by *ne exeat* orders over those that are not; the substantive interests of child and parent are the same. *Croll*, 229 F.3d at

142-43. The Contracting States simply declined to extend the Convention to protect such rights.[6]

2. Petitioner's Theory Will Sever Existing Custodial Relationships.

Yet another critical problem with Petitoner's theory is that if Article 12 proceedings are successful against a sole custodian, there is no guarantee that custodian will be able to return with the child to the country of habitual residence. Petitioner and the United States cavalierly dismiss this concern, Petr. Br. at 26-27; U.S. Br. at 18, but the Convention cannot be read to mandate severance of the child's relationship with the lone custodial parent.

Habitual residence may be established in a foreign country even if the custodial parent is on a short-term visa. *See, e.g.,* 8 C.F.R. § 214.2(h)(8)(iii)(A), (h)(13)(iii) (3-year employment visas); § 214.2(f)(5) (student visas for duration of their course of study); Law No. 1,094, July 14, 1975 (Chile) §§ 23, 27 (one-year renewable student visas); *id.* §§ 29, 30 (temporary resident visas, given to those with "family

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[6] Petitioner's claim that this Court should not make the United States a haven for parents who want to remove their children from their country of habitual residence at the expense of persons whose only substantive rights are access rights, Petr. Br. 25, is a plea for this Court to rewrite the Convention. The U.S. enforces the Convention vigorously, within its proper limits. U.S. Dep't of State, *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction* (2009) at 6-7, *available at* http://travel.state.gov/pdf/2009HagueAbductionConventionCompliance Report.pdf.

links or interests in the country," are limited to a year and may be extended only once); *Pielage*, 516 F.3d at 1284-1286 (establishing habitual residence in the U.S. of a child born to Dutch woman with a 6-month tourist visa).

Because visas are a principal instrument of border control, countries commit the power to revoke or deny renewal of an alien's visa to the discretion of immigration officials, who may do so for virtually any reason. *Noh v. INS*, 248 F.3d 938, 941 (9th Cir. 2001); 8 U.S.C. § 1201(g); Law No. 1,094, July 14, 1975 (Chile) § 13. Immigration statutes also specify grounds for denying visas, for example, if a applicant without financial means may become a "public charge" during the intended stay. *See* 8 U.S.C. § 1182(a)(4)(A); Law No. 1,094, July 14, 1975 (Chile) § 15(4); Exec. Decree No. 597, June 14, 1984 (Chile) § 26(4). There is no guarantee that a removing parent will be able to re-enter the country to which the child is returned. The Special Commission has recognized this problem. Hague Conference on Private International Law, *Report on the Fifth Meeting of the Special Commission* ¶¶ 239-40 (2006).

Under the Respondent's reading of the Convention, the removing parent's visa problems do not negatively affect the child; he will be returned to a sole or joint custodian. But under Petitioner's interpretation, the child's existing custodial relationship will be extinguished, and he will be committed to the care of a person or institution who has never had actual custody before. This subverts the Convention's purpose, which is to maintain existing custodial care relationships because of the recognition of the importance of the primary

caregiver to the child's emotional well-being. Dyer at 21-22; Pérez-Vera at 448; *Croll,* 229 F.3d at 141. Petitioner's rejoinder that the removing parent has only herself to blame (Petr. Br. 27) misses the mark. The Convention's focus is on the child, not parental rights, *see* Convention art. 13(b), and does not contemplate putting the child in such jeopardy.

Moreover, if the parent with sole custody rights cannot accompany the child, the foreign court will have to award at least temporary custody to someone (presumably the non-custodial applicant) until custody can be awarded in the State of return. But this impermissibly involves the foreign court in the very custody determinations that the Convention sought to avoid by allowing a court to rely on a prior jurisdiction's award of custody rights. Convention art. 16; Pérez-Vera at 463 (Article 16 "seeks to prevent a decision on the merits of the right to custody being taken in the State of refuge").

Petitioner's theory, premised as it is on one eight-word phrase of a definitional term without due regard for the structure, purpose, and operation of the Convention as a whole, is not viable.

IV. The Other Canons Invoked by Petitioner Do Not Support His Theory.

The plain meaning and drafting history of the Convention make resort to other canons unnecessary, but regardless none supports the Petitioner.

A. Petitioner Presents No Evidence of Post-Ratification Conduct by the Convention's Signatories.

A treaty is "a 'contract' among nations." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 260 (1984). As with any contract, this Court may look to "the post-ratification understanding of the contracting parties" as evidence of contractual intent, *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226-27 (1996), for "their conduct generally evinces their understanding of the agreement they signed," *United States v. Stuart*, 489 U.S. 353, 369 (1989).

Petitioner invokes but misapplies this doctrine. The isolated decisions of foreign courts and selective reports of the Hague Conference's Special Commission, *see* Petr. Br. 29-42; U.S. Br. 22-29, do not constitute post-ratification conduct of signatories.

Although judicial interpretation of a treaty may be entitled to weight, *see infra*, it is not the conduct of treaty parties. *See Saks*, 470 U.S. at 403 (distinguishing between "the conduct of the parties to the [Warsaw] Convention" and "the subsequent [judicial] interpretations of the signatories"); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 546 (1991) (same); *see also Zicherman*, 516 U.S. at 227-28 (*legislation* enacted by other countries can demonstrate the "postratification conduct"). The postratification-conduct doctrine attempts to divine the parties' intention at the time of contracting by examining the subsequent conduct of the *same* party. *O'Connor v. United States*, 479 U.S. 27, 33 (1986). A court is not acting in the capacity of a sovereign

contracting party when it adjudicates a treaty dispute, and its decision does not reflect the original intent of the sovereign State of which it is a part.

Nor are the reports of the Hague Conference Special Commission evidence of the States' post-ratification conduct. Petr. Br. 29-32; U.S. Br. 27-29. The Special Commission is not a diplomatic conference empowered to review and re-negotiate the Convention, and thus is not the kind of body whose acts this Court has traditionally regarded as evidence of post-ratification conduct of the signatories. *See, e.g.*, *Eastern Airlines*, 499 U.S. at 547-50; *Saks*, 470 U.S. at 403-04. Rather, the Special Commission is merely an assembly of "experts" designated by States to study the Convention's implementation and make recommendation to state-signatories, *see* Paul Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 25 (1999), and their conclusions carry advisory weight at best. *Cf.* United Nations Human Rights Committee, *Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights* ¶¶ 447-90 (2005) (disagreeing with recommendations and interpretations by the Human Rights Committee). Their interpretations are entitled to no more weight than a congressional commission to study statutory reform.

The Special Commission report that *is* relevant is the one Petitioner conveniently omits – the Report of the First Special Commission that presented its preliminary draft of the Convention to the Fourteenth Session. First Commission Report at 172-

210; *see* Pérez-Vera at 426-27. This report illuminates the Convention's meaning because it is a part of the Convention's "negotiating and drafting history," *Zicherman*, 516 U.S. at 226, not because the Special Commission serves as an oracle on the parties' original intent.

B. Petitioner Inaccurately Construes Sister Signatories' Decisions on *Ne Exeat* Orders and Non-Removal Clauses as Uniform.

Petitioner spills much ink on decisions by foreign courts. Pet. Br. 32-42. But while this Court accords weight to the opinions of the courts of treaty signatories, *see Saks*, 470 U.S. at 404, it does not "simply defer to their judgment," *Olympic Airways v. Husain*, 540 U.S. 644, 655 n.9 (2003), but measures these opinions by the persuasive force of their reasoning. *See, e.g., Eastern Airlines*, 499 U.S. at 551. The respect due foreign courts is also bounded by other considerations. This Court has been "hesitant" to follow decisions of intermediate courts "where the respective courts of last resort . . . have yet to speak," *Olympic Airways*, 540 U.S. at 655 n.9; where foreign decisions turn on substantially different facts, *id.*; or where foreign courts' practice "is at best inconsistent," *Medellin v. Texas*, 552 U.S. 491, 128 S. Ct. 1346, 1363 n.10 (2008). Moreover, the fundamental rationale behind respect toward other signatories' courts is to promote a uniform interpretation of the Convention. *See* 42 U.S.C. § 11601(b)(3)(B); *see also Sanchez-Llamas v. Oregon*, 548 U.S. 331, 382-83 (2006) (Breyer, J., dissenting).

Here, uniformity is impossible because the foreign courts are divided.

Only seven courts (of the Convention's eighty-one signatories) of last resort have considered whether a *ne exeat* clause confers rights of custody. This alone undermines Petitioner's assertion of a consensus among the treaty's parties. Petr. Br. at 32-33.

Moreover, the highest courts that *have* spoken on the issue are divided, with the Supreme Court of Canada having *twice* concluded that the *ne exeat* order is not a right of custody under the Convention. *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (Can.); *D.S. v. V.W.*, [1996] 2 S.C.R. 108 (Can.). Therefore, this is not a case where this Court will create a rift in controlling judicial authority among the Convention's signatories; such a rift already exists.

Petitioner attempts to evade the Canadian Supreme Court's decisions by erroneously labeling them as "dicta." Petr. Br. at 38-42. But these decisions have definitively considered and rejected the non-custodial parent's claim premised on the same argument Petitioner make here – that a right to refuse consent to a child's relocation to another country constitutes a right of custody.[7] The Canadian Supreme Court's decisions are particularly instructive because their method of treaty interpretation parallels the one adopted by this Court. In *Thomson*, the Canadian Supreme Court, after examining the text, drafting history, and

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[7] Whether court decisions are holdings or dicta is immaterial in any event; this Court evaluates them based on the persuasiveness of their reasoning. *Saks*, 470 U.S. at 404; *Eastern Airlines*, 499 U.S. at 551.

purpose of the Convention (including the Dyer Report and Questionnaire, on which Petitioner places heavy reliance, Petr. Br. at 42-43), expressly rejected the contention that "the right to determine the child's place of residence" can be "divisible from the right to care for the person of the child, and [that] by virtue of a non-removal clause, this rights vests in ... the access parent." 3 S.C.R. 551 ¶ 60. The court observed that *ne exeat* orders are intended "to preserve the court's jurisdiction to make a final determination of custody" and are "not intended to be given the same level of protection by the Convention as custody." *Id.* ¶¶ 67, 69.

Accordingly, *Thomson* concluded that a Scottish court's *ne exeat* order did not transform the father's access rights into "custody rights" requiring the child's return to Scotland under the Convention. *Id.* ¶ 68. Although the Canadian Supreme Court ultimately ordered the return on alternative grounds, *id.*, that does not transform the Court's considered rejection of the first ground into dicta. *See R.R. Cos. v. Schutte,* 103 U.S. 118, 142 (1880).

The Canadian Supreme Court dispelled any doubts about the validity of *Thomson* two years later, in *D.S. v. V.W.* There, the Canadian Supreme Court explicitly rejected the non-custodial parent's argument (and the holding of the lower court) that her "right to oppose the child's removal" from Maryland to Quebec "was equivalent to rights of custody within the meaning of [the Convention.]" [1996] 2 S.C.R. 108 ¶ 42. The Court explained that this construction violates the Convention's central purpose:

> By confusing, for all practical purposes, the concepts of custody rights and access rights, this interpretation amounts to saying that any removal of a child without the consent of the parent having access rights could set in motion the mandatory return procedure provided for in the [Convention] and thus indirectly afford the same protection to access rights and is afforded to custody rights.

Id. ¶ 43. This reasoned conclusion – which was not dicta since return was denied – is equally fatal to Petitioner's argument here.[8]

By contrast, Petitioner conveniently overlooks the fact that the decision by the U.K. House of Lords in *In Re D*, [2007] 1 A.C. 619 (H.L. 2006), is self-avowed dicta. *See* Petr. Br. at 33-34. Every opinion in that case acknowledged that a *ne exeat* order was not at issue, and the House of Lords accordingly concluded that the requesting parent had no custody rights. 1 A.C. 619 ¶ 9 (Lord Hope); ¶ 40 (Lady Hale); ¶¶ 72-73 (Lord Carswell); ¶ 81 (Lord Brown). Although some members of the House of Lords proceeded to opine on whether *ne exeat* orders could create such a right of custody, that was not at issue in that case. As Lord Carswell observed, commenting on his colleagues' advisory opinions, "I should prefer to reserve my

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[8] Contrary to Petitioner's claim, *see* Petr. Br. at 39-40, *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (Can.), is inapposite because it concerned only the proper scope of access rights in light of the best interests of the child. *Id.* ¶ 45.

opinion on that issue until it falls directly for decision in a case before the House." *Id.* ¶ 74.

Petitioner likewise fails to mention that many of the cases on which he relies turn on the rights that are different from the right of *ne exeat*. These cases (including the decisions by the highest courts in Germany and Ireland) involved instead joint parental rights that conferred upon the non-custodial parent additional rights and duties with respect to the child's care and upbringing. *See* Bundesverfassungs-gericht [BVerfG] [Fed. Const'l. Ct.] July 18, 1997, 2 BvR 1126/97, ¶¶ 13-15 (F.R.G.) (the non-custodial parent had a right to jointly decide questions relating to health, education, the child's right to marry, and the child's ability to join the military); *M.S.H. v. L.H.*, [2000] 3 I.R. 390 (Ir.) (the parents had joint "rights of parental responsibility," defined as "all the rights, duties, powers, responsibilities and authority which, by law, a parent of a child has in relation to a child and his property"); *C. v. C.*, [1989] 1 W.L.R. 654 (Eng. C.A.) (the parents were joint guardians of the child); *see also Thomson*, 3 S.C.R. 551 ¶ 63 (distinguishing *C. v. C.* as the case where "the parents were joint guardians"). This Court hesitates to follow the opinions of other signatories' courts where these cases involve "substantial factual distinctions." *Olympic Airways*, 540 U.S. at 655 n.9.

In yet another country, France, as Petitioner grudgingly acknowledges, Petr. Br. 37-38, the courts are divided. *Compare Ministere Public v. Mme. Y., Tribunal de grande instance* [T.G.I.][ordinary court of original jurisdiction] Périgueux, Mar. 17, 1992, D.S. Jur. 1992 (Fr.) (*ne exeat* provision does not create rights of custody), *with Ministre Public c. MB, Cour*

d'appel [CA] [regional court of appeal] Aix-en-Provence, Mar. 23, 1989, *reprinted in* 79 Rev. crit. 529 (1990) (Fr.) (*ne exeat* order creates rights of custody). Petitioner understandably prefers the earlier decision to the later one, but that is not a principled distinction.

Finally, another decision on which Petitioner relies, Petr. Br. at 36 – the opinion by the Family Court of Australia in *In Re Marriage of J.R. and M.R.*, (1991) App. No. 52 (Fam.) (Austl.) – openly expressed misgivings about its holding that *ne exeat* clauses create custody rights under the Convention, which was "a quantum leap from what had hitherto been the understood interpretation of that term." *Id.* The court accordingly suggested that "a later Full Court of this Court may on a fuller analysis of the issue wish to consider the matter further." *Id.*

Petitioner's claim that signatory countries have overwhelmingly decided the question presented is thus patently overstated. The Court should not be swayed by self-serving selections from foreign case-law. *See Olympic Airways*, 540 U.S. at 655 n.9; *Eastern Airlines*, 499 U.S. at 551.

C. The State Department's Interpretation Contradicts the Executive's Prior Position and Is Not Entitled to Deference.

The United States urges this Court to defer to its interpretation of the Convention, U.S. Br. 21-22, but deference is inappropriate in this case. While "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty," *El Al Israel Airlines, Ltd. v.*

Tsui Yuan Tseng, 525 U.S. 155, 168 (1999), the Executive's views on treaty obligations are "not conclusive," *Sumitomo,* 457 U.S. at 184; *see also Sanchez-Llamas*, 548 U.S. at 378 (Breyer, J., dissenting) (same). Because courts have an obligation to "interpret treaties for themselves," *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961), the Executive's construction of a treaty is entitled to weight only when it is "faithful to the Convention's text, purpose, and overall structure," *El Al Israel Airlines*, 525 U.S. at 168-69.

Accordingly, this Court has accorded respect to the Executive's position when that interpretation was "in conformity with [the treaty's] plain language," *Sumitomo*, 457 U.S. at 185 n.10, or consonant with the treaty's "basic purpose," *Kolovrat*, 366 U.S. at 193. Conversely, when the government's position was contrary to the text, drafting history, or settled principles of treaty interpretation, this Court consistently declined to adopt the Executive's construction. *See, e.g.*, *Chan,* 490 U.S. at 133-34; *United States v. Louisiana*, 363 U.S. 1, 62-64 (1960); *Louisiana Boundary Case*, 394 U.S. 11, 40-47, 60-63 (1969); *Perkins v. Elg*, 307 U.S. 325, 328, 337-42, 347-49 (1939).

This Court pays attention to the Executive's views as to the meaning of the treaty provisions because the Executive is "charged with their negotiation and enforcement." *Sumitomo*, 457 U.S. at 184-85; *Kolovrat*, 366 U.S. at 194. Here, however, the government offers no special perspective rooted in the State Department's participation in the Convention's drafting and negotiation. *Cf. Sumitomo*, 457 U.S. at 181 n.6. Indeed, the State Department's views at the

time of the Convention's adoption and ratification support Respondent. *See, e.g.*, Letter of Submittal by the Secretary of State to the President, Oct. 4, 1985, *in* 51 Fed. Reg. at 10,496-97 ("[t]he remedies for breach of the 'access rights' of the non-custodial parent do not include the return remedy" and the Convention seeks to ensure that the non-custodial parent does not "retain [the child] beyond the end of the visitation period"); *see also Croll*, 229 F.3d at 142; Bruch, *supra,* 38 FAM. L.Q. at 539-40 n. 33 (discussing views of members of the U.S. delegation). In its legal analysis of the Convention submitted to the Senate to facilitate ratification, the State Department emphasized that custody rights under the Convention involve "physical custody of a child," 51 Fed. Reg. at 10,505-06, and are exercised by "the person who has care of the child," *id.* at 10,507. This Court accords no deference to the Executive when its views on a treaty provision manifestly shift over time.[9] *See Clark v. Allen*, 331 U.S. 503, 513 (1947); *Perkins*, 307 U.S. at 346-49.

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[9] Nor does the U.S. here muster the diplomatic communications, official statements, or inter-agency letters on which this Court has traditionally relied when deciding whether to defer to the Executive. *See Sumitomo*, 457 U.S. at 184 nn.9, 10; *Kolovrat*, 366 U.S. at 194-95 & n.12. It offers nothing but this *amicus* brief, relying on *Auer v. Robbins*, 519 U.S. 452 (1997). U.S. Br. at 21 n.13. Not only did *Auer* involve matters of policy discretion, which is subject to change over time (unlike the intent of contracting parties), but the *Auer* Court deferred to an agency's legal brief because the agency was merely clarifying ambiguities in an existing regulation. 519 U.S. at 461-63.

D. Petitioner Misconstrues this Court's Canon of Liberal Construction of Treaties.

As a last resort, Petitioner invokes this Court's observation that treaties should be construed "liberally." Pet. Br. at 14 (quoting *Stuart*, 489 U.S. at 368). But this canon does not require a more expansive interpretation where a narrower construction is more faithful to the treaty's text, negotiating history, and the parties' intent. *Eastern Airlines*, 499 U.S. at 535-49; *Saks*, 470 U.S. at 398-404; *United States v. Miranda*, 41 U.S. 153, 159 (1842); *see Stuart*, 489 U.S. at 365-66; *id.* at 370 (Kennedy, J., concurring in part and concurring in the judgment) (same); *id.* at 371 (Scalia, J., concurring in the judgment) (same). It would be particularly inappropriate to interpret "rights of custody" broadly to give return remedies to access-rights holders who were clearly denied that remedy. Given that the text of the Convention and the *travaux* decisively contradict Petitioner's claim, he cannot circumvent them by a misplaced reliance on the principle of liberal construction.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

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