No. 11-1347

In the Supreme Court of the United States

JEFFREY LEE CHAFIN, PETITIONER,

v.

LYNN HALES CHAFIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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

ELIZABETH N. DEWAR
JESSE M. BOODOO
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

YIOTA SOURAS
PRESTON FINDLAY
THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN
699 Prince Street
Alexandria, VA 22314

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
ROPES & GRAY LLP
One Metro Center
700 12th Street, NW
Suite 900
Washington, DC 20005
(202) 508-4600
Douglas.Hallward-Driemeier@ropesgray.com

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INTEREST OF AMICUS[1]

The National Center for Missing and Exploited Children ("NCMEC") was established in 1984 as a private, non-profit organization to assist families and law enforcement in the prevention of child abductions, the recovery of missing children, and the reduction of child victimization. NCMEC has been designated by Congress as "the official national resource center and information clearinghouse for missing and exploited children," and it receives a federal grant to perform nineteen statutorily-authorized functions benefiting missing or exploited children and their families. 42 U.S.C. 5773(b)(1). NCMEC works in cooperation with federal, state, local, and international law enforcement agencies on cases of international child abduction. 42 U.S.C. 5771(9)(C).

For many years, NCMEC fulfilled the functions of the United States Central Authority under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention"), Oct. 24, 1980, T. I. A. S. No. 11670, S. Treaty Doc. No. 99–11, for "incoming cases," in which a parent abducts a child into the United States from a Contracting State. Beginning in 1995, the United States Department of State designated NCMEC, pursuant to a Cooperative Agreement, to perform the functions of the United

[1] The parties have consented to the filing of this amicus curiae brief in support of reversal in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than NCMEC and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

States Central Authority for incoming cases. Between 1995 and April 2008 (when the State Department assumed primary responsibility over incoming Convention abduction cases), NCMEC handled approximately 5,600 incoming Convention cases. NCMEC assisted left-behind parents with assembling applications for relief under the Convention, securing legal counsel, obtaining law enforcement and social services, and obtaining clarification of foreign custody laws from foreign authorities. NCMEC continues to provide technical assistance and resources to parents, attorneys, judges, and law enforcement officials involved in incoming cases. NCMEC also continues to maintain the International Child Abduction Attorney Network, a network of attorneys providing pro bono representation in abduction matters of all kinds, including Convention and non-Convention matters.

During its long involvement with Convention cases, NCMEC has established relationships with Central Authorities, legal representatives, and other agencies in many Convention Contracting States. These relationships provide NCMEC insight into the operation of the Convention in other Contracting States.

NCMEC participates as an amicus before this Court in cases that will have a significant effect on the Convention's efficient operation. NCMEC's overriding concern in all cases is that the Convention should operate in the best interests of children. The question presented implicates competing practical goals: to deter would-be abductors from crossing international borders in search of sympathetic courts, to facilitate the expeditious and accurate use of the return remedy, and to implement the Convention in a fashion which does not it-

self cause further instability and potential trauma in the lives of abducted children.

NCMEC believes that the court of appeals' holding—that the departure of a child pursuant to a return order moots an appeal from that order—is an incorrect interpretation of the Convention and should be reversed. NCMEC recognizes, however, that prolonged appeals, during which a child's status remains undetermined, undermines the goals of the Convention, and children's lives can be disrupted when they are uprooted numerous times. Thus, NCMEC urges the courts to adopt policies and procedures designed to ensure a temporary stay of return orders and expedited appellate review.

SUMMARY OF THE ARGUMENT

A child's departure from the United States pursuant to a duly issued return order does not moot an appeal from that order. Under established principles, an appeal is not moot unless there is no possibility of effectual relief for the losing party. That is not the case with an appeal from a district court's Convention return order, even if the prevailing party has already departed the country with the child. Even with the child gone, the appellant maintains a concrete interest in the outcome of the appeal. A successful appellant could, among other things, use the new judgment to support an affirmative custody action under the Uniform Child Custody Jurisdiction and Enforcement Act, seek voluntary or involuntary return of the child to the United States, and, in many cases, overturn any fee award made by the district court.

There are no special circumstances warranting departure from ordinary principles of justiciability in this case. The exercise of post-return jurisdiction is authorized by Article 12 of the Convention and has been repeatedly recognized as proper by Convention observers. The court of appeals' rule against exercise of post-return jurisdiction is contrary to the Convention and inconsistent with the majority of courts to have passed on the issue. Moreover, a categorical rule that the child's departure moots an appeal could easily lead courts to enter stays pending appeal as a matter of course in order to preserve the opportunity for full appellate review, even when a lengthy stay would be contrary to the purposes of the Convention.

NCMEC recognizes that lengthy appeals in Convention cases, and especially lengthy post-return appeals, may undermine the Convention's goals and cause further harm to children. The Convention is carefully structured to promote a balance between stability and speed in achieving the overall ideal that children should be returned to their habitual residences as quickly as can be achieved without causing further harm. The appellate process can, without proper attention, detract from both the speed and stability that are the twin goals of the Convention. An unsuccessful appeal of a return order that forces a child to remain in the United States can, if the process is prolonged, exacerbate the trauma, uncertainty, and frustration that the Convention is intended to prevent. On the other hand, a successful appeal can result in upheaval if the child has already returned to the alleged country of habitual residence by the time the appellate court overturns the return order.

NCMEC therefore urges the Court to make clear to lower courts the need to consider carefully whether to issue a stay pending appeal and, in particular, the appropriate length of such a stay. In NCMEC's view, even if a district court denies a responding parent's motion for stay pending the entire duration of appeal, it should nevertheless permit a brief, virtually automatic stay sufficient to permit recourse to an appellate court. While some district courts already follow this course, no rule requires them to do so. Adoption of a uniform automatic brief stay period by custom or otherwise would further the Convention's aims and be in the best interests of children. In addition, courts of appeals should seek to expedite their consideration of Convention appeals. While a child's return does not moot a Convention appeal, the courts must nonetheless be attentive to the impact of the appeal, and any stay pending appeal, in order to honor the Convention's balance between speed and stability.

ARGUMENT

I. A CHILD'S DEPARTURE FROM THE UNITED STATES PURSUANT TO A HAGUE CONVENTION RETURN ORDER DOES NOT MOOT AN APPEAL FROM THAT ORDER

A. ICARA Creates An *In Personam* Cause Of Action For Seeking A Child's Return Under The Convention

The central purpose of the Hague Convention is to remedy and prevent the problem of international child abduction. See Convention Preamble; Elisa Pérez-Vera, *Explanatory Report: Hague Conference on Private International Law*, 3 Acts and Documents of the

14th Session, §§ 16, 25 (1980) (translation of the Permanent Bureau) ("Pérez-Vera Report").[2] The Convention establishes a uniform set of procedures to be employed when a child is abducted from one Contracting State to another. See Convention Arts. 1, 12; United States Dep't of State, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10505 (Mar. 26, 1986) ("Text and Legal Analysis").

"The Convention's central operating feature is the return remedy." *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1989 (2010). When a child has been "wrongfully removed to or retained in" a Contracting State other than his or her country of habitual residence, that State must "order the return of the child forthwith," unless certain exceptions apply. Convention Arts. 1, 3, 12. The Convention and its return remedy "do[] not alter the pre-abduction allocation of custody rights." *Abbott*, 130 S. Ct. at 1989. Judicial and administrative authorities considering Convention cases may not consider the merits of an underlying custody dispute, but may simply determine the jurisdiction in which a custody dispute is to be heard. See Convention Arts. 16, 19; 42 U.S.C. 11601(b)(4).

The Convention is implemented in the United States by the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. 11601 *et seq.* Under ICARA,

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[2] The Pérez-Vera Report is recognized as an authoritative source for interpreting the Convention's provisions and as "the official history and commentary on the Convention." *Croll* v. *Croll*, 229 F.3d 133, 137 n.3 (2d Cir. 2000), cert. denied, 534 U.S. 949 (2001).

when a child is removed to or retained in the United States, a left-behind parent may "commenc[e] a civil action by filing a petition" for the child's return in a state or federal court with "jurisdiction in the place where the child is located at the time the petition is filed." 42 U.S.C. 11603(a), (b) (providing that); see Text and Legal Analysis, 51 Fed. Reg. at 10507; Convention Arts. 8-9.[3]

Such civil actions for the return of a child under the Convention are treated by statute and in practice as *in personam* actions by one parent against the other. See Text and Legal Analysis, 51 Fed. Reg. at 10512. Thus, notice of such civil actions is given "in accordance with the applicable law governing notice in interstate child custody proceedings." 42 U.S.C. 11603(c). The burdens of proof borne by each side are set forth by statute. 42 U.S.C. 11603(e). Where the requesting parent proves that the child was wrongfully removed or retained within the meaning of the Convention, and the defending parent fails to prove the application of an exception, the court will grant the petition and issue a return order. Convention Art. 12; 42 U.S.C. 11603(e).

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[3] The left-behind parent may also petition the Central Authority of the child's country of habitual residence or the U.S. Department of State. Petitions received by foreign Central Authorities are transmitted to the U.S. Department of State. Convention Art. 9. The Department of State, with the aid of both governmental and non-governmental agencies, including NCMEC, endeavors to locate the abducted child in the United States and, if requested, find *pro bono* legal representation for the left-behind parent. See NCMEC, Litigating International Child Abduction Cases Under the Hague Convention 3-5 (2012) ("NCMEC Guide"), http://www.ncmec.org/en_US/HagueLitigationGuide/hague-litigation-guide.pdf (last visited Sept. 28, 2012).

B. It Is Very Common That The Petitioning Parent Will Leave The United States With The Child As Soon As The District Court Enters A Return Order, Before Any Appeal Is Commenced

Once a district court enters a return order, the petitioning parent may, consistent with ICARA and the Convention, immediately return with the child to the country of habitual residence, unless the court's order is stayed. When the petitioning parent has physical custody of the child, a return order is effectively self-executing; that parent does not need to obtain anything further from the defending parent in order to carry out the court's order by departing with the child. Even if the child is in the custody of the responding parent, a court order directing that parent to release the child to the petitioning parent would constitute an injunction with immediate legal effect. Federal Rule of Civil Procedure 62(a), which generally imposes an automatic 14-day stay of a district court's judgment, does not apply to an "interlocutory or final judgment in an action for an injunction."[4] See Fed. R. Civ. P. 62(a) ("[N]o execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry."); *id.* at 62(a)(1) (excepting orders granting injunctive relief from automatic stay).

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[4] The same is true of Rule 62(d); an appellant may obtain a stay of a judgment including a money award by giving a supersedeas bond, but not an injunction. See Fed. R. Civ. P. 62(d) (exempting injunction actions described under Rule 62(a)(1)); 11 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2905 (2d ed. 2012).

Full, or even partial, stays of return orders pending appeal are frequently denied. Some courts disfavor stays pending appeal as contrary to the purposes of the Convention. See *Friedrich* v. *Friedrich*, 78 F.3d 1060, 1063 n.1 (6th Cir. 1996). And, even aside from any special considerations in the Convention context, the burden for obtaining a stay of an injunction pending appeal is "a heavy one." Wright & Miller, Federal Practice & Procedure § 2904 (describing standard and collecting cases). Because such cases "are excepted from the automatic stay of Rule 62(a)," courts and commentators have explained that "the court should not grant a stay in these cases as a matter of course but should consider carefully the harm that a stay might cause to the party who has obtained the judgment." *Id.* § 2902.[5]

In NCMEC's experience, it is common practice for the responding parent's counsel immediately to move for a stay of the return order pending appeal. See Fed. R. Civ. P. 62; Fed. R. App. P. 8. It is also common practice for the petitioning parent's counsel to prepare for the child to leave the United States immediately upon denial of such motion. See NCMEC Guide at 86-87, 91. Thus, in many cases, as in the case presently before the Court, a respondent facing denial of a motion for stay

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[5] Courts considering whether to stay a return order most often do so pursuant to Rule 62(c), which provides for an injunction pending appeal from an order or judgment that grants or denies an injunction. See, *e.g.*, *Haimdas* v. *Haimdas*, 720 F. Supp. 2d 183, 210-212 (E.D.N.Y. 2010); *Rowe* v. *Vargason*, No. 11-1966, 2011 WL 6151523, at *1 (D. Minn. Dec. 9, 2011). Those courts have noted the "difficult burden" faced by the party seeking the stay. *Haimdas*, 720 F. Supp. 2d at 210; accord *Rowe*, 2011 WL 6151523, at *1.

will be unable to seek appellate relief before the child departs the United States pursuant to the return order.

C. A Child's Return Does Not End Convention Proceedings, Interrupt A Respondent's Ability To Obtain Effective Relief, Or Oust The Jurisdiction Of United States Courts

The departure of a child from the United States pursuant to a duly issued return order does not moot the underlying Convention case. The court of appeals held that petitioner's appeal was moot on the premise that, after the child's departure, the parent's only remedies would be in the country to which the child was returned and that "a reversal of the district court's order [would] provide * * * no actual affirmative relief." *Bekier* v. *Bekier*, 248 F.3d 1051, 1053-1055 (11th Cir. 2001); Pet. App. 1-2 (relying on *Bekier*). Since the *Bekier* decision, its reasoning has been expressly rejected by the three courts of appeals that have squarely considered the issue. See *Larbie* v. *Larbie*, 690 F.3d 295, 304-306 (5th Cir. 2012); *Whiting* v. *Krassner*, 391 F.3d 540, 545-546 (3d Cir. 2004), cert denied, 545 U.S. 1131 (2005); *Fawcett* v. *McRoberts*, 326 F.3d 491, 495-497 (4th Cir. 2003), abrogated on other grounds by *Abbott*, 130 S. Ct. at 1983.[6] This Court should likewise reject the court of appeals' holding. As explained below, noth-

[6] The Tenth Circuit has reasoned in dicta that the departure of a child from the United States does not support dismissal of proceedings. See *Ohlander* v. *Larson*, 114 F.3d 1531, 1538-1539 (1997), cert. denied, 522 U.S. 1052 (1998). In contrast, the Sixth Circuit has suggested in dicta that stays of return orders may be necessary in order to preserve appellate jurisdiction. See *March* v. *Levine*, 249 F.3d 462, 468 (2001), cert. denied, 534 U.S. 1080 (2002).

ing in the Convention or ICARA supports the conclusion that a child's departure eliminates the justiciable controversy between the parents over whether the child's country of habitual residence is the United States or elsewhere. The court's jurisdiction does not depend upon the presence of the child, and reversal of an erroneous district court opinion will provide the appellant with significant, even if only partial, relief.

An appeal is not rendered moot simply because the appellate court cannot afford the appellant his preferred, or most expedient, form of relief. The doctrine of mootness derives from the constitutional limit on federal courts to adjudicate only "actual, ongoing controversies." *Honig* v. *Doe*, 484 U.S. 305, 317 (1988). A case is not moot, however, unless "it is impossible for a court to grant 'any effectual relief whatever to the prevailing party.' " *Knox* v. *Service Employees Int'l. Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (quoting *Erie* v. *Pap's A.M.*, 529 U.S. 277, 287 (2000)). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435, 442 (1984). See *Church of Scientology* v. *United States*, 506 U.S. 9, 12-14 (1992) (availability of "partial remedy" is "sufficient to prevent [a] case from being moot").

Although an appellant's compliance with the order under appeal can moot the appeal in certain circumstances, ongoing effects of the court's order generally prevent the appeal from becoming moot. Where the court's order directs that a single action be taken which cannot be undone, compliance may forestall all possibility of effectual relief. See, *e.g.*, *Sierra Club* v. *Glickman*, 156 F.3d 606, 619 (5th Cir. 1998) (defendant vol-

untarily performed ordered consultation, which was only relief sought). Compliance will not moot an appeal, however, where that compliance may be undone and the *status quo ante* restored by order of the appellate court. See, *e.g.*, *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2584 n.8 (2010) (removal of alien did not moot appeal of basis for removal, because, if he prevailed on appeal, alien could "still seek cancellation of removal even after having been removed"). Likewise, compliance will not moot an appeal where the order generates adverse collateral effects that could be prevented or undone by a favorable appellate ruling. See *Sibron* v. *New York*, 392 U.S. 40, 53-59 (1968) (collateral consequences of criminal conviction, following completion of sentence, avoided mootness); *Dailey* v. *Vought Aircraft Co.*, 141 F.3d 224, 226-229 (5th Cir. 1998) (continuing collateral consequences of lawyer's temporary disbarment, following payment of sanctions and readmission to practice, provided ongoing controversy).

1. The Convention's Text and Purpose Indicate That the Child's Return Does Not Moot an Appeal of the Return Order

Neither the text of the Convention nor that of ICARA supports the view that proceedings must terminate upon a child's exit from the United States. An action to obtain return of a child is not an *in rem* proceeding that depends on the child's presence for the exercise of jurisdiction. On the contrary, the Convention expressly contemplates continuation of proceedings in the absence of the child. Nor does anything in the Convention or ICARA preclude post-departure appellate relief from being given effect. In fact, many countries

and commentators expressly contemplate return of the child if the district court's order is reversed.

The court of appeals' dismissal cannot be based on any rule that the child's continued presence in the United States is necessary for the exercise of jurisdiction. The civil action under ICARA seeking a child's return is an *in personam* cause of action in which the petitioning parent files suit in state or federal court to establish the right to return a child to the alleged country of habitual residence. If the petitioner prevails by establishing that the child was taken from the country of habitual residence, the court grants the return order, and also ordinarily assesses against the respondent parent the petitioner's legal costs and fees, travel expenses, child care expenses, and costs incurred in locating the child, see 42 U.S.C. 11607(b)(3). The petitioner thus files suit to redress—with both injunctive and monetary relief—a very specific wrong done by the respondent: abducting the child from the child's place of habitual residence. The action is not some novel species of *in rem* action designed to establish any and all persons' rights in relation to a child, with respect to which the child's presence in the jurisdiction might be essential to jurisdiction. Indeed, an action for return of a child does *not* resolve any disputes over the custody of the child. Convention Art. 16. Although ICARA requires that a return action be brought in a court of competent jurisdiction "in the place where the child is located at the time the petition is filed," see 42 U.S.C. 11603(b), that is only a venue provision, and only requires the presence of the child "at the time the petition is filed," *ibid.* The court's jurisdiction is based up-

on 42 U.S.C. 11603(a), which does not refer to the presence of the child.

The text of the Convention also makes clear that the child's presence in the United States throughout the pendency of the litigation is not necessary to maintain jurisdiction.[7] Article 12 specifically contemplates that proceedings under the Convention may continue, despite the departure of the child during the pendency of those proceedings. "Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it *may stay the proceedings or dismiss the application* for the return of the child." Convention Art. 12 (emphasis added). The option to stay, as an alternative to dismissal, presumes that the child's departure does not oust the jurisdiction of a court, and that a court may continue to exercise jurisdiction notwithstanding the child's absence. As evidenced by the use of the permissive "may" in Article 12, the decision whether to exercise continued jurisdiction when a child has departed the State is ultimately committed to the discretion of the judicial or administrative authority.[8]

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[7] Resolution of an issue under a treaty necessarily "begin[s] with the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 534 (1991) (internal quotations omitted). "[The Court] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Air France* v. *Saks*, 470 U.S. 392, 396 (1985).

[8] Article 12's permissive, disjunctive phrasing ("may stay the proceedings or dismiss the application") is arguably ambiguous as to whether an authority's options to stay or dismiss are exclusive of the option to continue proceedings. The Court must therefore

The views of commentators and foreign courts further confirm that nothing in the Convention, or the nature of a return proceeding, precludes a court from continuing to exercise jurisdiction after the child has departed the requested state. Indeed, these authorities have specifically recognized the availability of appellate jurisdiction over a return order after the child has departed the State. Participants at the Second Special Commission Meeting to Review Operation of the Hague Convention on the Civil Aspects of Child Abduction (a meeting of official representatives with particular expertise in implementing and construing the Convention) discussed "the possible complications which could arise from return of a child while the appeal was pending, in case the appeal should be successful." Hague Conference on Private Int'l Law, 33 I.L.M. 225, 233 (1994). Participants discussed several ways in which a successful appeal might be given effect, including through agreements amongst Central Authorities to enforce re-return orders. *Ibid.* Similarly, the Hague Conference General Affairs Council has presumed the existence of post-return appeals, advising Contracting States that they should indicate "the effect

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look to the larger context of the Convention to determine Article 12's meaning. See *De Sylva* v. *Ballentine*, 351 U.S. 570, 573 (1956) ("The [disjunctive phrase of a statute] is hardly unambiguous, however, and presents problems of interpretation not solved by literal application of words as they are 'normally' used."); *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 700 (1988) (treaties "are construed more liberally than private agreements" and "general rules of construction may be brought to bear on difficult or ambiguous passages"). For the reasons given *supra* at Section I.C, this context weighs in favor of permitting active proceedings in the child's absence.

of lodging an appeal against a return order" and whether "the return order [will] be stayed while an appeal is pending." Permanent Bureau of the Hague Conference on Private International Law, Guide to Good Practice Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures § 6.6 (2003). See also *id.* at Part IV – Enforcement § 3.2 ("The possibility of * * * provisional enforceability of a return order which is not yet final should nevertheless exist in order to respond appropriately to the circumstances of each case.").

Accordingly, the one foreign court of which NCMEC is aware to have considered whether the Convention permits post-return appeals concluded that the Convention does permit post-return appeals. In 2002, Spain's high court on constitutional matters held that Convention cases are not mooted by departure of a child pursuant to a court-issued return order, since courts in the new jurisdiction might enforce a Spanish order for re-return of the child. S.T.C., May 20, 2002, (BOE No. 146) (INCADAT HC/E/ES 907). At least two additional foreign jurisdictions, the Netherlands and France, reportedly also hear Convention appeals notwithstanding the child's return. See Nigel Lowe, Good Practice Report on Enforcement Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction §§ 3.3.3, 3.5.7 (2007).

This interpretation of the Convention accords with its purposes. A rule that a child's departure deprives the court of jurisdiction over a return proceeding would encourage the very behavior the Convention was designed to prevent: the flight of parents in search of a

more favorable jurisdiction. See *Ohlander*, 114 F.3d at 1538-1539; Pérez-Vera Report § 11.

Moreover, it is likely that some courts would respond to this rule by staying return orders during the entirety of an appeal, even when a stay would not be in the child's interest. The availability of appellate review of return orders is desirable. The potential exists for district court error in Convention cases no less than in other civil proceedings. Convention cases are by no means simple; courts must work within tight timeframes to resolve complicated factual and legal disputes, sometimes regarding foreign law. See, *e.g.*, *In re Application of Adan*, 437 F.3d 381 (3d Cir. 2006) (reversing district court's return order based, in part, on misinterpretation of Argentine law), remanded to 2007 WL 1850910 (D.N.J. 2007), rev'd 544 F.3d 542 (3d Cir. 2008). Yet appeals in Convention cases sometimes lack merit and reflect an emotional appeal as much as dispassionate legal assessment. In some cases, where an appeal seems clearly to lack merit, the prompt return of the child during the pendency of the appeal best accords with the Convention's purpose: "to secure the *prompt* return of children wrongfully removed to or retained in any contracting State." Convention Art. 1(a) (emphasis added). If immediate return of the child would altogether preclude appellate review, however, some courts might be disinclined to permit the departure. By recognizing that an appeal can go forward, even after the child's departure, the Court would permit case-specific determinations that best further the Convention's purposes. See *infra* Section II.

2. The Court of Appeals' Rule Disregards the Availability of Effectual Appellate Relief, Even After the Child's Departure

Although the court of appeals' reasoning is not clear, it may have believed that the child's return to the requesting State mooted any appeal because it would prevent the court of appeals from granting any effective relief to the appellant. But that is not correct. A responding parent who succeeds in obtaining a reversal on appeal could obtain many forms of relief notwithstanding the child's departure.

Most obviously, the court of appeals, or district court on remand, could order the petitioning parent to bring the child back, and the parent might voluntarily comply with the court's order. See *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 289 (1952) ("[A district court] may command persons properly before it to cease or perform acts outside its territorial jurisdiction."); *Fawcett*, 326 F.3d at 496; *Larbie*, 690 F.3d at 305-306. Having initiated an action before the district court, the petitioning parent has subjected herself to that court's jurisdiction, and cannot dispute the court's authority to order her to undo the effects of an erroneous order in her favor. Cf. *Adam* v. *Saenger*, 303 U.S. 59 (1938) (holding that, by initiating suit, a plaintiff subjects itself to the court's jurisdiction and to orders relating to the subject matter of the suit, including counterclaims). Voluntary compliance could be attractive against the alternative of a civil contempt order, particularly for a petitioner holding assets subject to seizure in the United States, or wishing to travel in the United States in the future without fear of potential arrest. See 18

U.S.C. 401(3); *Fawcett*, 326 F.3d at 496; *Ohlander*, 114 F.3d at 1535.

Second, even if the petitioner does not voluntarily re-return the child, a prevailing respondent might request that the State Department attempt to secure re-return of the child in cooperation with the Central Authority of the state of residence.[9] See Convention Art. 7 (setting out the general duty of Central Authorities to co-operate, so as to ensure the Convention's objects are achieved). Cf. *Lindland* v. *United States Wrestling Ass'n*, 227 F.3d 1000, 1002 (7th Cir. 2000) (case not moot where effective relief required voluntary compliance of foreign tribunal); *Blondin* v. *Dubois*, 189 F.3d 240 (2d Cir. 1999) (ordering district court to request State Department to cooperate with the Central Authority of France to facilitate a return to France subject to certain protective conditions).

Prevailing on appeal would also relieve a respondent from an order to pay certain costs assessed under the Convention. A respondent who has lost in the trial court may have been assessed liability for a petitioner's legal costs and fees, travel expenses, child care expenses, and costs incurred in locating the child. See Convention Art. 26; 42 U.S.C. 11607(b)(3) (directing any court ordering return of a child to assess such expenses against respondent "unless the respondent establishes

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[9] This solution was recognized as proper and potentially effective at the Second Special Commission Meeting to Review the Operation of the Convention. See *supra* Section I.C.1; 33 I.L.M. at 233 (several experts "thought that the Central Authority in the State to which the child was returned would, if possible, give effect to the appellate decision").

that such order would be clearly inappropriate"). Regardless of the presence or absence of the child in the United States, prevailing on appeal would require that the trial or appellate court vacate any such order and relieve the respondent of the obligation to pay these costs.[10]

Finally, prevailing upon appeal frees a respondent from the Convention's bar on custody actions in the Contracting State to which a child has been removed. Convention Art. 16. Having established on appeal that the child should not have been returned, a respondent could in most states[11] commence a custody action under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), even if the child has left the country. See UCCJEA §§ 102(7), 105, 201 (custody action may be commenced over an absent child in a foreign country if the child lived in the jurisdiction for six consecutive months immediately before commencement of proceedings). A respondent with a favorable Convention judgment on habitual residence and wrongful removal would enter such proceedings with a significant head-start toward establishing the jurisdictional prerequisites to an action under the UCCJEA. See *Krymko* v. *Krymko*, 32 A.D.3d 941, 942-943 (N.Y. App. Div. 2006) (period of "wrongful removal" under the Convention equivalent to period of "temporary ab-

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[10] In NCMEC's experience, such expenses are often substantial (particularly the costs of last-minute international travel). See *Whiting*, 391 F.3d at 546; NCMEC Guide at 102. No such costs were sought or assessed in this case, however.

[11] Forty-nine states (every state except Massachusetts) have adopted the UCCJEA.

sence" and not counted against six-month consecutive residence requirement under UCCJEA § 102(7)). And, ultimately, a respondent with a UCCJEA custody order might attempt to seek international enforcement of that order, depending on the country where the child is then located.[12]

As the foregoing demonstrates, a defending parent who successfully overturns a return order may obtain both direct and collateral relief through numerous potential avenues. The court of appeals' apparent belief that any decision vacating and reversing the return order would be futile and of no value to the appellant does not withstand scrutiny. Because a favorable ruling on appeal would have afforded the appellant considerable relief, the court of appeals' ruling was in error and should be reversed.

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[12] In NCMEC's experience, it is possible for a UCCJEA custody order to be enforced in foreign countries, although the chance of success varies widely from country to country. See, *e.g.*, *Thomas* v. *Arul*, (2011) 5 C.T.C. 22 (India) (enforcing custody order issued by United States court while child was in India); Child Custody and Right of Access Act 361/1983 § 18 [Finland] (providing procedures for registration of international custody orders). NCMEC is also aware of parents succeeding in enforcing United States custody orders in Europe under principles of the so-called "Brussels II" treaty, a European Union pact to which the United States is not a signatory. See Council Regulation (EC) No. 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility.

II. Because Lengthy Appeals, Especially After The Child's Return, Conflict With The Convention's Purposes And Cause Further Harm To The Child, Courts Should Act To Mitigate These Harms

A. Abducted Children Face Untold Hardships Which The Convention Is Designed To Mitigate And Prevent

Abducted children confront a range of psychological, physical, and social hardships. Removed from their familiar environment, usually as a result of the failed adult relationships around them, abducted children find themselves thrust into strange cultures in strange lands. NCMEC, Family Abduction Prevention and Response 135-137 (2009) ("NCMEC Prevention and Response"); United States Dep't of State, Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction 7 (April 2009) ("Dep't of State 2009 Compliance Report"). Abductors frequently commit their children to a life on the run, prevent their children from making close friends, sometimes even changing their children's names, birthdates, or physical appearances to conceal their true identities. Dep't of State 2009 Compliance Report at 7. Research has found that abducted children suffer higher rates of abuse and a range of other problems, including anxiety, eating problems, and difficulty developing personal relationships. *Ibid.*; NCMEC Prevention and Response at 137. With the passage of enough time, abducted children may find that their relationship with the left-behind parent, as well as their connection to their previous culture and social group, have suffered. Dep't of State 2009 Compliance Report at 7; Pérez-Vera Report

§§ 29-30. These are the ills that the Convention was designed to mitigate and prevent.

The Convention is intended to protect children from the harms attendant to abduction and to do so in a procedural fashion consistent with their overall best interests. See Convention Preamble; Pérez-Vera Report §§ 24-34.[13] To this end, the Convention promotes the twin objects of discouraging would-be abductors from crossing international borders and securing the prompt reintegration of abducted children into their countries of habitual residence. See Pérez-Vera Report §§ 16, 18, 25. These objects are effectuated throughout the Convention's provisions, which are carefully structured to promote a balance between speed in resolving the action[14] and stability in the child's situation.[15] The

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[13] To be sure, the operative part of the Convention does not mention the best interests of children. See Pérez-Vera Report § 23. And it is implicit in Article 16 that the best interests of a particular child should not, apart from those circumstances specified in Article 13, govern the decision whether or not that child is returned under the Convention. See *Kufner* v. *Kufner*, 519 F.3d 33, 40 (1st Cir. 2008). But the Convention's treatment of "this point ought not to lead one to the conclusion that the Convention ignores * * * the interests of children." Pérez-Vera Report § 23. To the contrary, "right from the start the signatory States declare" that they "drew up the Convention, 'desiring to protect children internationally from the harmful effects of their wrongful removal or retention.' " *Ibid.* (quoting Convention Preamble).

[14] The importance of expeditious proceedings is emphasized in six separate Convention Articles. Convention Arts. 1, 2, 7, 9, 11, 12. Through these provisions, the Convention aims to "bring[] about speedy solutions so as to prevent the consolidation in law of initially unlawful factual situations, brought about by the removal or retention of a child." Pérez-Vera Report § 40. Closely related to the goal of speed is the Convention's effort to concentrate pro-

overall aim is that children should be returned to their habitual residences as quickly as can be achieved without causing further trauma, uncertainty, or frustration. See *id.* §§ 24-34. In adjudicating Convention cases, including on appeal, courts should be attentive to these precepts and purposes of the Convention.

B. Prolonged Appeals, Especially Post-Return, Can Cause Further Trauma, Uncertainty, And Frustration In The Lives Of Abducted Children

Prolonged appeals, which are unfortunately common in Convention cases, undermine the purposes of the Convention, whether or not the child's return is stayed.

In a case where a full stay is granted, the child will remain in the United States during the entire course of

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ceedings in the judicial and administrative authorities of the child's country of residence. See Convention Arts. 9, 12; Pérez-Vera Report § 111.

[15] Three Convention Articles emphasize the importance of stability and the prevention of further harm, by creating exceptions to the general rule for return of the child. See Convention Art. 12 (mandatory exception to return where more than one year has elapsed since removal and child is settled in new environment); *id.* at Art. 13 (discretionary exceptions to return where left-behind parent acquiesced in removal or retention, where return poses a "grave risk" of harm or other "intolerable situation," or where child of sufficient age and maturity objects to return); *id.* at Art. 20 (discretionary exception to return where the requested State's "fundamental principles" of "human rights and fundamental freedoms" do not permit return). Each exception may add length and complication to proceedings, see NCMEC Guide at 37-65; Pérez-Vera Report §§ 9, 109, but is nonetheless critical to the Convention's framework.

appellate proceedings—occasionally even in the care of a child protective services agency, see NCMEC Guide at 74-75. In 2008, appeals added an average of 232 days to incoming Convention cases in the United States. A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – National Reports 207 (May 2011) ("2008 Statistical Analysis"). For a child eventually returned, a delay of this length only prolongs the period of uncertainty, renders the subsequent return and reintegration more difficult, and complicates the subsequent adjudication of custody by the foreign court. See *Friedrich* v. *Friedrich*, 78 F.3d 1060, 1063, n.1 (6th Cir. 1996). See also Convention Art. 11 (suggesting a period of six weeks from commencement of petition to final decision in Hague Convention cases).[16]

The situation can be equally difficult where no stay whatsoever is granted, and the child departs the United States while the responding parent appeals. The possibility of appellate reversal (and the specter of a future re-return order to the United States) holds the child's status in limbo and complicates resettlement ef-

[16] The slow course of appellate proceedings worldwide has long concerned observers of the Convention. See Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction § 3.3 (March 2001). Appellate proceedings in United States courts are no exception in this regard. See 2008 Statistical Analysis at 207 (noting a global average of 324 days to finalize cases that are appealed and a United States average of 441 days to finalize cases that are appealed).

forts. A foreign court may be uncertain of its own jurisdiction to commence custody proceedings, or reluctant to exercise such jurisdiction, prior to decision from the United States appellate court. See Convention Art. 16.[17] A child who departs but is later ordered to re-return to the United States may face further dislocation or instability as a result of a second international move.

C. A Brief Automatic Stay Period, As Already Used By Some Courts, Followed By An Expedited Appeal, Best Achieves The Balance Between Stability And Speed Sought By The Convention

For the reasons described above, either an indefinite stay pending a protracted appeal or a complete denial of any stay pending appeal can upset the Convention's careful balance between speed and stability, and ill-serve the interests of abducted children. In NCMEC's view, the Convention's purposes would be better served if courts routinely granted respondents a brief stay during which to move the appeals court to grant expedited treatment of the appeal and, if appropriate, a further brief stay pending appeal.

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[17] Article 16, which limits custody proceedings in the country "to which the child has been removed or in which it has been retained," would not technically limit foreign jurisdiction to commence a custody case in this situation. For instance, a custody action related to this case was apparently commenced in a Scottish court prior to the court of appeals' dismissal of the Convention appeal as moot. The existence of potentially conflicting, simultaneous court proceedings in two different countries is nevertheless at odds with the purposes of the Convention.

To be effective, a temporary stay from the district court need only be long enough to permit a respondent to seek relief from the court of appeals pursuant to Fed. R. App. P. 8.[18] A respondent is thereby afforded an abbreviated but meaningful opportunity to convince a new judge of the substantial merit of his position. Where an appeal has merit, and the child is reasonably likely to remain in the United States, the appellate court may stay execution of the return order, allowing the proceeding to continue in the way that causes the least amount of disruption, harm, and procedural uncertainty. Conversely, where the appeal lacks merit, the appellate court may permit immediate execution of the return order, and the petitioner and child may move on with their lives with diminished concern that those lives will be upended by the ongoing proceedings in the United States. A stay of this nature thus permits appellate review without undue delay, serving the goals of the Convention and the interests of petitioners, respondents, and abducted children.

There is presently no rule or statute requiring or encouraging district courts to grant brief stays of return orders. Some courts have granted such stays. See, *e.g.*, *March* v. *Levine*, 136 F. Supp. 2d 831, 861 (M.D. Tenn. 2000), aff'd, 249 F.3d 462 (6th Cir. 2001), cert. denied 534 U.S. 1080 (2002) (stay of six days to permit appeal to Sixth Circuit); *Haimdas* v. *Haimdas*, 720 F. Supp. 2d 183, 213 (E.D.N.Y. 2010) (stay of one

[18] NCMEC does not support a mandatory stay period for the duration of appeal for the reasons explained *supra* at Section II.B. In addition to those reasons, a full mandatory stay period could also create unacceptable tactical opportunity for abductors to cause additional delay.

month "for the purpose of permitting respondent to apply to the Second Circuit Court of Appeals for an emergency stay pending appeal and an expedited appeal"); *Charalambous* v. *Charalambous*, 744 F. Supp. 2d 375, 379 (D. Me. 2010) ("Absent a stay of judgment, Respondent separately seeks an extension of this deadline in order to allow her to seek a stay from the First Circuit. In the Court's assessment, this is a reasonable request."). Other courts—such as the district court below—refuse to do so. It is NCMEC's belief that abducted children, practitioners, and judges would all be served by a uniform rule in favor of such brief stays to permit initial consideration of the case by the appellate court.

In the absence of a formal rule, NCMEC respectfully suggests that this Court might encourage the lower courts to grant such brief stays pursuant to their authority under ICARA. See 42 U.S.C. 11604 (providing that courts hearing a Convention case "may take * * * measure[s] * * * as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition"). Similarly, the Advisory Committee on Civil Rules might consider in the future whether to amend Fed. R. Civ. P. 62 to bring Convention judgments within the 14-day automatic stay period of subpart (a).[19] Through either of these means, the Convention's purposes might best be achieved: allowing for

[19] The Department of State, too, might adopt regulations pursuant to 42 U.S.C. 11606 to accomplish the same end. But the underlying questions of judicial administration and economy are, in many respects, best suited for determination by the judiciary.

correction of errors on appeal—as both the Convention and our principles of justiciability permit, regardless of the presence of the child in the United States—while also resolving these disputes "us[ing] the most expeditious procedures available." Convention Art. 2.

CONCLUSION

The judgment of the Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted.

YIOTA SOURAS
PRESTON FINDLAY
THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
ELIZABETH N. DEWAR
JESSE M. BOODOO
ROPES & GRAY LLP

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