No. 08-645

In the Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT, PETITIONER

v.

JACQUELYN VAYE ABBOTT

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELENA KAGAN
Solicitor General
Counsel of Record

EDWIN S. KNEEDLER
Deputy Solicitor General

TONY WEST
Assistant Attorney General

GINGER D. ANDERS
Assistant to the Solicitor General

MICHAEL JAY SINGER
HOWARD S. SCHER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JAMES H. THESSIN
Deputy Legal Adviser

KEITH LOKEN
Assistant Legal Adviser for Private International Law

MARY CATHERINE MALIN
Assistant Legal Adviser for Consular Affairs

MARY HELEN CARLSON
JAMES L. BISCHOFF
Attorney-Advisers
Department of State
Washington, D.C.

QUESTION PRESENTED

Whether a *ne exeat* order, which prohibits either parent from removing a child from the country without the other parent's consent, confers a "right of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction, thus allowing a parent to seek to have a child who was removed to another country in violation of the *ne exeat* order returned to his or her country of habitual residence.

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INTEREST OF THE UNITED STATES

This brief is filed in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. The Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention or the Convention) was adopted in 1980 to address the growing problem of international child abduction by persons involved in child custody disputes. *Hague International Child Abduction Convention; Text and Legal Analysis (Convention Text and Legal Analysis)*, 51 Fed. Reg. 10,498 (1986); see Convention on International Childhood Abduction, *done* Oct. 25, 1980, T.I.A.S. No.

11,670, 1343 U.N.T.S. 49.[1] To facilitate the international cooperation that is necessary to deter and remedy such abductions, the Convention establishes uniform legal standards and procedures to be employed by States parties when a child is abducted from one country to another. See 42 U.S.C. 11601(a); see also Convention, introductory decls., Art. 1. In particular, the Convention provides that children abducted in violation of a parent's custody rights should be promptly returned to their country of habitual residence. See *id.* Art. 1. The return remedy is designed to "protect children internationally from the harmful effects of their wrongful removal or retention" by quickly restoring them to their established family and social networks. See *id.* introductory decls.; 51 Fed. Reg. at 10,504. It also prevents the abducting parent from gaining any legal advantage from removing the child to a different jurisdiction, and ensures that decisions relating to the child's custody are made by the courts of his or her country of habitual residence. See *id*. at 10,498.

The Convention applies to any child under the age of 16 who is "wrongfully removed" from one contracting State to another. Convention Arts. 1(a), 4. Removal is "wrongful[]" if it is (1) "in breach of rights of custody attributed to a person, * * * either jointly or alone, under the law of the State in which the child was habitually resident," *id*. Art. 3(a); and (2) "at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised

[1] The English-language text of the Convention is reprinted at 51 Fed. Reg. at 10,498-10,502, together with an analysis prepared by the Department of State and submitted to the Senate Committee on Foreign Relations in connection with the Senate's consideration of the Convention. See *id*. at 10,494, 10,503-10,516.

but for the removal or retention," *id.* Art. 3(b). "Rights of custody," for purposes of the Convention, "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." *Id.* Art. 5(a).

Upon finding that a child's removal was wrongful —that is, that it violated the custody rights of the left-behind parent—authorities in the State where the child has been brought must, subject to certain defenses, "order the return of the child forthwith."[2] Convention Art. 12. That remedy reflects the Convention's premises that custody determinations should be made by the courts in the child's country of habitual residence, and that the abducting parent should gain no benefit from attempting unilaterally to change the forum. Elisa Perez-Vera, *Report of the Special Comm'n: Hague Conference on Private International Law, in 3 Actes et Documents de la Quatorzième Session (Child Abduction)* 172, paras. 16, 19, at 177 (Permanent Bureau trans. 1982) (*Explanatory Report*).[3] Accordingly, a court considering a petition for the return of the child is not to make any determination of the parties' custody rights, and any decision made concerning return under the Convention "shall not be

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[2] In contrast, the Convention does not provide the return remedy for violations of "rights of access," which "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). Rather, an individual whose access rights have been violated may petition to "secur[e] the effective exercise of" her rights. *Id.* Art. 21.

[3] The *Explanatory Report* is recognized "as the official history and commentary on the Convention." *Convention Text and Legal Analysis*, 51 Fed. Reg. at 10,503. Courts have recognized the *Explanatory Report* as "an authoritative source for interpreting the Convention's provisions." See, *e.g.*, *Croll* v. *Croll*, 229 F.3d 133, 137 n.3 (2d Cir. 2000), cert. denied, 534 U.S. 949 (2001).

taken to be a determination on the merits of any custody issue." Convention Arts. 16-17, 19.

The United States participated in the negotiations concerning the Convention's terms, and the Convention entered into force for the United States in 1988. *Convention on International Child Abduction*, *supra*. In order to implement the Convention, Congress enacted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 *et seq*., which establishes procedures for requesting return of a child abducted to the United States.[4] In so doing, Congress found that "concerted cooperation pursuant to an international agreement" and "uniform international interpretation of the Convention" were necessary to combat international child abduction. 42 U.S.C. 11601(a)(3) and (b)(3)(B).

ICARA authorizes "[a]ny person" seeking return of a child pursuant to the Convention to file a petition for relief in state or federal court. 42 U.S.C. 11603(b). The court "shall decide the case in accordance with the Convention." 42 U.S.C. 11603(d). A child determined to have been wrongfully removed is to be "promptly returned," unless the party opposing return establishes the applicability of one of the Convention's "narrow exceptions." 42 U.S.C. 11601(a)(4), 11603(e)(2). Those exceptions—which include situations in which the child

[4] As required by Article 6 of the Convention, ICARA also provides for a "Central Authority for the United States," to be designated by the President. 42 U.S.C. 11606(a). Under the Convention, each Central Authority is charged with "promot[ing] co-operation amongst the competent authorities in their respective States" and performing various duties, including facilitating voluntary returns and providing legal and investigative resources. Convention Art. 7. The Office of Children's Issues in the Bureau of Consular Affairs in the State Department serves as the Central Authority for the United States. See 22 C.F.R. 94.2.

would face a "grave risk" of harm upon his or her return, Convention Art. 13(b), the child is old enough to object, *id.* Art. 13, or return would violate "fundamental principles" of the requested State, *id.* Art. 20—may be raised as affirmative defenses to the return of the child.[5] 42 U.S.C. 11603(e)(2).

2. Petitioner is a British subject who married respondent, a United States citizen, in England in 1992. Pet. App. 1a. In 1995, while living in Hawaii, the couple had a child, A.J.A. *Id.* at 1a, 16a. Eventually, petitioner and his family moved to Chile. *Id.* at 1a. In March 2003, petitioner and respondent separated, and they subsequently litigated various custody and visitation issues in the Chilean family courts. *Id.* at 1a-2a. As relevant here, the courts granted respondent daily care and control of A.J.A. and accorded petitioner "direct and regular" visitation rights, including a full month of summer vacation. *Id.* at 2a, 16a-17a. The courts also entered, at respondent's request, a *ne exeat* order that prohibited either parent from removing A.J.A. from Chile without the other's consent. *Id.* at 17a.[6]

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[5] Domestic custody and relocation law is animated by the same principles as the Convention, and contemplates similar results. The Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), 9 U.L.A. §§ 201- 202 (1999), provides that a court that makes an initial custody determination maintains exclusive and continuing jurisdiction over that determination. The UCCJEA also attempts to deter interstate child abduction by providing that courts generally must recognize and enforce, by any available remedy, existing custody and visitation decrees entered in other jurisdictions, *id.* § 303.

[6] Petitioner also held a *ne exeat* right under a Chilean statute that requires authorization from a parent having visitation rights before the other parent may take a child out of Chile. See Pet. 4 (citing Minor's Law 16,618 art. 49 (Chile)); Pet. App. 61a; see also *Villegas Duran* v. *Arribada Beaumont*, 534 F.3d 142, 147-148 (2d Cir. 2008) (characteriz-

In August 2005, respondent removed A.J.A. from Chile without petitioner's consent. At the time, petitioner was seeking to expand his rights with respect to A.J.A., and several motions were pending before the Chilean family court. Subsequently, petitioner hired a private investigator and located his son in Texas. Pet. App. 2a.

3. Petitioner commenced this action in the District Court for the Western District of Texas in May 2006, seeking to have A.J.A. returned to Chile pursuant to the Convention and ICARA. Pet. App. 2a-3a, 17a. The district court denied the request. *Id.* at 15a. The court acknowledged that respondent's removal of A.J.A. without petitioner's consent "violated and frustrated the Chilean court's order." *Id.* at 19a-20a, 24a. The court concluded, however, that the removal was not "wrongful" within the meaning of the Hague Convention because petitioner's *ne exeat* right did not constitute a right of custody under the Convention. *Id.* at 26a.

The court of appeals affirmed. Pet. App. 1a-14a. The court observed that the courts of appeals are divided on the question whether a *ne exeat* right constitutes a "right[] of custody" for purposes of the Convention. *Id.* at 6a-7a. As the court noted, three courts have concluded that a *ne exeat* right is not a custody right. See *Fawcett* v. *McRoberts*, 326 F.3d 491, 500 (4th Cir.) (holding that a *ne exeat* right was simply a "limitation on the custodial parent's right to expatriate his child" and therefore not a right of custody) (citation omitted), cert. denied, 540 U.S. 1068 (2003); *Gonzalez* v. *Gutierrez*, 311 F.3d 942, 948-949 (9th Cir. 2002) (holding that a *ne exeat*

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ing Minor's Law 16,618 art. 49 as conferring a *ne exeat* right), petition for cert. pending, No. 08-775 (filed Dec. 12, 2008).

right was not custodial because the parent holding it could not "direct with any specificity where the children" would live); *Croll* v. *Croll*, 229 F.3d 133, 138-139 (2d Cir. 2000) ("custody is something other and more than a negative right or veto"), cert. denied, 534 U.S. 949 (2001). The Eleventh Circuit, the court below noted, has "reached the opposite conclusion." Pet. App. 6a-7a (footnote omitted); see *Furnes* v. *Reeves*, 362 F.3d 702, 720 (because of *ne exeat* right, parents "share a divided right to determine [the child's] place of residence"), cert. denied, 543 U.S. 978 (2004). The court of appeals also stated that "foreign courts disagree regarding whether *ne exeat* rights are 'rights of custody' within the meaning of the Hague Convention." Pet. App. 11a.

Adopting the Second Circuit's analysis in *Croll*, the Fifth Circuit held in this case that petitioner was not entitled to have A.J.A. returned to Chile, because the *ne exeat* right was only a "partial power" that gave petitioner "a veto" over A.J.A.'s country of residence, but not a "righ[t] to determine where in Chile his child would live." Pet. App. 7a-8a, 13a. The court also emphasized the Chilean courts' grant of physical custody to respondent, and determined that petitioner possessed only rights of access, not rights of custody. *Id.* at 13a-14a. Under the Convention, the court concluded, petitioner's access rights could not provide a basis for ordering the return of the child to Chile. *Ibid.*

DISCUSSION

The court of appeals incorrectly held that petitioner's *ne exeat* right does not constitute a "right[] of custody" within the meaning of the Hague Convention. Understanding a *ne exeat* right as a "right[] of custody" best gives effect to the Convention's broad definition of cus-

tody rights, which expressly includes the "right to determine the child's place of residence." Convention Art. 5(a). That result also furthers the Convention's purpose of protecting from interference all of the ways in which parents can be accorded control over decisions affecting a child's care and residence.

Because the court of appeals' decision deepens the disagreement among the circuit courts on the proper characterization of the *ne exeat* right, and deviates from the view of a majority of courts in States parties that have considered the issue, the petition for a writ of certiorari should be granted.

A. The Court Of Appeals Erred In Holding That A *Ne Exeat* Right Is Not A Right Of Custody

1. a. Under the Convention, a removal is wrongful if it is a breach of "rights of custody attributed to a person * * * either jointly or alone." Convention Art. 3(a). The Convention defines "rights of custody" expansively, stating that they "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." See *id.* Art. 5(a). The definition is purposefully phrased in inclusive, rather than exhaustive, language: the Convention seeks "to protect *all* the ways in which custody of children can be exercised." *Explanatory Report* para. 71.[7] Consequently, the definition of custody under the Convention is an "autonomous concept," Hague Con-

[7] Because the *Explanatory Report* is the "official history" of the Convention and "a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it," 51 Fed. Reg. at 10,503, it is proper to look to the *Explanatory Report* to illuminate the meaning of the Convention's text. See *Air France* v. *Saks*, 470 U.S. 392, 400 (1985).

ference on Private International Law, *Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 29 I.L.M. 219, ¶ 9, at 222 (1990),[8] and may be broader than any participating country's domestic conception of custody. See *C.* v. *C.*, [1989] 1 W.L.R. 654, 658 (Eng. C.A.) (Butler-Sloss, L.J.); *In re D*, [2007] 1 A.C. 619, 635 (H.L.) (U.K.); see also *Furnes* v. *Reeves*, 362 F.3d 702, 711 (11th Cir.), cert. denied, 543 U.S. 978 (2004).

The *ne exeat* right is a "right[] of custody" under Article 5(a) because it is a joint "right to determine the child's place of residence." See *Furnes*, 362 F.3d at 714-716, 719-722; see also *Croll*, 229 F.3d at 144-154 (Sotomayor, J., dissenting). A parent who holds a *ne exeat* right has the ability to decide whether or not the child may be taken outside of the country of habitual residence, and thus the right to share in the decision as to where the child will reside. See *Furnes*, 362 F.3d at 715. Inherent in that right, moreover, is the ability to take part in more specific decisions about the child's residence. In agreeing to relocation outside the country, a parent with a *ne exeat* right may impose conditions on the relocation, thereby having a say in which new country, or community within that country, a child will reside. See *id.* at 719-721; *C.*, 1 W.L.R. at 663 (Neil, L.J.)

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[8] The multilateral Special Commission to Review the Operation of the Hague Convention (Special Commission) is organized by the Permanent Bureau of the Hague Conference on Private International Law. It serves as a forum for the States parties to meet and review the operation of the Convention. The Special Commission's reports are issued after each meeting, and express the consensus views of the participating States parties. The United States has participated in each Special Commission meeting since the Commission's inception.

("[T]his right to give or withhold consent[,] * * * coupled with the implicit right to impose conditions, is a right to determine the child's place of residence.").

In according a parent effective control over the country in which the child will grow up, a *ne exeat* order also gives the parent a substantial say in the child's care and development. The choice of country will determine everything from the child's primary cultural identity—the languages she speaks, the games she plays—to the character of the schools that she attends and the opportunities that will be open to her as an adult. The *ne exeat* right thus confers on the parent significant, if indirect, "decision-making authority over the child's care." *Furnes*, 362 F.3d at 716 (By holding a *ne exeat* right, "Plaintiff Furnes effectively can decide that [the child] will *be Norwegian.*").

Protection of the *ne exeat* right as a right of custody also effectuates the parties' intent in crafting the Convention's wrongful removal provisions. A *ne exeat* right acts as a limitation on the custody rights of the parent with physical custody, permitting that parent to exercise her custody rights only in the home country, and requiring her to obtain the approval of the *ne exeat* holder before relocating to another. See *Croll*, 229 F.3d at 148 (Sotomayor, J., dissenting); *Sonderup* v. *Tondelli*, 2000(1) Constitutional Court of South Africa 1171, at para. 25 (effect of the *ne exeat* order was that "the mother was entitled to exercise her rights of custody * * * only in British Columbia"). A violation of a *ne exeat* order is thus a wrongful attempt to expand one's custody rights at the expense of the other parent's joint decision-making authority—just the kind of harm that the Convention aims to prevent. See *Explanatory Report* paras. 13, 15, 71; *Croll,* 229 F.3d at 146-147 (Soto-

mayor, J., dissenting); see *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999) (*El Al*) ("[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.") (brackets in original) (quoting *Air France* v. *Saks*, 470 U.S. 392, 399 (1985)).

Consistent with the foregoing principles, the Department of State, whose Office of Children's Issues serves as the Central Authority for the United States under the Convention, considers the Convention to include *ne exeat* rights among the protected "rights of custody."[9]

b. The court of appeals' holding that a *ne exeat* right is not a custody right was based on several incorrect conclusions regarding the Convention's text and scope. First, the court adopted *Croll*'s reasoning that the Convention protects only those persons who possess the full "bundle of rights relating to custody, such that possessing only one of the rights [does] not amount to having 'rights of custody.'" Pet. App. 7a-8a (quoting *Croll*, 229 F.3d at 138-139). But that conclusion fails to acknowledge the ways in which the Convention contemplates that the "bundle" of custody rights may be divided. See *Furnes*, 362 F.3d at 714. The Convention provides that custody rights may be held jointly, Convention Art. 3(a), so that removal of a child by one holder of joint custody is wrongful even though the other joint holder by definition does not possess unilateral custody rights. *Explanatory Report* para. 71. In addition, the *Explanatory Report* indicates that a parent possessing only some, but not all, custody rights may seek a child's return. *Id.*

[9] Although the State Department has not previously memorialized its interpretation, this position represents the Department's "considered judgment on the matter." *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997); see note 12, *infra*.

para. 78 (parent may seek return even if the child possesses the right to determine his own residence, because "the right to decide a child's place of residence is only one possible element of the right to custody"). The Convention thus does not distinguish between parents who possess full, unilateral custody over a child, and those who possess only more particular custody rights. Rather, the Convention is intended to encompass *all* of the ways in which the domestic law of the various parties may create—and divide—rights of custody. *Id.* para. 67; see *Furnes*, 362 F.3d at 716 & n.12.

Second, the court of appeals characterized the *ne exeat* right as a mere "veto right," Pet. App. 13a, rather than an affirmative right to "determine" residence. See *Croll*, 229 F.3d at 139. But given the Convention's recognition of joint custodial arrangements, this reasoning is but a mistaken attempt to pry apart two sides of one coin. To be sure, a *ne exeat* right can be framed as a veto right that prevents the other parent from removing a child from the country. But a *ne exeat* right can be understood no less accurately as an affirmative right to participate with the other parent in the determination of the country in which the child should reside. The "veto" implies and effectuates a joint right of control, and as just noted, the Convention contemplates that joint rights may count as custodial.

Third, the court viewed the *ne exeat* right as conferring insufficient control over "residence" to qualify as a right of custody because it did not encompass the right to determine where the child would live *within* the country. Pet. App. 8a, 12a-13a. But the Convention provides no basis for construing the "right to determine the child's place of residence" so narrowly. The phrase "place of residence" can connote both a specific location

within a country and the very country itself. The Convention's essential focus is on the country as a place of residence, given that its entire purpose is to prevent the wrongful removal of children across international borders. Convention Art. 1(a); see *Explanatory Report* paras. 15, 56. And, as noted above, the choice of country in which a child will reside is likely to have a significant impact on the child's life and care. Therefore, "the only logical construction of the term 'place of residence' in the Convention" is that it "necessarily encompass[es] decisions regarding whether [a child] may live outside of" the home country. *Furnes*, 362 F.3d at 715; see *C.*, 1 W.L.R. at 658.

Finally, the court relied on what it regarded as the Convention's sharp distinction between "rights of custody" and "rights of access." See Pet. App. 14a; *id.* at 12a. This distinction indeed exists, but the court erred in assimilating the *ne exeat* right to a right of access. See *Croll*, 229 F.3d at 145 (Sotomayor, J., dissenting). Unlike a *ne exeat* holder, a parent with access rights has only visitation rights, 42 U.S.C. 11602(7); the parent does not have the right to participate in decisions concerning the child's country of residence. This difference is fundamental under the terms of the Convention. It explains why the *ne exeat* holder, but not the parent with simple access rights, can invoke the Convention's remedy of return.[10]

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[10] The *Croll* court also denied return of the child in part because it assumed that if return were ordered, the child would be returned to a parent "whose sole right—to visit or veto—imposes no duty to give care." 229 F.3d at 140. The return contemplated by the Convention, however, is a return to the child's country of habitual residence—not a return to a particular person. An abducting parent who has had physical custody is free to return with the child to the country of habitual

2. The court of appeals' decision also deviates from the postratification understanding of a majority of States parties to the Convention. In interpreting the language of a treaty, "the opinions of our sister signatories [are] entitled to considerable weight." *Saks*, 470 U.S. at 404 (citation omitted); *El Al*, 525 U.S. at 175-176 & n.16 (relying on foreign intermediate and highest court decisions). That is particularly so here, given the Convention's and Congress's emphasis on the importance of uniformity in interpreting the Convention.

Courts in the United Kingdom, Australia, South Africa, New Zealand, and Israel have adopted the view that a *ne exeat* right creates a right of custody. See, *e.g.*, *C.*, 1 W.L.R. at 658; *A.J.* v. *F.J.*, [2005] ScotCS CSIH_36; *Secretary for Justice* v. *Abrahams, ex parte Brown*, [2001] FP 069/134/00 (Fam. Ct.) (Taupo, N.Z.) (parent with guardianship rights under South African law had "right to determine children's place of residence" because guardianship rights included *ne exeat* right); *In the Marriage of Resina*, [1991] FamCA 33, para. 26 (Austl. Fam.); *Sonderup* v. *Tondelli*, *supra*, para. 25 (holding that *ne exeat* clause in interim custody order constituted custody right); C.A. 5271/92 *Foxman* v. *Foxman* [1992] (H.C.) (Isr.).

One court in another signatory nation has held that a *ne exeat* right does not constitute a right of custody.[11]

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residence, or to petition the courts of that country for an adjustment of custody rights. See *Furnes*, 362 F.3d at 717.

[11] In addition, the Supreme Court of Canada has twice stated, in dicta, that a *ne exeat* right may not be a right of custody. See *Thomson* v. *Thomson*, [1994] 119 D.L.R. (4th) 253; *D.S.* v. *V.W.*, [1996] 134 D.L.R. (4th) 481. Neither case had before it a controversy involving a parent who violated a *ne exeat* order after a final custody order had issued. See *In re D*, *supra* (characterizing statements of Supreme Court of

In *Ministère Public* c. *Mme. S., D.S.*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Perigueux, Mar. 17, 1992, D.S. Jur. 1992 (Fr.), the court refused to order return of children to the United Kingdom because it viewed the *ne exeat* order as a mere limit on the mother's exercise of her custody rights, and also as an impermissible restriction on the mother's right to expatriate under the European Convention for the Protection of Human Rights and Fundamental Freedoms. That decision, however, is inconsistent with an earlier French decision, see *Ministère Public c. M.B.*, Cour d'appel [CA] [regional courts of appeal] Aix-en-Provence, Mar. 23, 1989, which held that a *ne exeat* right is a custody right that triggers the Convention's return remedy.

Mme. S., moreover, has been recognized by the Special Commission of States parties as out of step with the prevailing view of the Convention. The Special Commission noted that the court's conclusion that a *ne exeat* right "constituted only a 'modality' attached to the right of custody and not a situation of joint custody, gathered no support." *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduc-*

Canada as dicta). In *Thomson*, the court ordered the return of a child based on violation of a *ne exeat* clause in an interim custody order, but suggested that a final *ne exeat* order would "raise[] quite different issues" because such an order is "usually intended" to protect access rights. In *D.S.*, the petitioning parent had no *ne exeat* right, but asserted that a similar restriction was implicit in a court order. The court held that a return remedy was not available, referring to *Thomson*'s statement that violations of removal restrictions concern only access rights, not custody rights.

tion, Question 5 (1993).[12] Moreover, the Commission noted, *Mme. S.*'s holding "had been rejected by the *Cour d'appel d'Aix-en-Provence*, as well as courts in Austria, Australia, the United Kingdom and the United States of America." *Ibid.*

Thus, the prevailing view among courts in States parties to have considered the issue is that a *ne exeat* right constitutes a right of custody. See *In re D*, *supra* (surveying case law, and noting that opinion in common-law countries was virtually "united"); Hague Conference on Private International Law, *Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice* 43 (2008) <http://www.hcch.net/upload/guidecontact_e.pdf> ("preponderance of the case law" holds that *ne exeat* is a custody right, and the opposing view "does not command widespread support").

B. There Is Disagreement Among The Circuits As To Whether A *Ne Exeat* Right Is A Custody Right

This Court's review is warranted to resolve the disagreement among the courts of appeals regarding whether a *ne exeat* right is a custody right under the Convention. The court below followed decisions of the Second, Fourth, and Ninth Circuits in holding that *ne exeat* orders do not confer custody rights. Pet. App. 6a-7a; see *Fawcett* v. *McRoberts*, 326 F.3d 491, 500 (4th Cir.), cert. denied, 540 U.S. 1068 (2003); *Gonzalez* v. *Gutierrez*, 311 F.3d 942, 948 (9th Cir. 2002); *Croll*, 229 F.3d

[12] The Department of State has informed this Office that its representatives at the Special Commission meeting were in agreement that a *ne exeat* right should be considered a custody right.

at 138-139. The Eleventh Circuit has reached the opposite conclusion.[13] See *Furnes,* 362 F.3d at 719.

To be sure, as respondent correctly points out (Br. in Opp. 10-11), the Eleventh Circuit's holding that the petitioning father possessed custody rights under the Convention was based not only on his *ne exeat* right, but also on his rights of "joint parental responsibility" under Norwegian law. *Furnes*, 362 F.3d at 712-713. Nevertheless, the *Furnes* court unambiguously concluded, expressly "diverg[ing] from" other courts of appeals, *id.* at 719, that the "*ne exeat* right under Norwegian law is a right of custody under the Convention," *id.* at 716. The court therefore found it unnecessary to determine definitively whether the father's "joint parental responsibility" constituted a custody right. See *id.* at 714, 719. As a result, the court below correctly described *Furnes* as creating a "[c]ircuit [s]plit," Pet. App. 6a, by holding "that a *ne exeat* right alone is sufficient to constitute a custody right," *id*. at 10a (footnote omitted).

C. The *Ne Exeat* Issue Is An Important Question That Merits This Court's Review, And This Case Is A Suitable Vehicle

1. The question presented is important because it implicates the United States' ability to fulfill its obligations as a party to the Convention. Uniformity in application is key to the Convention's goals of deterring international parental abduction and achieving the prompt

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[13] The state courts to consider the issue have agreed with the Eleventh Circuit that a *ne exeat* right is a right of custody under the Convention. See *Janakakis-Kostun* v. *Janakakis*, 6 S.W.3d 843, 848-849 (Ky. Ct. App. 1999), cert. denied, 531 U.S. 811 (2000); *D'Assignies* v. *Escalante*, No. BD 051876 (Cal. Super. Ct. Dec. 9, 1991) <http://www.hcch.net/incadat/fullcase/0198.htm>.

return of abducted children. See Convention Art. 1; *Explanatory Report* para. 16. In enacting the Convention's implementing legislation, Congress explicitly recognized "the need for uniform international interpretation of the Convention," 42 U.S.C. 11601(b)(3)(B). The court of appeals' decision and the other decisions following *Croll* have grafted an unduly narrow concept of custody rights onto the Convention, thereby rendering the United States an outlier among States parties on the *ne exeat* issue, causing disparities in interpretation that threaten to undermine the efficacy of the Convention, and creating an incentive for abducting parents who violate *ne exeat* orders to bring their children to the United States. As a leader in negotiating the Convention and overseeing its operation, the United States has a strong interest in avoiding those consequences and in promoting comity in the application of the Convention.

The disagreement among domestic courts—which the court of appeals' decision deepens—also results in inconsistent application of the Convention within the United States. The United States is among the States parties that receive the highest yearly number of applications for the return of abducted children. See Hague Conference on Private International Law, *A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* 13 (2007). Especially because the United States is a primary destination for parents who have abducted their children, the United States Central Authority needs the benefit of a settled and uniform interpretation of the Convention, so that it can perform its functions. See Convention Art. 7; 42 U.S.C. 11606; see also Office of Children's Issues, U.S. Dep't of State, *Incoming Cases: Frequently Asked*

Questions (visited May 27, 2009) <http://travel.state.gov/family/abduction/incoming/incoming_4183.html> (Central Authority offers assistance and various resources to individuals seeking the return of children abducted to the United States).

In addition, the disagreement among the circuits provides abducting parents with the ability to forum shop among United States jurisdictions in order to obtain the most favorable rule. Here, for instance, had respondent brought her son to Florida instead of Texas, he would have been subject to return pursuant to *Furnes*. This disuniformity within the United States undermines the Convention's purpose of preventing abducting parents from obtaining any benefit by choosing a favorable forum to which to take the child. See *Explanatory Report* para. 71.

2. This case presents a suitable vehicle for resolving the question whether a *ne exeat* right is a custody right. Although respondent argues that the *ne exeat* right under Chilean law is not absolute because a Chilean court may override an unreasonable exercise of the right, both courts below construed the Chilean statute and the court's *ne exeat* order as conferring on petitioner the "authority" to prevent removal of his child from the country. Pet. App. 13a; *id.* at 19a-20a, 22a-23a; *Villegas Duran* v. *Arribada Beaumont*, 534 F.3d 142, 147-148 (2d Cir. 2008) (characterizing *ne exeat* right conferred by Chilean statutory law as "the right to determine whether the child will leave the country"), petition for cert. pending, No. 08-775 (filed Dec. 12, 2008). And even if a court does have the power to override one parent's refusal to consent to the child's removal, the *ne exeat* right remains a right of custody. In these circumstances, the *ne exeat* right at the least forces the parent who wishes

to relocate to petition the court for permission, rather than to do so unilaterally. The *ne exeat* right thus continues to give the holder a meaningful ability to participate in the decision whether any relocation should occur. That the *ne exeat* right may not be permanent and unconditional—either because a court can override its exercise or because a court can modify the order granting it in the first place—is not determinative for purposes of the Convention. A right of custody, whether a *ne exeat* right or any other kind, need not be unlimited or unalterable to qualify for the protection that the Convention offers.

Respondent also points out (Br. in Opp. 22-25) that the district court "never reached the question of whether Petitioner was actively 'exercising' any 'rights of custody' he may have had at the time of removal." That is true, but not surprising. The court never reached that question because it is most logically asked *after* a court determines that the petitioning parent has custody rights to exercise. In the event that this Court determines that petitioner's *ne exeat* right is a custody right, the question whether petitioner exercised that right could be addressed on remand. In any event, the Convention permits return when the custody rights "would have been so exercised but for the removal," Convention Art. 3(b), and the evidence here strongly suggests that petitioner would have exercised his *ne exeat* right but for the wrongful removal. See *Furnes*, 362 F.3d at 724. It was respondent's failure to comply with the *ne exeat* clause that actually prevented petitioner from exercising his right, either by consenting to the relocation (with or without conditions) or by withholding consent. *Id.* at 722-723.

Finally, respondent asserts (Br. in Opp. 22), in one sentence, that the possibility of a res judicata defense makes this case an unsuitable vehicle. The court below did not address that argument. If a res judicata issue exists and was properly preserved, it would remain open on remand from this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMES H. THESSIN
Deputy Legal Adviser
KEITH LOKEN
Assistant Legal Adviser for Private International Law
MARY CATHERINE MALIN
Assistant Legal Adviser for Consular Affairs
MARY HELEN CARLSON
JAMES L. BISCHOFF
Attorney-Advisers
Department of State

ELENA KAGAN
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
TONY WEST
Assistant Attorney General
GINGER D. ANDERS
Assistant to the Solicitor General
MICHAEL JAY SINGER
HOWARD S. SCHER
Attorneys

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