No. 12-820

In the Supreme Court of the United States

MANUEL JOSE LOZANO, PETITIONER

v.

DIANA LUCIA MONTOYA ALVAREZ

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, 100, provides that "[w]here a child has been wrongfully removed" from one Contracting State to another or wrongfully retained in a Contracting State and, at the date of the commencement of administrative or judicial proceedings, "a period of less than one year has elapsed" from the date of the wrongful removal or retention, the child shall be "return[ed]" "forthwith." The Convention further provides that "even where the proceedings have been commenced after the expiration of the period of one year," the court or administrative body "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." *Ibid.*

The question presented is whether equitable tolling applies to the one-year period provided in Article 12.

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INTEREST OF THE UNITED STATES

The question presented in this case is whether the one-year period during which a country must return a child "forthwith" under the Hague Convention on the Civil Aspects of International Child Abduction, *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (the Hague Convention or Convention), without any inquiry into whether the child is settled in her new environment, is subject to equitable tolling. As a party to the Convention, the United States has a substantial interest in the manner in which the Convention is interpreted and applied by the courts of this country. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of the case.

STATEMENT

1. The Hague Convention "was adopted in 1980 in response to the problem of international child abductions during domestic disputes." *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1989 (2010); see Hague Convention, 51 Fed. Reg. 10,498 (Mar. 26, 1986).[1] To facilitate the international cooperation that is necessary to deter and remedy such abductions, the Convention establishes uniform legal standards and identifies remedies to be employed when a child is abducted from one country to another. See Convention Introductory Declarations, Art. 1.

Subject to certain defenses, if a child has been wrongfully removed or retained in violation of a parent's custody rights, and "a period of less than one year has elapsed from the date of the wrongful removal or retention" to "the date of the commencement of the proceedings" for return of the child, authorities in the State where the child is located must "order the return of the child forthwith." Convention Art. 12.[2] When "the proceedings have been commenced after the expiration of the period of one year," the court "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new

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[1] The Convention is reprinted in 51 Fed. Reg. at 10,498-10,502, together with an analysis prepared by the Department of State in connection with the Senate's consideration of the Convention, see *id.* at 10,494, 10,503-10,516.

[2] "Return is not required if the parent seeking it was not exercising custody rights at the time of removal or had consented to removal, if there is a 'grave risk' that return will result in harm, if the child is mature and objects to return, or if return would conflict with fundamental principles of freedom and human rights in the state from which return is requested." *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1021 (2013); see Convention Arts. 13, 20.

environment." *Ibid.* The Convention additionally establishes that the provisions concerning return of the child "do not limit the power of a judicial or administrative authority to order the return of the child at any time." Art. 18. "The Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence." *Abbott*, 130 S. Ct. at 1995. The return remedy therefore is intended to "leave[] custodial decisions to the courts of the country of habitual residence." *Id.* at 1989.

To implement the Convention, Congress enacted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 *et seq.*, which establishes procedures for seeking return of a child abducted to the United States. See *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1021-1022 (2013). Under ICARA, a person who seeks a child's return from the United States may file a petition in state or federal court, and the court must "decide the case in accordance with the Convention." 42 U.S.C. 11603(a), (b) and (d). In passing ICARA, Congress made clear that "[t]he international abduction or wrongful retention of children is harmful to their well-being" and that "[p]ersons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention." 42 U.S.C. 11601(a)(1) and (2).

As required by Article 6 of the Convention, ICARA provides for a "Central Authority for the United States," to be designated by the President. 42 U.S.C. 11606(a). The Office of Children's Issues in the Bureau of Consular Affairs in the Department of State has been designated as the Central Authority for the United States. See 22 C.F.R. 94.2. The Central Au-

thorities are to cooperate with one another to secure the prompt return of children, including by taking all appropriate measures to discover the whereabouts of abducted children. Convention Art. 7.

2. Petitioner and respondent are the parents of a child who was born in England in 2005. Pet. App. 4a-5a. In November 2008, respondent left petitioner and moved into a women's shelter in England with the child. *Id.* at 5a-6a. In July 2009, respondent and the child left the United Kingdom and eventually traveled to the United States. Since then, they have lived in New York with respondent's sister and her family. In New York, the child has been enrolled in school and as of 2011 was in kindergarten. The child has developed friendships, has grown close to respondent's sister and extended family, attends church, and takes ballet classes. The child has also been obtaining treatment for post-traumatic stress disorder and has improved substantially. *Id.* at 6a-7a.

After respondent's departure, petitioner unsuccessfully attempted to locate his child by contacting a sister of respondent's living in London (who denied any knowledge of respondent's or the child's whereabouts) and various police and government officials. Pet. App. 8a. In July 2009, petitioner initiated proceedings in England, seeking orders that would enable him to locate and contact the child. *Id.* at 8a, 58a. In March 2010, petitioner filed an application with the Central Authority for England and Wales, seeking the child's return. *Id.* at 8a. In that application, petitioner noted that respondent had threatened to take the child to the United States, where they could live with respondent's siblings. *Id.* at 59a & n.10. The applica-

tion was sent to the Central Authority for the United States. *Id.* at 8a, 59a & n.10.

3. a. In November 2010, 16 months after respondent removed the child from the United Kingdom, petitioner commenced this action, seeking to have the child returned to the United Kingdom pursuant to the Convention and ICARA. Pet. App. 8a-9a.

Respondent did not dispute that she had wrongfully removed the child from the United Kingdom within the meaning of the Convention. Pet. App. 78a-80a. She argued, however, that the court was not required to order the child's return under Article 12 because the return petition was filed more than one year after the child's abduction and "the child is now settled in [her] new environment." Art. 12; Pet. App. 81a, 92a-94a.

Petitioner contended that under a theory of equitable tolling, the court should extend the one-year period by seven months, the amount of time that petitioner alleged that he did not "kn[o]w that the child was probably in New York," and that his petition should therefore be treated as though it had been filed within a year of the child's removal from the United Kingdom. Pet. App. 102a; see *id.* at 95a. Applying that calculus, petitioner argued, the court would be obligated to order the child's return forthwith, without regard to whether the child is now settled in the United States. *Ibid.*

b. At an evidentiary hearing, the parties presented evidence concerning, among other things, the child's settlement in the United States and petitioner's claim that the one-year period under Article 12 should be extended by seven months under a theory of equitable tolling. Pet. App. 43a, 60a-64a, 95a, 102a-103a.

The district court denied petitioner's request for the child's return. Pet. App. 35a-36a, 37a-38a. The court issued a written opinion in August 2011. *Id.* at 39a-115a. The court held that "[t]he one-year period is not a statute of limitations and, therefore, it is not subject to equitable tolling." *Id.* at 99a. The court also observed that "even if equitable tolling could apply to Convention petitions," *id.* at 101a, an extension of the one-year period would not be warranted in this case because respondent "did not conceal the child to an extent that would warrant equitable tolling," *id.* at 103a.

The district court then concluded, based on evidence of the child's family, social, and educational ties to New York, that the child had become settled in her new environment. Pet. App. 104a-111a. The court stated that Article 12 did not bar it from ordering the return of a settled child, *id.* at 100a, but it concluded that ordering return in this case would be inappropriate in light of the child's strong connection to New York and the lack of any countervailing interest warranting return. *Id.* at 112a-114a.

4. The court of appeals affirmed. Pet. App. 1a-34a.

The court of appeals held that "the one-year period set out in Article 12 is not subject to equitable tolling." Pet. App. 17a. It explained that Article 12's one-year period is not a statute of limitations that bars the filing of a petition after the year has elapsed. Instead, expiration of the one-year period "merely permits courts to consider" whether the child is settled in her new environment in deciding whether to order return. *Id.* at 18a-19a. The court further explained that because Article 12 is designed to permit courts to "take

into account a child's interest in remaining in the country" if a petition is filed more than one year after the child's removal, extending the one-year period "would undermine its purpose." *Id.* at 24a.

The court found support for its conclusion in the text and drafting history of the Convention. Pet. App. 17a-24a. Noting that Article 12's one-year period runs "from the date of the wrongful removal or retention," the court observed that "if the state parties to the Convention wished to take account of the possibility that an abducting parent might" conceal a child's whereabouts, "[i]t would have been a simple matter" to do so—by having the one-year period run "from the date that the petitioning parent learned [or, could reasonably have learned] of the child's whereabouts." *Id.* at 17a n.8 (brackets in original). The court further noted that "the drafting history demonstrates that this was a conscious choice, and that the drafters specifically rejected a proposal to have a different date trigger the start of the one-year period when the child's whereabouts had been concealed." *Ibid.*; see *id.* at 21a-23a (reviewing drafting history). The court also cited the position of the United States as amicus curiae, that the one-year period is not subject to equitable tolling, noting that the Executive Branch's interpretation of the Convention is entitled to "great weight." *Id.* at 24a-25a.

Finally, the court of appeals observed that equitable tolling was not necessary to ensure that abducting parents do not gain an advantage by concealing the child's whereabouts. Pet. App. 19a. The court explained that Article 12 permits a court to order return even if the child has become settled in her new environment, and that a court may take equitable consid-

erations into account in deciding whether to do so. *Id.* at 18a-19a.

SUMMARY OF ARGUMENT

A. Article 12 of the Hague Convention requires the return of a child "forthwith" if a petition is filed less than one year after a child is wrongfully removed from or retained in another country. That one-year period is not subject to extension based on principles of equitable tolling. The plain text of Article 12 states that the one-year period runs from the date of the wrongful removal or retention, and it makes no provision for extension of that period. The choice of language is significant because the negotiators of the Convention understood that wrongful removal of children will often involve concealment of the child's whereabouts.

The Convention's drafting history demonstrates that the one-year period was a compromise adopted to balance the goal of returning a child forthwith and the prospect that, as time progresses, a child may form attachments to a new environment. The delegations that drafted and adopted this provision intended that the one-year time limit would apply regardless of difficulty in locating the child. Consistent with that determination, the courts of other States Parties that have considered the availability of equitable tolling to extend Article 12's one-year period have uniformly declined to adopt it.

B. The Department of State interprets Article 12 not to permit equitable tolling, but to confer on the court equitable discretion to consider concealment and other equitable factors in deciding whether a settled child should be returned in cases filed more than one year after wrongful removal. That interpretation is entitled to great weight.

Accordingly, even if an abducting parent can establish that a child is now settled, a court retains equitable discretion to order the return of the child. In conducting that equitable assessment, the court could conclude that the abducting parent's conduct in concealing the child (and any other equitable factors) justify returning the child to her country of habitual residence. Article 12 also affords the court discretion to pretermit the "settled" inquiry altogether if the court concludes that the circumstances supporting return are sufficiently forceful to justify ordering return regardless of the outcome of that inquiry. That approach could be appropriate, for example, if the abducting parent's conduct is egregious and scarcely more than a year has passed, if the child is very young, or if the child still has strong ties to her habitual residence.

C. Petitioner's arguments in support of equitable tolling appear to be based on the premise that Article 12's one-year period is a statute of limitations. It is not. Article 12 does not fix a time limit in which a parent may petition a court for the return of a child. Rather, it establishes the permissible substantive scope of a court's inquiry in adjudicating the return petition by permitting consideration of the child's interests—*i.e.*, whether the child is settled in her new environment—after one year has passed since the wrongful removal.

Adopting petitioner's equitable-tolling rule would rebalance the considerations weighed by the negotiators in drafting the Convention by requiring the court to return a child forthwith, regardless of the child's settlement in the new environment, so long as the petitioning parent could show that he had been pursu-

ing his rights diligently and was prevented by some extraordinary circumstance from filing a petition within one year of the child's removal or retention. Such a rule would be inconsistent with the approach adopted in the Convention to limit the period of mandatory return to one year so as to ensure that the child's potential settlement can be taken into account after that time.

Petitioner's further contention that equitable tolling should be applied as a policy matter, to avoid rewarding bad conduct by abducting parents, is unwarranted. Even where a statute of limitations is involved, the question whether equitable tolling applies is a question of statutory interpretation. Here, the compromise adopted in Article 12 is a clear indication that the language negotiated in the Convention was not intended to allow equitable tolling to apply, even in cases of concealment. Additionally, an abducting parent cannot always rely on concealment to resist return because some types of concealment may inhibit a child from forming attachments in a new environment, and concealment could also undermine other defenses the abducting parent could be expected to present, such as the child's objection to return. And because a court retains equitable discretion to order the return of a settled child, abducting parents cannot assume that they can defeat a return petition by concealing the child for a year.

ARGUMENT

THE ONE-YEAR PERIOD UNDER ARTICLE 12 OF THE HAGUE CONVENTION IS NOT SUBJECT TO EXTENSION BASED ON PRINCIPLES OF EQUITABLE TOLLING

A. Article 12 Provides For The Return Of A Child "Forthwith" Only If A Petition Is Filed Within One Year

A central purpose of the Hague Convention is to "secure the prompt return of children wrongfully removed to or retained in any Contracting State." Art. 1; see Introductory Declarations. To accomplish that purpose, the Convention provides that children abducted in violation of a parent's rights of custody should be promptly returned to their country of habitual residence. See Arts. 1, 12. Article 12 requires that a court order the return of a child "forthwith," except in limited circumstances provided in other Articles (see note 2, *supra*), if a petition is filed within one year of the wrongful removal or retention of the child. The Convention also provides, however, that if more than one year has elapsed, the court may consider whether the child is "now settled" in her new environment. Art. 12. That one-year period is not subject to equitable tolling.

1. "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1990 (2010) (citation omitted). The plain language of Article 12 indicates that the one-year period is not subject to extension. Article 12 provides that if a child has been wrongfully removed or retained in violation of a parent's custody rights, and "a period of less than one year has elapsed from the date of the wrongful removal or retention" to "the

date of the commencement of the proceedings" for return of the child, authorities in the State where the child is located "shall order the return of the child forthwith." Convention Art. 12. When "the proceedings have been commenced after the expiration of the period of one year," the court "shall also order the return of the child, unless it is demonstrated that the child is now settled in [her] new environment." *Ibid.*

The one-year period thus runs "from the date of the wrongful removal or retention," and Article 12 makes no provision for an extension of that period. Convention Art. 12. As the court of appeals observed, if the States Parties to the Convention had meant to vary the starting date of the one-year period based on the circumstances of a left-behind parent's locating his or her child, they easily could have adopted a discovery rule—providing for a one-year period running from the date the petitioning parent learned or reasonably could have learned of the child's whereabouts. Pet. App. 17a n.8.

The choice of language is significant because the Convention negotiators fully understood that wrongful removal of a child to a foreign country commonly results in difficulties, often due to concealment, in learning the child's whereabouts. See Elisa Pérez-Vera, *Explanatory Report* in 3 Hague Conference on Private Int'l Law, 14th Sess., Oct. 6-25, 1980, *Actes et Documents de la Quatorzième Session: Child Abduction* 426, paras. 107-108, at 458-459 (Permanent Bureau trans., 1982) (*Actes et Documents*) (acknowledging "difficulties encountered in establishing the child's whereabouts," but stating that the "single time-limit of one year" was the optimal resolution of

competing concerns);[3] see also, *e.g., Replies of the Governments to the Questionnaire* in *Actes et Documents* 61, 88 ("There is a sixth problem which is becoming all too common—the taking and concealment of a child by a parent before or after a custody decree."); *Comments of the Governments on Preliminary Document No. 6* in *Actes et Documents* 215, 231-232 (noting that in many cases, a child's location is unknown at the time of abduction and that some abductors will conceal the child's whereabouts). Given that understanding, one would expect Article 12's text to provide for the running of the one-year period from the date the left-behind parent knew or should have known of the child's whereabouts, or to address tolling in circumstances involving concealment, had the Convention's drafters intended either result.

2. The Convention's drafting history demonstrates that the decision to calculate Article 12's one-year period from the time of a child's removal or retention, rather than from the discovery of the child's whereabouts, was a considered choice made during Convention negotiations. See *Air France* v. *Saks*, 470 U.S. 392, 396, 400 (1985) (noting that because multilateral treaties are negotiated by numerous delegates, "the history of the treaty, [and] the negotiations," may be especially important, and therefore "[i]n interpreting a treaty it is proper * * * to refer to the records of its drafting and negotiation").

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[3] The State Department has described the *Explanatory Report* "as the official history and commentary on the Convention." 51 Fed. Reg. at 10,503. This Court has not decided how much weight the *Explanatory Report* should be accorded. *Abbott*, 130 S. Ct. at 1995.

At the outset of the process of drafting the Convention, a preliminary report prepared for a Special Commission charged by the Hague Conference on Private International Law with studying the problem of international parental kidnapping emphasized that "[t]ime is an important factor in the adjustment of the child to his new situation" and that a "court may find it more difficult to send back a child who has been forced to adjust to his new situation." Adair Dyer, *Report on International Child Abduction by One Parent* in *Actes et Documents* 12, 23-24. Thus, the Special Commission initially suggested that if "an application has been made more than six months after the removal" and the child has been "habitually resident" in the new country for more than one year, a court in the new country should "assume jurisdiction to determine" the proper custody arrangement rather than simply return the child. *Conclusions Drawn from the Discussions of the Special Commission of March 1979 on Legal Kidnapping* in *Actes et Documents* 162, 164.

Consistent with that view, the preliminary draft of the Convention provided that when a parent sought return within six months of the abduction, the court was required to "order the return of the child forthwith." *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera* in *Actes et Documents* 166, 168 (Art. 11). But when the child's location "was unknown," the six months would "run from the date of the discovery," although even then the "total period" could not exceed one year. *Ibid.*

During consideration of that draft, the delegations from the participating nations debated the workability

of a two-tier system and the proper length of each time period. See, *e.g.*, *Comments of the Governments on Preliminary Document No. 6* in *Actes et Documents* 216, 218, 242; *Procès-verbal No. 6* in *Actes et Documents* 283, 288; see also *Procès-verbal No 7* in *Actes et Documents* 290, 291-293. Several delegations expressed concern that abductors would conceal the whereabouts of their children. See, *e.g.*, *Comments of the Governments on Preliminary Document No. 6* in *Actes et Documents* 216. Nevertheless, after a number of delegations expressed the view that determining the "date of 'discovery'" would be difficult, the delegations decided to adopt a single time period that did not vary based on discovery. See *Procès-verbal No 7* in *Actes et Documents* 291-293; *Explanatory Report* para. 108, at 458-459.

During discussion of the appropriate length of that single time period, the United States delegation urged that the period should be long enough to account for the difficulty of locating a child but should also take into account the possibility of the child's assimilation into a new environment after enough time had passed. *Procès-verbal No 7* in *Actes et Documents* 292. Several other delegations expressed concern that a long period of virtually automatic return would fail to consider the child's potentially strong ties with the new environment. *Id.* at 292. The delegations ultimately settled on the one-year period of essentially automatic return ultimately embodied in Article 12. *Id.* at 293. To balance the relevant concerns, the German delegation suggested that even after the "short time-limit of one year" had expired, a State should still be required to return the child unless "the child was now settled in his new environment." *Id.* at 295; see also *Working*

Document No. 25 in *Actes et Documents* 274 (initial proposal). The delegations debated, modified, and ultimately adopted this proposal. See *Procès-verbal No 10* in *Actes et Documents* 314-316 (modification and debate). Under the resulting framework, as described by the United States delegation, the Convention provides for a one-year period in which "no assimilation of the child was presumed to have occurred" and "return could be refused only on the grounds set forth" expressly, *e.g.*, severe risk to the child. *Id.* at 315; see note 2, *supra*. After one year, "assimilation in a new environment [becomes] an open question." *Procès-verbal No 10* in *Actes et Documents* 315.

The one-year period during which return is required, without further inquiry thus represented a compromise between the interest in securing the immediate return of a wrongfully removed child and the interests that may arise when a child develops attachments to a new environment. From the outset, the delegations negotiating the Convention contemplated that after *some* fixed period of time, return would not be mandatory. See *Preliminary Draft Convention* in *Actes et Documents* 168 (Art. 11) (time period running from "date of the discovery" but "total period" could not exceed one year). The negotiators explicitly considered but ultimately rejected a two-tier framework in which the period for obligatory return would be extended if there were difficulty locating the child. See *Procès-verbal No 7* in *Actes et Documents* 291-293. When the negotiators adopted the single time limit, they plainly understood that the time limit would apply regardless of difficulty in locating the child. See, *e.g.*, *id.* at 292-293, 295.

3. The post-ratification understanding of States Parties to the Convention reinforces the conclusion that the one-year period is not subject to equitable tolling. See *Abbott*, 130 S. Ct. at 1993 ("In interpreting any treaty, [t]he opinions of our sister signatories * * * are entitled to considerable weight.") (internal quotation marks omitted; brackets in original); 42 U.S.C. 11601(b)(3)(B) ("recogniz[ing]" "the need for uniform international interpretation of the Convention").

To our knowledge, the courts of other States Parties that have considered invocation of equitable tolling to extend Article 12's one-year period of automatic return have uniformly declined to adopt it. In *Cannon* v. *Cannon*, [2004] EWCA (Civ) 1330, [2005] 1 W.L.R. 32 (Eng.), the Court of Appeal for England and Wales stated that even where the "abductor may have caused or contributed to the period of delay that triggers [Article 12's 'now settled' defense]," it "would not support a tolling rule." *Id.* at 48. The court explained that "disregard[ing]" the "period gained by concealment" would be "too crude an approach which risks * * * produc[ing] results that offend what is still the pursuit of a realistic Convention outcome." *Id.* at 48-49. Courts in Canada, Hong Kong, and New Zealand have likewise not tolled Article 12's one-year period. *Kubera* v. *Kubera*, 2010 BCCA 118, para. 64 (Can.); *A.C.* v. *P.C.*, HCMP001238/2004, 2005 WL 836263 paras. 51-55 (C.F.I.) (Legal Reference System) (H.K.); see also *Secretary for Justice* v. *H.J.*, [2006] NZSC 97, paras. 21-24, 69 (SC) (N.Z.).

The only case that petitioner even attempts to fit into the box of equitable tolling (Pet. Br. 47-48) is *In re H* [2000] EWHC (Fam) 2 FLR 51, [2000] 3 FCR 404

(Eng.), http://www/hcch.net/incadat/fullcase/0476.htm, in which a single-judge family court concluded that the reason for delay in locating the child was "relevant to the question of settlement." *Ibid.* The court explained that "[s]ettlement * * * is to be given its ordinary meaning with two constituents, physical and emotional," and ultimately held that "in the circumstances of th[e] case," the abducting parent could not establish that the child was settled. *Ibid.* Although the court's reasoning is not entirely clear, it appears that the court was balancing the child's physical and emotional attachments to a new environment with the equities of the parents—a framework that is functionally similar to the rule of equitable discretion advocated by the United States. See Part B, *infra*. The court did not refer to a rule of equitable tolling. In any event, the Court of Appeal for England and Wales, in rejecting equitable tolling as "too crude an approach," was fully aware of that case. See *Cannon*, 1 W.L.R. at 40 (para. 25) (reviewing the *In re H* decision).

Article 12 thus reflects a compromise based on the judgment that once enough time elapses, the return of a child may not be appropriate. The Convention implements that judgment with a single one-year period during which the child must be returned "forthwith"; after that period, the court may consider whether the child is settled before ordering return. The text, drafting history, and decisions of other States Parties demonstrate that the one-year period may not be extended.

B. The Department Of State Interprets Article 12 Not To Permit Equitable Tolling, But To Allow A Court To Consider The Abducting Parent's Concealment In Exercising Its Equitable Discretion To Order The Child's Return

1. The Department of State—which negotiated the Convention and facilitates the return of children from and to other countries, and whose Office of Children's Issues serves as the Central Authority for the United States—interprets Article 12 not to permit equitable tolling. But it interprets the Convention to confer on the court equitable discretion, in cases filed more than a year after wrongful removal or retention, to consider concealment and other equitable factors in determining whether the child should be returned.[4]

The State Department's interpretation is informed, in part, by its recognition that foreign courts hearing petitions seeking the return of a child to the United States should not be precluded from considering relevant factors, including the behavior of the abducting parent, in determining whether to order the return of the child. The State Department's interpretation is

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[4] In its 1986 analysis of the Convention in connection with the Senate's consideration of ratification, the State Department stated that a court is not obligated to return a child who has become settled in her new environment; that "[t]he reason for the passage of time, which may have made it possible for the child to form ties to the new country, is also relevant to the ultimate disposition of the return petition"; and that "[i]f the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of the return proceeding by the applicant, it is highly questionable whether the [abducting parent] should be permitted to benefit from such conduct absent strong countervailing considerations." 51 Fed. Reg. at 10,509.

"entitled to great weight." *Abbott*, 130 S. Ct. at 1993 (citation omitted).[5]

2. Although Article 12 is not subject to equitable tolling, the Convention "provides a mechanism other than equitable tolling to avoid rewarding a parent's misconduct— * * * discretion to order the return of a child, even when a defense is satisfied." Pet. App. 27a; see *id.* at 19a (even when a child is settled, a court may order the child's return).

Article 12 provides that "where the proceedings have been commenced after the expiration of the period of one year," the court "shall also order the return

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[5] In response to a 2006 questionnaire from the Hague Conference on Private International Law, the State Department noted that statutes of limitations are often assumed to permit equitable tolling and reported five decisions in which American courts had tolled Article 12's one-year period. Hague Conference on Private Int'l Law, *Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* 217, 430 (Oct. 2006). The State Department described this as "a positive trend" that prevents abducting parents from being "rewarded for evading identification" and left-behind parents from being "penalized for the other parent's successful concealment," *id.* at 430, and stated that it "supports the concept of equitable tolling of the one-year filing deadline in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child," *id.* at 577. The State Department thus endorsed the concept of "equitable tolling," as it had been applied in the lower-court decisions, as a means of enabling courts to take into account concealment and other equitable factors in determining the ultimate disposition of return petitions. Upon broader examination of the issues in connection with its participation in this case as amicus curiae in the court of appeals, the Department concluded that "equitable discretion," and not "equitable tolling," is the appropriate legal framework for consideration by courts of concealment and other factors bearing on return.

of the child, unless it is demonstrated that the child is now settled in [her] new environment." Article 12 thus *requires* return of the child if less than one year has elapsed or if the child is not settled in her new environment.

But even when a year has passed and the child is now settled in her new environment, the Convention does not affirmatively *prohibit* return. See, *e.g.*, *Oregon* v. *Ice*, 555 U.S. 160, 165 (2009) (explaining that state statute providing that sentences shall run concurrently, unless the court finds certain facts, permits (but does not require) the judge to impose consecutive sentences if it finds such facts); *Goonsuwan* v. *Ashcroft*, 252 F.3d 383, 388-389 (5th Cir. 2001) (similar); cf. *Department of Commerce* v. *U.S. House of Representatives*, 525 U.S. 316, 339 (1999) (stating that the interpretation of the similar "except/shall" statutory structure "depends primarily on the broader context in which that structure appears"). Rather, against the background presumption favoring return, see Convention Art. 1; *Abbott*, 130 S. Ct. at 1997, Article 12 permits (but does not require) the return of a child who is settled if the court determines that equity warrants return. See *United States* v. *Stuart*, 489 U.S. 353, 368 (1989) ("[A] treaty should generally be 'construe[d] . . . liberally to give effect to the purpose which animates it.'") (quoting *Bacardi Corp. of America* v. *Domenech*, 311 U.S. 150, 163 (1940)); *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989) (when "a general statement of policy" (like that in Article 1 of "secur[ing] the prompt return of children") "is qualified by an exception," courts "usually read the exception narrowly"); 42 U.S.C. 11601(a)(4) (describing the exceptions to return as "narrow").

As multiple courts of appeals have concluded, a court thus retains equitable discretion to order the return of a child even though she is settled in her new environment. See *Yaman* v. *Yaman*, Nos. 13-1240, 13-1285, 2013 WL 4827587, at *12-*17 (1st Cir. Sept. 11, 2013) (recognizing discretionary authority to return "now settled" child); *Blondin* v. *Dubois*, 238 F.3d 153, 164 (2d Cir. 2001) (same); cf. *Asvesta* v. *Petroutsas*, 580 F.3d 1000, 1004 (9th Cir. 2009) (courts have discretion to order return notwithstanding establishment of any Convention exception to return); *Miller* v. *Miller*, 240 F.3d 392, 402 (4th Cir. 2001) (same); *Friedrich* v. *Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) (same); *Feder* v. *Evans-Feder*, 63 F.3d 217, 226 (3d Cir. 1995) (same).

The British House of Lords and courts of other States Parties have similarly held that they possess equitable discretion to order the return of a settled child, or that they should consider equitable factors, including concealment and the objectives of the Convention, in performing the "settled" analysis. See *In re M*, [2007] UKHL 55, [2008] 1 A.C. 1288, 1296-1297, 1304 (appeal taken from England) (stating that Article 12 "envisage[s] that a settled child might nevertheless be returned" and that the Convention "leaves the court with all options open," including taking into consideration that "the late application may be the result of active concealment"); *Cannon*, 1 W.L.R. at 43-46, 49-50 ("Even if settlement is established on the facts the court retains a residual discretion to order a return under the Convention."); *Kubera,* 2010 BCCA 118, paras. 102-104 ("settled" inquiries should take into account "both the objectives of the Convention and the interests of the child in the particular factual

circumstances"); *A.* v. *M.*, 2002 NSCA 127, paras. 74-82 (N.S.) (considering concealment and deterrent purpose of Convention in conducting "settled" analysis); *P.* v. *B.* (No. 2), [1999] 4 I.R. 185 (Ir.) (considering bad conduct by abducting parent in evaluating whether to return a settled child); *H.J.*, [2006] NZSC 97, para. 69 (concluding that "the policy implications of not letting a parent gain an advantage from concealment or deceit" should be addressed "as a facet of the exercise of the discretion"); cf. *Director-General, Dep't of Cmty. Servs.* v. *M & C,* (1998) 24 Fam LR 178, paras. 95-98 (Family Ct.) (Austl.) (reserving question of discretion to order return under Convention and its implementing regulations).[6]

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[6] On this point, the *Explanatory Report* states that once a child has become settled, her "return should take place only after an examination of the merits of the custody rights exercised over [her]—something which is outside the scope of the Convention." *Explanatory Report* in *Actes et Documents* para. 107, at 458. This language echoes an earlier report by the same author on the preliminary draft. See Elisa Pérez-Vera, *Report of the Special Commission* in *Actes et Documents* 172, para. 89, at 201 ("In fact, if the return is looked at from the point of view of the child's interests, when the child is well integrated in his new social environment, his return should not take place before the custody rights have been examined on the merits—which would fall outside the object of the Convention, which seek[s] to ensure an immediate return without prejudging the custody on the merits."). It is not clear whether this language is the author's interpretation of Article 12 or a policy recommendation that once a child is settled, it would be better to conduct a full custody determination in the country where the child is now settled. In any event, as the First Circuit has explained, a court's exercise of discretion concerning whether to order a child returned to another country is not "a determination of custody." *Yaman*, 2013 WL 4827587, at *19. The decision to return has no bearing on any past or future custody decision made under the family law of either country. *Ibid.*; Convention Art. 19.

In conducting that equitable assessment, the court should take into account the Convention's background presumption favoring return. Cf. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497-499 (2001). The court could ultimately conclude that the abducting parent's conduct in concealing the child's whereabouts, and other equitable factors, justify returning the child to the country of her habitual residence. Deterring concealment and ensuring that abduction does not confer tactical advantages on the abducting parent are important animating principles of the Convention. See *Explanatory Report* in *Actes et Documents* paras. 15-16, at 429. The court may therefore consider the abducting parent's misconduct (including whether the parent actively took steps to conceal the child), together with any other relevant circumstances such as the degree to which the child is settled, whether return would not be harmful or disruptive even if the child has become settled, the extent of the left-behind parent's custody rights, and any other reasons for the lapse of time in filing the petition.

Furthermore, given that the child's settlement can be outweighed by other equitable factors, Article 12 should be understood to afford the court discretion in appropriate cases to pretermit an extensive "settled" inquiry—which can involve a fact-intensive and time-consuming inquiry into the child's living situation—if it is apparent to the court at the outset that equitable factors favoring return would clearly outweigh the outcome of any "settled" analysis. Cf. *Chisom* v. *Roemer*, 853 F.2d 1186, 1188 (5th Cir. 1988) (because alleged harm to party seeking a preliminary injunction was not irreparable and the public interest did

not require an injunction, court "pretermit[ted] a discussion" of the first two preliminary injunction factors).

Although Article 12 does not explicitly state that a court may forgo deciding whether a child is "now settled" (see Pet. Br. 41-42; Resp. Br. 55 n.20), that is simply the logical implication of the fact that even if a child is "now settled," a court may still order the child's return. Such discretion is reinforced by Article 18, which provides that "[t]he provisions of this chapter [enumerating exceptions] do not limit the power of a judicial or administrative authority to order the return of the child *at any time*." Convention Art. 18 (emphasis added). A court could conclude in a particular case, for example, that fact-intensive discovery and hearings delving into the child's life would serve little purpose where the abducting parent's conduct was egregious, and—based perhaps on scarcely more than a year having passed, or on a child's young age or her continued strong ties to the habitual residence—that whether the child was now settled would be, at most, a close question that could not outweigh other factors. See *Chafin*, 133 S. Ct. at 1027 ("[C]ourts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation."); *id.* at 1028 (litigation "uncertainty adds to the challenges confronting both parents and child"); cf. Convention Art. 1 (one object of the Convention is "[t]o secure the prompt return of children").

C. Petitioner Identifies No Authority For Extending Article 12's One-Year Period During Which A Child Must Be Returned "Forthwith"

1. Petitioner's arguments in support of equitable tolling appear to rest on the premise that Article 12 is a statute of limitations (Br. 23-29), and that it may therefore be tolled under general principles of domestic law of the United States. There is no indication that the Convention negotiators intended the one-year period they adopted to be applied against the backdrop of one State's domestic tolling principles—or the disparate domestic tolling principles of each State. But in any event, Article 12's one-year period is not a statute of limitations; it is a period that triggers a substantive defense. Accordingly, even if ordinary presumptions for interpreting domestic law were applicable to the Convention, see *Holland* v. *Florida*, 130 S. Ct. 2549, 2560 (2010) (describing "rebuttable presumption" that equitable tolling applies for "federal statute[s] of limitations"), there is no basis for presuming that the one-year period contained in Article 12 is subject to equitable tolling. See *Hallstrom* v. *Tillamoook Cnty.*, 493 U.S. 20, 27 (1989) (60-day notice period was not subject to equitable tolling because it was a condition precedent, not a limitations period, and tolling would be inconsistent with the purpose of the notice period).

A statute of limitations establishes a period in which a claim must be brought if it is to be adjudicated at all. The limitations period reflects a judgment about the point at which concerns about repose, stale claims, lost evidence, and the parties' need for certainty outweigh the plaintiff's interest in bringing a claim. See *Young* v. *United States*, 535 U.S. 43, 47

(2002). The doctrine of equitable tolling applies when circumstances render the balancing of interests embodied in the limitations period inequitable—*i.e.*, when extraordinary circumstances prevent the plaintiff, despite due diligence, from bringing his claim during the limitations period. See *Lawrence* v. *Florida*, 549 U.S. 327, 330-332, 336 (2007). When applied, tolling permits the court to treat the claim as though it were timely filed. *Ibid.*

Article 12's one-year period is not a statute of limitations. It does not fix a time limit in which a parent may petition for the return of a child. Instead, the one-year period establishes the permissible substantive scope of a court's inquiry in adjudicating the petition. The consequence of failing to file suit within a year is that the court is no longer automatically required to "order the return of the child forthwith" if it finds that the child was wrongfully removed (and no other exception to return applies). After one year, the court may also consider the child's ties to her new environment in deciding whether to order return. The expiration of the one-year period does not extinguish the left-behind parent's ability to seek return, and it does not eliminate the court's authority to order return. To the contrary, the court must still order return if the child is not settled (and no other exception to return applies), and it may order return even if the child is settled.

Article 12's one-year period is thus not comparable, as petitioner suggests (Br. 28-29), to the "three year lookback" period in the Bankruptcy Code that the Court concluded was a statute of limitations in *Young*. 535 U.S. at 47. Under that provision, if the Internal Revenue Service "has a claim for taxes for which the

return was due within three years before the bankruptcy petition was filed, the claim enjoys eighth priority under [11 U.S.C.] 507(a)(8)(A)(i) and is nondischargeable in bankruptcy under [11 U.S.C.] 523(a)(1)(A)." *Young*, 535 U.S. at 46. The court explained that this three-year lookback period is a statute of limitations because it "prescribes a period within which certain rights (namely, priority and nondischargeability in bankruptcy) may be enforced," and thus encourages the IRS to perfect its right to the tax revenue within three years so that its claim will not lose priority and become dischargeable. *Id.* at 47. The Court explained that the lookback period "serves the same 'basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Id.* at 47 (quoting *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000) (brackets in original)).

Unlike the lookback period in *Young*, Article 12 does not simply balance the parties' (the parents') respective interests in redress and repose and provide a time limitation for claims based on a balance of those interests. Article 12 allows a left-behind parent to file a claim at any time, but it permits the court to take into account specific interests of the child—*i.e.*, whether she is settled in her new environment—not merely the parents' interests in redress and repose, after one year. One year represents the point at which the delegations negotiating the Convention determined that the child has been in the new environment long enough that the court, in deciding on the merits whether to order return, should be authorized

to consider whether she is now settled in that environment.

Petitioner, in essence, asks the Court to restrike the balance of considerations the negotiators of the Convention struck in drafting Article 12. But recognizing equitable tolling of Article 12's one-year period would disrupt the framework adopted in the Convention. Under petitioner's view, in cases where (1) the left-behind parent has been pursuing his rights diligently, and (2) some extraordinary circumstance stood in the way of his filing a timely petition, the petition would be treated as having been filed within one year. See Pet. Br. 45-46, 53 (citing *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)). The court would then be *required* to order return "forthwith," Convention Art. 12, and would be foreclosed from considering whether the child had become settled in her new environment—no matter how long the child had lived there, how strong her attachments had become, or how few attachments she had left in her country of habitual residence. But affording the court discretion to consider the child's settlement in cases in which she has been in the new country for a year—regardless of the reason for that prolonged residence—is the very purpose of the Convention's provision of a one-year cutoff for the child's mandatory return. *Explanatory Report* in *Actes et Documents* para. 107, at 458.

Petitioner observes (Br. 6, 27-28, 38) that the United States delegation used the term "statute of limitations" when suggesting changes to the preliminary draft of the Convention. The delegation was commenting on a different version of Article 12, and one that explicitly provided for extension of the filing period when the whereabouts of the child were un-

known. See *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera* in *Actes et Documents* 168 (Art. 11). In any event, one delegation's passing use of the term "statute of limitations" during a negotiation session does not transform an explicit and firm time period in a multinational Convention into a flexible period presumed subject to equitable tolling based on background principles applied by the courts of one nation (the United States).

2. Petitioner for the first time asserts (Br. 23-26, 30) that Article 34 of the Convention invites countries to engraft a rule of equitable tolling onto Article 12's one-year period. Article 34 provides that the Convention "shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained." Art. 34. That provision allows for the use of international agreements or domestic law to effectuate the return of a child. See *Explanatory Report* in *Actes et Documents* paras. 39-40, 143, at 436-437, 470. Petitioner's reliance on Article 34 thus would allow a principle concerning equitable tolling in domestic law to trump the express provision in Article 12 itself for consideration of a child's "settled" status after one year. To do so would disrupt the balance of interests struck in Article 12.

3. Petitioner further contends (Br. 34-36, 53) that equitable tolling should be applied as a policy matter, so that parents will not have an incentive to conceal an abducted child for a year to avoid Article 12's period

of automatic return. That argument is both legally and factually incorrect.

Even in a case involving a statute of limitations in an Act of Congress (which Article 12 is not), the question whether equitable tolling is available is a question of statutory interpretation. There is only a "rebuttable presumption" that tolling applies, which can be overcome by a showing that Congress intended to the contrary. See *Holland*, 130 S. Ct. at 2560-2561; *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137-138 (2008); *United States* v. *Brockamp*, 519 U.S. 347, 350-354 (1997); *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). Here, the negotiators of the Convention took account of the concealment concern petitioner identifies, but they also understood the potential harm of an automatic-return requirement for children who may have formed significant attachments in a new environment. The Convention reflects a judgment that the proper balance of those interests is to enable the court to consider the child's attachments in cases where it has been more than a year since the wrongful removal or retention. Petitioner's policy arguments are therefore already accounted for in the balance struck in the Convention. Any presumption in favor of equitable tolling is overcome by the negotiators' rejection of a discovery rule and adoption of the one-year period instead.

Furthermore, petitioner is wrong to assume that abducting parents can always rely on the prediction that by concealing the child, they can defeat a petition for the child's return. Concealment may undermine a child's ability to form stable attachments in a new environment. Concealment may also call into doubt other evidence and defenses that the abducting parent

can be expected to present, such as the child's objection to return, a defense found in Article 13. See *Wasniewski* v. *Grzelak-Johannsen*, No. 06-cv-2548, 2007 WL 2344760, at *5 (N.D. Ohio Aug. 15, 2007) (refusing to give weight to child's opinion when his "generalized statements" suggested that "his mother's influence * * * biased [the child's] opinion of Poland, particularly given [her] efforts to isolate [the child] from his father and his earlier childhood"); *Gonzalez* v. *Nazor Lurashi*, No. 04-cv-1276, 2004 WL 1202729, at *5 (D.P.R. May 20, 2004) (refusing to treat child's opinion as conclusive because the "child has not seen [his mother] nor his sister in over 16 months even though they occasionally communicate by telephone, e-mail and letters. Thus, we understand the child has been heavily influenced by [his father's] wish for the child to remain in Puerto Rico").

More fundamentally, as discussed in Part B, *supra*, even if an abducting parent can establish that a child is now settled, a court retains equitable discretion to order the child's return and may take the abducting parent's conduct into account in deciding whether to order return despite the passage of one year since the wrongful removal. Abducting parents therefore cannot rely on the prediction that by concealing the child, they can defeat a petition for the child's return. The inequity of rewarding an abducting parent's misconduct is appropriately addressed at that later stage, but it does not warrant an extension of the one-year period of automatic return adopted in the Convention so as to bar any consideration at all of whether the child has become settled in her new environment.

4. Finally, although petitioner agrees (Br. 40) that a court has discretion to order a child's return even if

the child is now settled in a new environment, petitioner contends (Br. 45) that the Court should nevertheless recognize equitable tolling because, according to petitioner, few courts have exercised that discretion to order a child's return after the one-year period has expired. That concern is unfounded.

As petitioner has described, a number of United States courts have addressed concealment by tolling Article 12's one-year period of mandatory return, as petitioner urges this Court to do. Pet. Br. 45, Pet. 13-19 (cataloguing cases). Had those courts instead correctly recognized that Article 12's one-year period is not a statute of limitations subject to equitable tolling, it is entirely speculative for petitioner to assume that that those courts would have concluded the children involved were settled and that the full range of equitable factors would not have warranted their return in any event.

The one-year period of mandatory return was a compromise adopted to balance the interests of returning a child forthwith and the prospect that as time progresses, a child may form attachments to a new environment. Petitioner has identified no authority for extending that period through a principle of equitable tolling, and doing so would be inconsistent with the framework agreed to in the Convention.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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