No. 11-1347

In the Supreme Court of the United States

JEFFREY LEE CHAFIN, PETITIONER

v.

LYNNE HALES CHAFIN

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
MARK B. STERN
SHARON SWINGLE
Attorneys

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

HAROLD HONGJU KOH
Legal Adviser
Department of State
Washington, D.C. 20520

QUESTION PRESENTED

Whether an appeal of a district court order under the Hague Convention on the Civil Aspects of International Child Abduction, providing for return of a child to the country of the child's habitual residence, becomes moot if the child is returned pending appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, treaty, statutes, regulation and rule:

Treaty, statutes, regulation and rule: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 11-1347

JEFFREY LEE CHAFIN, PETITIONER

v.

LYNNE HALES CHAFIN

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question presented in this case is whether an appeal of a district court order to return a child under the Hague Convention on the Civil Aspects of International Child Abduction becomes moot if the child is returned pending appeal. The United States is a party to the Convention, and the Department of State is the designated Central Authority that coordinates with other States and assists in the Convention's implementation in the United States. Accordingly, the United States has a substantial interest in the manner in which the Convention is interpreted by the courts of this country.

STATEMENT

1. a. The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention or 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 Hague Convention, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.[1] The Convention's purposes are to "secure the prompt return of children wrongfully removed to or retained in any Contracting State" and to "ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Art. 1. To achieve these purposes, the Convention establishes uniform legal standards and remedies to be employed by States Parties when a child is removed from one country to another. See 42 U.S.C. 11601(a); see also Convention Introductory decls., Art. 1.

The Convention provides that any child under age 16 who is "wrongfully removed or retained" in a contracting State, in violation of a parent's or other person's custody rights, shall be promptly returned to the country of the child's habitual residence. See Convention Arts. 1(a), 4. Removal or retention is "wrongful[]" if: first, it is "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," and second, "[a]t the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." Art. 3.

---

[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.

Upon finding that a parent has wrongfully removed or retained a child—*i.e.*, that the parent has violated the custody rights of the other, "left-behind" parent—authorities in the State in which the child is present must, subject to certain defenses, "order the return of the child forthwith." Convention Art. 12. "This right of return is the core of the Convention." *Convention Text and Legal Analysis*, 51 Fed. Reg. at 10,507. It 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 Convention Introductory decls.; 51 Fed. Reg. at 10,504. The Convention provides that courts shall "act expeditiously" in adjudicating petitions for return of children. Art. 11.

The Convention's return remedy reflects two important principles: custody determinations should be made by the courts in the child's country of habitual residence, and an abducting parent should gain no legal advantage from attempting unilaterally to change the forum. See Elisa Perez-Vera, *Explanatory Report*, in 3 *Actes et Documents de la Quatorzieme Session (Child Abduction)* 426, paras. 16, 19, at 429-430 (Permanent Bureau trans. 1982) (*Explanatory Report*); 51 Fed. Reg. at 10,498. The inquiry before a court considering a Hague Convention petition is limited to whether the child was wrongfully removed from or retained in a contracting State (see Convention Art. 12) and whether any of the exceptions to return apply (see Art. 13). The court does not decide custody, and any decision concerning return "shall not be taken to be a determination on the merits of any custody issue." Arts. 16-17, 19. Thus, the Convention "simply restores the pre-abduction status quo by allowing for the return of a wrongfully ab-

ducted child," leaving custody disputes to be resolved by the courts in the country of the child's habitual residence. *Von Kennel Gaudin* v. *Remis*, 282 F.3d 1178, 1182 (9th Cir. 2002).

The United States participated in the negotiation of the Convention's terms, see *Members of the First Commission, Proces-verbaux et Documents de travail de la Premiere commission*, in 3 *Actes et Documents*, at 253-255, and the Convention entered into force for the United States in 1988. See T.I.A.S. No. 11,670, *supra*.

b. Congress enacted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 *et seq.*, to implement the Hague Convention. In doing so, Congress found that the "international abduction or wrongful retention of children is harmful to their well-being," 42 U.S.C. 11601(a)(1), and it concluded that the Convention "provides a sound treaty framework to help resolve th[at] problem," 42 U.S.C. 11601(a)(4). ICARA supplements the provisions of the Convention by "establish[ing] procedures for the implementation of the Convention in the United States." 42 U.S.C. 11601(b)(1); see 42 U.S.C. 11601(b)(2).

ICARA authorizes a person seeking return of a child under the Convention to file suit in any state or federal court that has jurisdiction of the action and "is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed." 42 U.S.C. 11603(a) and (b). The court "shall decide the case in accordance with the Convention," 42 U.S.C. 11603(d), and shall not decide "the merits of any underlying child custody claims," 42 U.S.C. 11601(b)(4). A child found to have been wrongfully removed or retained must 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). If the court orders return of the child, it must order the party opposing return to pay "necessary expenses incurred by or on behalf of" the person seeking return, including court costs, legal fees, and transportation costs related to return, unless the party opposing return establishes that such an order would be "clearly inappropriate." 42 U.S.C. 11607(b)(3).

ICARA provides that the President shall designate a Central Authority for the United States. 42 U.S.C. 11606(a). Central Authorities are responsible for "promot[ing] co-operation amongst the competent authorities in their respective States" and "tak[ing] all appropriate measures" to perform various functions, 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 is the U.S. Central Authority. See 22 C.F.R. 94.2.

c. In the United States, interstate child abduction is addressed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), 9 U.L.A. 657 (1999).[2] Under the UCCJEA, a state court that makes an initial custody determination maintains exclusive and continuing jurisdiction over that determination until the child and his or her parents lack a sufficient connection to the State. §§ 201-202, 9 U.L.A. 671-674. The UCCJEA attempts to deter interstate child abduction by providing that courts generally must recognize and enforce existing custody and visitation decrees entered in other jurisdictions, including foreign jurisdictions. §§ 105, 303,

[2] The UCCJEA has been adopted by 49 States, the District of Columbia, Guam, and the U.S. Virgin Islands. See UCCJEA introductory note, 9 U.L.A. 114-115 (Supp. 2012).

9 U.L.A. 662, 690-691. The UCCJEA also provides that courts may enforce a Hague Convention return order "as if it were a child-custody determination." § 302, 9 U.L.A. 690.

2. Petitioner, a United States citizen, married respondent, a citizen of the United Kingdom, in 2006. 1 10/11/2011 Trial Tr. 37 (5:11-CV-01461 Docket entry No. 32) (Tr.); Pet. Br. 8. Their child was born in Germany the following year. 1 Tr. 34; Pet. Br. 8. Petitioner, who was serving in the United States Army, then was deployed to Afghanistan. 1 Tr. 38; Pet. Br. 8. In August 2007, respondent and the child moved to Scotland with petitioner's consent. 1 Tr. 38-42, 44-46.

Petitioner was transferred to Huntsville, Alabama in 2009. 2 Tr. 71-72. In February 2010, respondent and the child traveled to Alabama in an effort to salvage the parties' marriage. Pet. App. 5. Respondent entered the United States on a 90-day visitor's visa, with a return ticket to Scotland. *Id.* at 7. She maintained her rental home in Scotland, and the child was scheduled to begin nursery school there in April. *Ibid.*; 1 Tr. 51-52.

By April 2010, the parties had agreed to end their marriage. Pet. App. 8. When respondent and the child were preparing to leave for Scotland in May 2010, petitioner filed divorce papers and an emergency child custody petition in Alabama state court. *Ibid.*

Respondent and the child remained in Alabama with petitioner until December 2010. Pet. App. 8. At that point, respondent was placed into removal proceedings because her visitor's visa had expired. *Ibid.* In February 2011, respondent was removed from the United States to the United Kingdom. 1 Tr. 118, 268. The child remained in the United States with petitioner. 2 Tr. 203-206.

3. Respondent filed suit in federal district court to obtain return of the child to Scotland under the Hague Convention. She contended that the child's habitual residence was in Scotland and that petitioner had wrongfully retained the child in the United States starting in May 2010. Pet. App. 3-5; see Verified Pet. for Return of Child 2-7 (May 2, 2011) (5:11-CV-01461 Docket entry No. 1).

After a bench trial, the district court agreed with respondent that the child should be returned to Scotland. Pet. App. 3-12. The court noted the parties' agreement that, "until February 2010, [they] intended the child's habitual residence to be in Scotland." *Id.* at 5 n.2. The district court then concluded that the parties' trial period together in the United States between February and April 2010 did not change the child's habitual residence. *Id.* at 5-6. The district court found that in May 2010, petitioner removed the child's U.S. and British passports from their customary location, essentially "prohibit[ing] [respondent] from leaving the country with the child." *Id.* at 9. The district court further found that respondent "decided to return to Scotland with the child in early May, 2010," and that she would have done so but for petitioner's serving her with emergency divorce and custody papers and taking the child's passports. *Id.* at 6, 8-9. The district court then rejected petitioner's affirmative defenses to return. *Id.* at 10-12. Having concluded that respondent established a right to return under the Convention, the district court entered an order permitting respondent to return with the child to Scotland, "for appropriate custody proceedings to commence there." *Id.* at 12.

The district court granted the Hague Convention petition in an oral ruling, which was later memorialized in

a written decision. 2 Tr. 261, 264-266; see Pet. App. 12. Petitioner immediately sought a stay. See Resp. Mot. to Stay Implementation of Order (Oct. 12, 2011) (5:11-CV-01461 Docket entry No. 29). The court denied the stay motion, stating that respondent "is permitted to return to Scotland this day with her minor child." Pet. App. 13. Respondent and the child left the United States that day. Pet. Br. 11.

4. Petitioner appealed. Respondent moved to dismiss the appeal on the ground that the case was moot. Mot. to Dismiss Appeal 5-9 (Dec. 6, 2011).

In a brief order, the court of appeals granted the motion to dismiss the appeal and remanded the case to the district court with directions to vacate its return order and dismiss the case as moot. Pet. App. 1-2. In support of that conclusion, the court of appeals cited *Bekier* v. *Bekier*, 248 F.3d 1051 (11th Cir. 2001). In *Bekier*, the district court entered a Hague Convention order allowing a child to return to Israel with his father; the child returned to Israel; the mother appealed, but did not secure a stay; and the court held that the case was moot. *Id*. at 1053 & n.2. The court of appeals reasoned that even if the mother prevailed on appeal, she could obtain "no actual affirmative relief" because the child "ha[d] already returned to Israel." *Id.* at 1054. In the court of appeals' view, the mother's "potential remedies" would be "in the Israeli courts." *Ibid.*

5. On remand, the district court in this case vacated its earlier return order and dismissed the action. Pet. App. 15. The court also entered two orders requiring petitioner to pay respondent a total of approximately $94,000 for her attorney's fees, court costs, and travel expenses. 3/7/2012 Order 15-16 (5:11-CV-01461 Docket

entry No. 50); 6/5/2012 Order 2 (5:11-CV-01461 Docket entry No. 59); see 42 U.S.C. 11607(b)(3).

6. After the court of appeals' decision, there were further developments in child-custody proceedings in both the United States and the United Kingdom.

a. The Alabama state court had stayed the parties' divorce and custody case pending resolution of the Hague Convention case. See *Chafin* v. *Chafin*, No. 2110421, 2012 WL 3055522, at *1 (Ala. Civ. App. July 27, 2012). After respondent obtained the return order, she sought dismissal of the Alabama state case, and the trial court dismissed the case for lack of jurisdiction. *Id.* at *2. The state appellate court agreed that the state courts now lacked jurisdiction over the child-custody portion of the proceeding. See *id.* at *4. The court explained that it could not decide child custody under the UCCJEA because the Hague Convention order established that "the child's 'home state' was Scotland." *Ibid.*

b. In December 2011, respondent filed a child-custody action in Scotland. Her complaint recounted the Hague Convention proceedings in the United States and requested that the court grant her temporary custody of the child and enter an order preventing petitioner from removing the child from Scotland. Initial Writ at 2-8, *Hales* v. *Chafin*, No. F544/11 (Sheriffdom of S. Strathclyde, Dumfries & Galloway at Airdrie Dec. 21, 2011) (Writ). The Scottish court entered an interim order granting the requested relief. Form of Warrant of Citation in Family Action at 1-2, No. F544/11 (Dec. 22, 201[1]) (Warrant); see Pet. Br. 12. The Scottish court apparently has not taken any further action to resolve the child-custody dispute. See *id.* at 12-13.

SUMMARY OF ARGUMENT

The return of a child in accordance with a Hague Convention return order issued by a federal district court does not moot an appeal of that order.

A. Under Article III of the Constitution, a case becomes moot when there is no longer a live, concrete dispute between the parties or when the court could not provide any effectual relief to a prevailing party. In this case, the parties have an ongoing dispute about which country is their child's place of habitual residence. They have not settled that dispute, and they have filed related custody proceedings in both the United States and the United Kingdom. The mootness issue depends on whether the courts of the United States could grant effectual relief to the prevailing party or otherwise affect a matter in issue between the parties.

B. Appellate resolution of this case could have a number of real-world consequences for both parties. If petitioner prevailed on appeal, he could seek an order requiring respondent to bring the child back to the United States and could seek recognition of that judgment in UK courts. Although respondent's presence outside the United States may complicate enforcement of such an order, that does not render the case moot. An appellate decision in petitioner's favor also would remove legal barriers to adjudication of custody in the United States and would remove the basis for the district court's award of fees and costs.

On the other hand, if respondent prevailed on appeal, she would have a final judgment holding that the child's habitual residence is in the United Kingdom and no defenses to return apply, and she could ask the court in her custody case in the United Kingdom to take notice of that judgment. Affirmance of the return order also

would affirm respondent's entitlement to fees and costs under ICARA.

C. The Convention's history and purposes support the conclusion that this case is not moot. The Convention's central object is to secure the prompt return of children to their countries of habitual residence. Under the court of appeals' rule, a district court either would have to grant a stay—thereby keeping the child in a country found not to be her habitual residence—or allow the child to return and cut off one parent's appellate rights. The Convention contemplates prompt return; neither the Convention nor ICARA requires curtailing appellate rights if the child is returned; and eliminating one parent's right to appeal would be inconsistent with the history of ICARA and the general rule permitting an appeal as of right in the United States. The United States is aware of only one foreign court of last resort—the Spanish Constitutional Court—that has directly addressed the mootness question, and that court held that return of the child did not moot the case. The judgment of the court of appeals should be reversed and the case remanded for adjudication on the merits.

ARGUMENT

RETURN OF A CHILD IN CONFORMITY WITH A DISTRICT COURT'S ORDER UNDER THE HAGUE CONVENTION DOES NOT MOOT AN APPEAL OF THE RETURN ORDER

The question in this case is whether an appeal of a Hague Convention return order is rendered moot when the child is returned in accordance with the order. This case is not moot under Article III of the Constitution because there remains a live dispute between the parties, and appellate resolution of that dispute would have concrete consequences for the parties. Moreover, the Convention's history and purposes suggest that prompt

return of a child to her habitual residence should not moot the opposing parent's appeal of the return order. The United States expresses no views on the merits of the underlying Hague Convention petition. But this case is not moot.

A. Whether This Case Is Moot Depends On Whether There Is A Live Controversy The Resolution Of Which Would Have Real-World Consequences For The Parties

1. Article III of the Constitution grants the Judicial Branch the authority to adjudicate "Cases" and "Controversies." U.S. Const. Art. III, § 2. A federal court may not "give opinions upon moot questions or abstract propositions," or "declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). There must be an "actual controversy" between the parties "at the time the complaint is filed" and at "all stages" of the case. *Alvarez* v. *Smith*, 130 S. Ct. 576, 580 (2009); see *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) ("This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.").

A case becomes moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," *Murphy* v. *Hunt*, 455 U.S. 478, 481 (1982) (per curiam) (internal quotation marks omitted), or when an event occurs while the case is pending "that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology*, 506 U.S. at 12 (quoting *Mills*, 159 U.S. at 653). If appellate resolution of the case would not "affect the matter in issue," then the case is moot. *Ibid.*

2. In a Hague Convention case, a court's charge is limited: the court is to decide only whether one parent has wrongfully removed the child to, or retained the child in, a country that is not her habitual residence and if so, whether any exception to return applies. Convention Arts. 3, 5, 12-13.

Here, respondent sought return of the child to the United Kingdom under the Hague Convention. The federal district court held a two-day bench trial, concluded that petitioner had wrongfully retained the child in the United States because Scotland is the child's habitual residence, and entered an order permitting respondent to return to Scotland with the child. Pet. App. 12. Petitioner sought a stay of that order, which was denied, *id.* at 13, and respondent immediately left for Scotland with the child. Petitioner appealed the return order. Respondent and the child have remained in Scotland, and respondent initiated child-custody proceedings there. See Writ 1-8. In the Alabama proceedings, the state appellate court determined that the trial court had lost jurisdiction to adjudicate child custody because, under the federal court's Hague Convention ruling, the child's country of habitual residence is the United Kingdom. See *Chafin* v. *Chafin*, No. 2110421, 2012 WL 3055522, at *4 (Ala. Civ. App. July 27, 2012).

At this point, it is plain that the parties still have a real-world dispute about where the child should reside. The parties disagree about whether the child's habitual residence changed from the United Kingdom to the United States when respondent and the child came to live in Alabama in February 2010 and whether, if the child's habitual residence remained in Scotland, any defenses to return might apply. Compare Pet. Br. 8-10 with Br. in Opp. 2-5. Accordingly, "notwithstanding the

return of the child, the issue as to whether the initial [retention of the child] was wrongful [is] still very much alive." *Whiting* v. *Krassner*, 391 F.3d 540, 545 (3d Cir. 2004), cert. denied, 545 U.S. 1131 (2005). Further, the parties' ongoing child-custody dispute, while addressing an issue distinct from whether return is required under the Convention, underscores that the parties have maintained the type of "concrete adverseness" and "personal stake in the outcome" required for Article III purposes. *City of L.A.* v. *Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)).

The mootness issue in this case therefore depends on whether the court of appeals could "grant 'any effectual relief whatever' to a prevailing party" or otherwise "affect the matter that remains in issue" between the parties. *Church of Scientology*, 506 U.S. at 12 (quoting *Mills*, 159 U.S. at 653). As explained below, the court of appeals could provide relief to the prevailing party, and appellate resolution of the dispute likely would have a number of real-world consequences for both parties.

B. This Case Is Not Moot Because A Federal Appellate Court's Order Could Have Concrete Consequences For The Parties

1. The primary remedy envisioned by the Convention—return of the child—has occurred. The Convention does not address what should happen if a return order is overturned on appeal after the child has left the jurisdiction; instead, it leaves that issue (and most procedural questions) to the domestic law of each State Party. ICARA, the Convention's implementing statute in the United States, likewise does not address what might happen if a return order is overturned on appeal. But under general principles that are presumptively ap-

plicable in this setting, the courts can afford petitioner relief if he prevails on appeal.

This Court has long recognized that "so long as [the court] retains control of the subject-matter and of the parties," it has inherent "equitable powers" to "correct that which has been wrongfully done by virtue of its process." *Arkadelphia Milling Co.* v. *St. Louis Sw. Ry.*, 249 U.S. 134, 145-146 (1919); see, *e.g.*, *Federal Power Comm'n* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 582-583 (1949); *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 312 U.S. 621, 628-630 (1941); *Northwestern Fuel Co.* v. *Brock*, 139 U.S. 216, 219 (1891). The court's equitable authority extends to compelling a party properly before it to perform an act outside its territorial jurisdiction. See *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 287 (1952).

When respondent filed suit in federal district court, seeking a return order under the Hague Convention, she submitted herself to the jurisdiction of that court. The court may continue to exercise personal jurisdiction over her despite the fact that she is outside its territorial jurisdiction. See *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451-452 (1932); see also, *e.g.*, *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). If the court of appeals concluded that the district court's return order was erroneous because the United States was the country of the child's habitual residence, it could reverse the district court's decision and order respondent to bring the child back to the United States. See, *e.g.*, *Larbie* v. *Larbie*, 5:11-CV-00160 Docket entry No. 60, at 2 (W.D. Tex. Aug. 29, 2012) (order directing parties to "immediately comply with the Fifth Circuit's judgment" by "re-

turn[ing] K.L. to the United States" and "to the custody of [the parent who prevailed on appeal]").

If the court of appeals (or the district court on remand) orders a non-resident parent to bring a child back to the United States, the parent might voluntarily comply with that order. *Larbie* v. *Larbie*, 690 F.3d 295, 305 (5th Cir. 2012), petition for cert. pending, No. 12-304 (filed Sept. 7, 2012). If the non-resident parent declines to comply, enforcement of such an order may be complicated, but that does not make enforcement impossible. See *Knox* v. *Service Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (internal quotation marks omitted)). The district court could impose contempt sanctions. *Larbie*, 690 F.3d at 305; see *Leman*, 284 U.S. at 452 ("contempt of the court" is "none the less contempt because the act was committed outside the district"; "the contempt lay in the fact, not in the place, of the disobedience to the requirement"). That contempt order could be enforced if the non-resident parent returned to the United States.

Moreover, a party who succeeds in obtaining a judgment on appeal reversing a return order could bring that decision to the attention of a foreign court. The foreign court's response would depend on that country's domestic law regarding recognition and enforcement of foreign judgments. Neither the Hague Convention itself nor the UK statute implementing the Convention specifically provides for enforcement of foreign Hague Convention decisions. See Child Abduction and Custody Act 1985, ch. 60, Pt. I, §§ 1-11 (UK) (available at

www.legislation.gov.uk/ukpga/1985/60).[3] But if petitioner filed a new Hague Convention petition in the United Kingdom and sought recognition of the U.S. judgment, a UK court might give effect to it as a matter of comity, or at least apply preclusion principles with respect to certain issues. See 1 Dicey, Morris & Collins, *The Conflict of Laws*, R. 35(2) & cmt., at 575-576 (14th ed. 2006) (*Conflict of Laws*) (identifying circumstances in which UK courts might recognize certain foreign judgments); cf. *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895) (describing circumstances under which U.S. courts might recognize foreign judgments as a matter of international comity).[4]

There likewise could be consequences under the Convention if respondent prevailed on appeal. After concluding that petitioner's appeal was moot, the court of

---

[3] Some courts have mistakenly read the UK Act to require courts in that country to recognize a foreign Hague Convention judgment. See, *e.g.*, *Fawcett* v. *McRoberts*, 326 F.3d 491, 496-497 (4th Cir. 2003), abrogated on other grounds by *Abbott* v. *Abbott*, 130 S. Ct. 1983 (2010). The mistake stems from reading "the Convention" in Section 15 of the UK Act to refer to the Hague Convention when the phrase actually refers to a European treaty regarding recognition of child-custody decisions. See Act, ch. 60, Pt. II, §§ 12, 15.

Nonetheless, the UK Act appears to contemplate that one State will take account of another State's Hague Convention decision, because the Act authorizes a UK court to provide an authenticated copy of its return order when a Hague Convention case is filed in another contracting state. See Act, ch. 60, Pt. II, § 10(2)(d).

[4] The Convention contemplates affording this type of respect to foreign judgments, because it provides that, before ordering return, a judicial or administrative authority may request a determination from the State of the child's habitual residence that the child's removal from that State was wrongful. Art. 15. The Convention also states that a court should look to and "take account of the reasons for" a foreign custody decision in adjudicating a return petition. Art. 17.

appeals vacated the district court's return order. Pet. App. 1-2; see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). That disposition "strip[ped] the decision below of its binding effect," *Deakins* v. *Monaghan*, 484 U.S. 193, 200 (1988), so that respondent was left with no court order establishing that the child's habitual residence was in the United Kingdom and that no defenses to return applied. By contrast, affirmance of the return order would provide respondent with a judgment she could invoke against petitioner if she and the child returned to the United States, and that she could bring to a UK court's attention and rely upon if petitioner filed a Hague Convention petition there.

2. Appellate resolution of the parties' Hague Convention dispute likely would also have consequences in their ongoing child-custody proceedings. The Hague Convention is not itself a mechanism for litigating child-custody issues; a court considering a Hague Convention petition may not decide custody and the court's decision "shall not be taken to be a determination on the merits of any custody issue." Convention Arts. 16-17, 19. Nonetheless, once the court decides the child's habitual residence in adjudicating the Hague Convention petition, the courts of the country of habitual residence may adjudicate custody under their domestic law.

If petitioner prevailed in this case on appeal, that ruling would remove a legal barrier to adjudication of custody in the United States. Petitioner filed divorce and child custody proceedings in Alabama state court, and then respondent filed a Hague Convention petition. The state court stayed its custody proceedings, because once judicial or administrative authorities in a contracting State receive notice that the child has been wrongfully removed or retained, they "shall not decide on the mer-

its of rights of custody until it has been determined that the child is not to be returned under this Convention" or an application seeking return of the child is not lodged within a reasonable time. Convention Art. 16. After the federal district court entered its return order, the state appellate court determined that petitioner's child-custody case could no longer be litigated in Alabama by virtue of the UCCJEA. See *Chafin*, 2012 WL 3055522, at *4. Under the UCCJEA, a state court may not exercise its jurisdiction to make a child-custody determination when the child's home State is elsewhere and a court in that State has jurisdiction to adjudicate custody. See UCCJEA § 201(a), 9 U.L.A. 671 (codified in relevant part at Ala. Code § 30-3B-102(4) (LexisNexis 2011)).[5]

If the return order were overturned on appeal, it would remove the Hague Convention barrier to adjudication of custody in the Alabama courts, and petitioner could ask the Alabama courts to take account of the federal district court's findings in deciding custody. If petitioner instead chose to submit to litigation of custody in the Scottish courts, he would no longer have the disadvantage of the U.S. court order finding him to have wrongfully retained the child.

There would likewise be real-world consequences in the custody dispute if respondent prevailed on appeal.

---

[5] The "home state" under the UCCJEA is not necessarily the same as the child's "habitual residence" under the Hague Convention. See UCCJEA § 102(7), 9 U.L.A. 122 (Supp. 2012) (defining child's "home state" as "the State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding"). In this case, the Alabama appellate court concluded that the child's home state is Scotland based on findings the district court had made in discerning her habitual residence. See 2002 WL 3055522, at *4.

Although the Scottish court entered an initial order granting respondent temporary custody, see Warrant at 1-2, that court has not taken any further action with respect to the custody dispute, perhaps because that court is awaiting the U.S. courts' final resolution of this case. If the return order were affirmed, respondent might rely on the finding that petitioner wrongfully retained the child in violation of her custody rights to support her request for custody. See Writ at 2-8 (relying on district court's findings in writ seeking temporary custody). Moreover, she could ask the Scottish court to give weight to the district court's findings, as a matter of international comity, as it further adjudicates the custody dispute. See *Conflict of Laws*, R. 35(2) & cmt., at 575-576. And, of course, affirmance of the district court's order would make it unlikely that respondent would have to litigate custody in the Alabama courts. See UCCJEA § 201, 9 U.L.A. 671.

3. Finally, appellate resolution of this case would resolve the status of the judgment that has been entered against petitioner for fees and expenses. ICARA provides that, when a court orders the return of a child, the court "shall order" the parent who wrongfully removed or retained the child to pay "necessary expenses incurred by or on behalf of" the other parent, including "court costs," "legal fees," "foster home or other care during the course of proceedings," and "transportation costs related to the return of the child," unless the abducting parent establishes that such an award "would be clearly inappropriate." 42 U.S.C. 11607(b)(3).

The district court in this case entered a substantial award of fees and expenses to respondent. See pp. 8-9, *supra*. If the district court's return order were reversed on appeal, it would terminate respondent's entitlement

to those amounts under ICARA.[6] Conversely, if the return order were affirmed on appeal, respondent would retain her entitlement to payment of those amounts. Although it is well-established that a contingent "interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim," *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (internal quotation marks omitted), here the monetary award extends far beyond attorney's fees. The financial consequences of an appellate decision provide yet another reason why this case is not moot. Cf. *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 313-318 (1999).

4. The court of appeals apparently based its mootness holding on a concern about practical obstacles to enforcing a judgment against a non-resident parent. See Pet. App. 1-2 (citing *Bekier* v. *Bekier*, 248 F.3d 1051, 1054-1055 (11th Cir. 2001)). But difficulties in enforcement do not render a case moot. See *Church of Scientology*, 506 U.S. at 12-13 (test for mootness is not whether a court can "return the parties to the *status quo ante*" or grant a "fully satisfactory remedy" to undo the effect of an erroneously entered injunction, but whether some remedy is "possible"); *Ratner* v. *Sioux Natural Gas Corp.*, 770 F.2d 512, 516 (5th Cir. 1985) ("Difficulties in formulating a remedy in an otherwise living case do not

---

[6] The district court entered the fees and expenses orders after the court of appeals had found the case moot, and petitioner did not appeal those orders. Nonetheless, petitioner could argue that this Court's reversal of the court of appeals' decision would unwind the proceedings on remand to the district court and allow vacatur of the fees and expenses orders. See *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983).

evidence the absence of a case or controversy).[7] And here, quite aside from any questions concerning direct enforcement of such a judgment, its legal rulings might be given effect in other proceedings.

There are various events that plainly would moot a Hague Convention case on appeal. For example, there would be no dispute about return of the child if the child's age rendered the Convention no longer applicable, Convention Art. 4 (Convention "cease[s] to apply" when child turns 16); see *Gaudin* v. *Remis*, 334 Fed. Appx. 133 (9th Cir. 2009), cert. denied, 131 S. Ct. 109 (2010) (unpublished); see also *Camreta* v. *Greene*, 131 S. Ct. 2020, 2034 (2011) (case moot when child "is no longer in need of any protection from the challenged practice"), or the child died, see *Slagenweit* v. *Slagenweit*, 63 F.3d 719 (8th Cir. 1995). The case also would become moot if the parties conclusively settled their dispute about where the child should live, see *Leser* v. *Berridge*, 668 F.3d 1202, 1208 (10th Cir. 2011) (district court entered written order reflecting parents' "agreement the children would in fact return to the Czech Republic"), or the parent seeking relief under the Convention permanently

---

[7] Courts regularly render judgments that face impediments to enforcement. For example, a court may award a monetary judgment in a civil or criminal case even if the defendant lacks the funds to pay the judgment. Such a "case is not mooted by the fact that" the defendant "lack[s] the means to satisfy [the] judgment." *MCI Telecomms. Corp.* v. *Credit Builders of Am., Inc.*, 2 F.3d 103, 104 (5th Cir.), cert. denied, 510 U.S. 978 (1993); see 13C Charles A. Wright et al., *Federal Practice and Procedure* § 3533.3, at 3 (3d ed. 2008). Similarly, a court may render a judgment against a defendant whose person or assets are outside the United States or who cannot be found; although there may be significant impediments to enforcement in such circumstances, those obstacles do not make the case moot. See, *e.g.*, *Fawcett*, 326 F.3d at 496 (citing cases).

moved to the country where the child and other parent live, see *Von Kennel Gaudin* v. *Remis*, 282 F.3d 1178, 1183 (9th Cir. 2002).

But those situations are all unlike this case, because in those instances, either there would be no adversity or the parties no longer would have rights under the Convention. Here, by contrast, the child has not reached age 16, there remains a live dispute between the parties about where the child should reside, and a federal appellate court's resolution of that dispute could have numerous consequences for the parties. Accordingly, the case is not moot under this Court's Article III jurisprudence.

C. The History And Purposes Of The Convention Support The Conclusion That An Appeal Of A Return Order Is Not Mooted By The Child's Return

1. The Convention's "central operating feature" is its "return remedy." *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1989 (2010). A court must issue a return order when a child has been wrongfully removed or retained in a contracting State in violation of a parent's or other person's custody rights and none of the defenses to return apply. See Convention Arts. 1, 4, 12-13. But the Convention does not expressly address what should happen when an initial judicial or administrative authority enters a return order and the losing party appeals it. Instead, the Convention generally leaves the procedures for adjudicating return petitions in the first instance or on appeal to be determined as a matter of domestic law. See *Explanatory Report* 426, para. 63, at 444.

One thing that is clear under the Convention, however, is that a child should be returned to her country of habitual residence promptly. The Convention's primary object is "to secure the prompt return of children wrongfully removed to or retained in any Contracting

State." Convention Art. 1(a). The Convention obligates States Parties to "use the most expeditious procedures available" to implement the Convention within their territories and provides that the judicial or administrative authorities in those States shall "act expeditiously in proceedings for the return of children." Arts. 2, 11. The Convention sets an aspirational goal of reaching a decision on a petition for return within six weeks of its filing. Art. 11. The Convention further provides that once an administrative or judicial authority in a contracting State has determined that a child has been wrongfully removed or retained and no exception applies, it "shall order the return of the child forthwith." Art. 12.

Accordingly, once a district court has entered a return order under the Convention, it will be appropriate in many cases for the court to permit return pending appeal. That course will often enable children to be returned to familiar surroundings and established social and family networks. See Convention Introductory decls.; 51 Fed. Reg. at 10,504. The Hague Convention is premised on the principle that a decision regarding return should be swiftly rendered to avoid the possibility that the child will become settled in a new environment and subsequently uprooted. The longer the child remains in a country that a court has decided is not the child's habitual residence, the more disruptive it will be for the child if she eventually returns to her habitual residence, and the more difficult it will be for the courts of that country to adjudicate custody. See *Friedrich* v. *Friedrich*, 78 F.3d 1060, 1063 n.1 (6th Cir. 1996); see also *Abbott*, 130 S. Ct. at 1996 (noting the "trauma" a child suffers when one parent "separate[s] [the child] from the second parent and the child's support system"). By providing a remedy of swift return, the Convention

helps to prevent abduction by removing an incentive a parent might have to "forum shop."

2. A rule that the return of a child in conformity with a return order moots an appeal of that order could have the unintended consequence of slowing cases down rather than speeding them up. If a case becomes moot when a child leaves the United States, then courts would be more likely to grant stays of return orders pending appeal. See, *e.g.*, *John Doe Agency* v. *John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (probability of mootness is a "compelling justification" for granting stay in Freedom of Information Act case). But "[s]taying the return of a child in an action under the Convention should hardly be a matter of course," because it would keep the child from what has been found to be her country of habitual residence and would benefit the parent who the district court found to have wrongfully removed or retained the child. *Friedrich*, 78 F.3d at 1063 n.1; see *Bekier*, 248 F.3d at 1055 (acknowledging that the court's mootness holding "to some degree conflicts with the purposes of the Convention: to prevent parents from fleeing jurisdictions to find a more favorable judicial forum and to return children to their habitual residence in a timely fashion").

Indeed, delay in implementation of a return order pending appeal could take an older child outside of the Convention's scope of coverage entirely. See Convention Art. 4; see also 51 Fed. Reg. at 10,504 ("Even if a child is under sixteen at the time * * * the Convention is invoked, the Convention ceases to apply when the child reaches sixteen."). Similarly, a holding that return of the child moots an appeal would give the parent found to have wrongfully removed or retained a child a strong incentive to seek further review even in a weak case in

order to increase the likelihood that the child would remain with that parent for the duration of the appeal.

Finally, a routine practice of imposing stays in Hague Convention cases would undermine efforts to obtain prompt return of children abducted from the United States. It is already difficult for U.S. courts to meet the Convention's aspirational time limits in providing an initial Hague Convention decision. If courts in the United States routinely issued stays barring return pending appeal, it would be difficult for the United States to encourage other countries to act promptly in adjudicating Hague Convention petitions, thereby stranding children abroad during lengthy appeal processes.

3. Under the court of appeals' decision, the alternative to requiring a child to remain in the United States to prevent mootness is to cut off the losing parent's appellate rights if the child is returned after the trial court's ruling and require the parties to start over in another country. No such result is required by the Convention or ICARA: "While it is true that the process for the adjudication of Hague Convention petitions should be as quick as possible, neither the Convention nor the U.S. implementing legislation restricts the appellate process." *Walsh* v. *Walsh*, 221 F.3d 204, 214 (1st Cir. 2000) (citation omitted), cert. denied, 531 U.S. 1159 (2001). Reading the Convention to extinguish a parent's right of appeal when the child departs the United States would be an unwarranted intrusion into this country's domestic law, contrary to the Convention's approach of generally leaving procedural issues to be decided by each State Party.

This Court likewise should not assume that Congress, in enacting ICARA, decided *sub silento* to limit appellate review of Hague Convention orders in this manner.

Federal law generally affords an aggrieved party an appeal as of right from a final district court decision. See 28 U.S.C. 1291; Fed. R. App. P. 3. If Congress had meant to curtail that right under the Convention by barring any appellate proceedings following return, it would have been expected to do so expressly. See *Greenlaw* v. *United States*, 554 U.S. 237, 250 (2008) (when Congress legislates against a backdrop of "solidly grounded rule[s] of appellate practice," the inference to be drawn from silence is that Congress intended for the new provision to "operate in harmony" with those rules); see also, *e.g.*, *Silva* v. *Di Vittorio*, 658 F.3d 1090, 1098 (9th Cir. 2011) (dismissal of a prisoner's case should not count as a "strike" for purposes of the Prison Litigation Reform Act's "three-strikes" rule until after the prisoner has waived or exhausted his opportunity to appeal). And in fact ICARA's legislative history suggests that Congress expected the losing parent would be able to appeal a return order. See H.R. Rep. No. 525, 100th Cong., 2d Sess. 12 (1988) (*House Report*) (stating that the "full faith and credit" provision of ICARA, 42 U.S.C. 11603(g) was "not intended to deny the possibility of appeal from a return order or a decision denying a return order").

Moreover, requiring a stay as a condition of appellate review would make it more difficult to achieve the "uniform international interpretation of the Convention" that Congress intended, 42 U.S.C. 11601(b)(3)(B), as it would terminate the full course of appellate proceedings except in cases in which stays had been obtained or where return was denied. See also *House Report* 10 (emphasizing "the need for uniformity in [the Convention's] interpretation in the United States"). In contrast, permitting appeals to go forward after a child has

been returned will secure both the prompt return of the child and the full appellate review necessary to promote national uniformity in interpretation of the Convention.[8]

4. We are aware of only one foreign court of last resort that has directly addressed the mootness issue. Its decision is consistent with the conclusion that this case is not moot.

In a 2002 decision, the Spanish Constitutional Court held that an appeal of a return order was not mooted by return of the child in accordance with the order. See S.T.C., May 20, 2002 (B.O.E., No. 120, p. 47) (Spain).[9] In that case, the mother and father of the child obtained a divorce in Poland, and the Polish court awarded custody to the father. Decision 3-4. The mother traveled to Spain with the child, and the father filed a Hague Convention petition in Spain to secure the child's return to Poland. *Id.* at 4. The Spanish trial court ordered the child returned to Poland, and the child was returned. *Id.* at 4-5. The mother filed an appeal, and the appellate

---

[8] In its amicus brief filed at the Court's invitation in *Janakakis-Kostun* v. *Janakakis*, 531 U.S. 811 (2000) (No. 99-1496), the United States urged denial of a petition for certiorari concerning standards for establishing a certain Hague Convention defense. The brief suggested in passing that the case was a poor vehicle for further review because the child had been returned to Greece in compliance with the return order and "the case appears to be effectively moot." Br. at 19. The mootness question had not been addressed by the court of appeals, see *ibid.*, and the government's brief did not take a definitive position on that question. After full consideration of the continuing legal consequences of a return order and the ability of a reviewing court to provide relief, the United States has concluded that return of the child does not moot an appeal of a return order.

[9] The State Department's Office of Language Services has prepared a translation of this decision. With this brief, the United States is filing a request to lodge the translation. This brief cites to page numbers in the translation.

court held that the "appeal is moot" because "the child ha[s] been returned to her country of origin." *Id.* at 5; see *id.* at 19.

The question before the Spanish Constitutional Court was whether the intermediate appellate court violated the mother's right under the Spanish Constitution "to obtain a decision, based on law, on the merits of the claim asserted." Decision 10. The court held that the case was not moot and thus that the mother had been denied her constitutional right to effective judicial protection. *Id.* at 25-26. The court explained that, in enacting the domestic laws implementing the Convention, "[i]t was the intent of the Legislature" for an initial decision regarding return "to be subject to the right of review by the second-instance court." *Id.* at 23. The court observed that domestic law provided a particular timeframe for such an appeal, and it "indicate[d] that the consideration of the appeal shall not stay execution of the first-instance decision." *Ibid.* In the court's view, the "Spanish Legislature must have foreseen that one of the possible consequences" of its procedural rules would be "that at the time the appeal is decided * * * , the decision appealed may already have been executed," yet the legislature did not require the appellate court to "refrain * * * from issuing a ruling on the merits of the issue placed before it." *Ibid.*

The Spanish Constitutional Court further explained that, even though the child had been returned to Poland, "it was not meaningless for the Provincial Court to issue a determination on the issue of whether or not the appellant had illegally removed her daughter from Poland to Spain, especially since, throughout the proceeding, the mother had maintained that the father did not actually exercise custody rights to the child, who had always

been in the care and company of her maternal grandparents." Decision 25. The court observed that "[a] determination on this issue, regardless of its effectiveness in the Spanish proceeding once the child had been returned via execution of the decision under appeal, could still be relevant to the interests" of the mother because "a decision favorable to [her] could be invoked before the courts of Poland hearing the divorce proceeding between the parents in order to support or strengthen the mother's rights to obtain custody of the child." *Ibid.* The court therefore directed the appellate court to "decide the appeal as justice may require." *Id.* at 26.[10]

A 2006 survey of States Parties revealed that, although virtually all of the responding countries permitted appeal of a return order, a number of jurisdictions permitted immediate enforcement of the order, with the filing of an appeal sometimes, but not always, staying enforcement. See Hague Conference on Private Int'l Law, *Enforcement of Orders Made Under the 1980 Convention: A Comparative Legal Study, Prelim. Doc. No. 6 of Oct. 2006, for 5th Meeting of Special Comm'n to review the operation of the Hague Convention* 22-23, 31-33 & nn.95, 99. Although the surveyed States apparently did not specify whether enforcement of the order would

[10] Petitioner also cites (Br. 50) a Portuguese decision. A congressional document reports that, in that case, the "judge decided to immediately return the child to Canada, with the respective judicial delivery of the child"; then "[o]n the appellate level, the Court of Appeals of Lisbon granted the right to appeal to the Portuguese parent." Directorate of Legal Research, The Law Library of Congress, *Report for Congress: Hague Convention on International Child Abduction* 291 & n.28 (June 2004) (citing Ac. Rel. Lisboa of May 2, 1989, No. 0002087, Rel. Herlander Martins (Port.)). We have been unable to obtain a legible copy of that decision and therefore cannot discern whether the court explicitly addressed mootness.

moot an appeal, there is no indication that return typically would be a barrier to an appeal if no stay was granted. See also Hague Conference on Private Int'l Law, *Guide to Good Practice Under the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction* 19-20 (2003) (making recommendations for expediting proceedings, apparently based on the premise that an appeal could go forward if a child is returned). Accordingly, there is no indication that the practice of the States Parties is inconsistent with the conclusion that this case is not moot under Article III.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for a decision on the merits of the appeal.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
HAROLD HONGJU KOH
Legal Adviser
Department of State
MARK B. STERN
SHARON SWINGLE
Attorneys

OCTOBER 2012