No. 08-___

IN THE

Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,

Petitioner,

v.

JACQUELYN VAYE ABBOTT,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Hague Convention on International Child Abduction requires a country to return a child who has been "wrongfully removed" from his country of habitual residence. Hague Convention art. 12. A "wrongful removal" is one that occurs "in breach of rights of custody." *Id.* art. 3. The question presented is:

Whether a ne exeat clause (that is, a clause that prohibits one parent from removing a child from the country without the other parent's consent) confers a "right of custody" within the meaning of the Hague Convention on International Child Abduction.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Mark Cameron Abbott respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a) is published at 542 F.3d 1081. The district court's opinion (Pet. App. 15a) is published at 495 F. Supp. 2d 635.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 2008. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Hague Convention on the Civil Aspects of International Child Abduction (Pet. App. 27a), the International Child Abduction Remedies Act (Pet. App. 46a), and Minors Law 16,618 art. 49 (Chile) (Pet. App. 61a) are reproduced in the Petition Appendix.

STATEMENT OF THE CASE

This case presents an important question of international law over which the federal courts of appeals are intractably divided: whether a "ne exeat clause" confers a "right of custody" for purposes of the Hague Convention on International Child Abduction. The conclusion reached by a majority of U.S. courts of appeals directly conflicts with the conclusions of the vast majority of our sister signatories. Moreover, the question presented recurs frequently and in practice is often determinative of parental rights involving children who are taken from their home countries.

1. The United States is a signatory of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670 ("Hague Convention" or "Convention"). The Convention exists "to secure the prompt return of children wrongfully removed 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." Hague Convention art. 1. Congress implemented the Convention – which came into force in the United States on July 1, 1988, *see* U.S. DEP'T OF STATE, MULTILATERAL TREATIES IN FORCE FOR THE UNITED STATES AS OF JAN. 1, 2007, at 98 (2007) – in the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 et seq.

Under the Convention, a parent has the right to have his or her child returned to the country of the child's habitual residence if the child "has been wrongfully removed or retained." Hague Convention art. 12. Article 3 provides that a removal is wrongful

when it occurs "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 immediately before the removal or retention." Article 5(a) of the Convention in turn provides that "rights of custody shall include rights relating to the care of the person of the child, and, in particular the right to determine the child's place of residence."

In contrast to parents holding rights of custody, parents who merely hold "rights of access" – which the Convention describes as "includ[ing] the right to take a child for a limited period of time to a place other than the child's habitual residence," *see* Hague Convention art. 5(b) – cannot compel their child's return to the country of his habitual residence. Instead, parents can only seek assistance in exercising those rights in the new country. *See id.* art. 21.

2. Petitioner Timothy Abbott, a British citizen, married respondent Jacquelyn Vaye Abbott, a U.S. citizen, in England in 1992. Pet. App. 1a. Petitioner's work as an astronomer specializing in detector science and telescope management took the couple to Hawaii, where their son A.J.A. was born in 1995. Pet. App. 1a. After a three-year stay in the Canary Islands, the Abbotts moved to Chile, where petitioner had accepted a new job. Pet. App. 1a.

Petitioner and respondent separated in March 2003. Pet. App. 1a. Litigation in the Chilean family courts produced various court orders, four of which are relevant here. The first, entered in January 2004, granted petitioner "direct and regular" visitation rights. Pet. App. 17a. The second, entered

in November 2004, left daily care and control of A.J.A. with respondent.[1] Pet. App. 17a. The third, entered in February 2005, expanded petitioner's visitation rights to include a full month of summer vacation. Pet. App. 2a. The fourth, entered on January 13, 2004, prohibited both parents from removing A.J.A. from Chile without written authorization from the court. Pet. App. 2a. In addition to the Chilean family court ne exeat order, petitioner also held a ne exeat right under a Chilean statute that requires authorization from a parent having visitation rights before the other parent may take a child out of Chile. Minor's Law 16,618 art. 49 (Chile) (Pet. App. 61a).

In July 2005, petitioner sought an order from Chilean courts that would have expanded his rights with respect to his son. *See* Pet. App. 2a. Shortly thereafter, in August 2005, respondent violated the ne exeat order and Chilean law, taking petitioner's son out of Chile without petitioner's knowledge or the court's consent. Pet. App. 17a. Petitioner hired a private investigator and, four months after the removal, located his son in Texas. Pet. App. 2a.

3. Petitioner filed this suit in federal district court in Texas, seeking to have his son returned to Chile pursuant to the Hague Convention and ICARA. Pet. App. 18a. The district court denied petitioner's

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[1] Such an order was consistent with Chilean law, which – absent a showing by the father that she is unfit – vests responsibility for the personal care of a child with the mother, without any implication that the father is an inadequate parent. *See* CODE Civil Section 225 (Chile).

request. Pet. App. 15a. Although respondent conceded that her removal violated Chilean law (and in particular the ne exeat order), Pet. App. 6a, 19a-20a, and the court acknowledged that respondent's removal of A.J.A. without petitioner's consent or knowledge "violated and frustrated the Chilean court's order," Pet. App. 24a, the court concluded that the removal was not "wrongful" within the meaning of the Hague Convention because petitioner's ne exeat right did not constitute a right of custody under the Convention. Pet. App. 26a.

4. On appeal, the Fifth Circuit affirmed. As an initial matter, the panel recognized that the courts of appeals are divided on the question whether a ne exeat right constitutes a "right of custody" for purposes of the Hague Convention. Pet. App. 6a-7a. The Fifth Circuit explained that three courts, including the Second Circuit in *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001), had answered the question in the negative, while in *Furnes v. Reeves*, 362 F.3d 702 (11th Cir.), *cert. denied*, 543 U.S. 978 (2004), the Eleventh Circuit had "explicitly rejected *Croll*" by holding that "a ne exeat right alone is sufficient to constitute a custody right." Pet. App. 6a-7a (footnote omitted). The Fifth Circuit also noted that "foreign courts disagree regarding whether ne exeat rights are 'rights of custody' within the meaning of the Hague Convention." Pet. App. 11a.

Adopting the Second Circuit's holding in *Croll*, the Fifth Circuit held that it lacked authority to order A.J.A.'s return to Chile because petitioner had only "rights of access," rather than "rights of custody." *See* Pet. App. 14a. The panel reasoned that although

"[t]he ne exeat order . . . gave [petitioner] a veto right over his son's departure from Chile, . . . it did not give him any rights to determine where in Chile his son would live." Pet. App. 13a. Moreover, the panel emphasized, "the Chilean family court, in its second order, expressly denied the father's request for custody rights and awarded all custody rights to the mother." *Id.* Finally, the panel deemed "persuasive *Croll*'s reasoning that the Hague Convention clearly distinguishes between 'rights of custody' and 'rights of access' and that ordering the return of a child in the absence of 'rights of custody' in an effort to serve the overarching purposes of the Hague Convention would be an impermissible judicial amendment of the Convention." *Id.*

REASONS FOR GRANTING THE WRIT

The Hague Convention is the primary source of international law governing the return of children who have been abducted by a parent to another country. However, federal courts are deeply divided over whether a ne exeat right confers a right of custody under the Hague Convention. This conflict is untenable because it undermines bedrock constitutional principles and creates perverse incentives for would-be child abductors. This case presents an ideal opportunity for this Court to resolve the question presented, which was squarely raised below and was the sole basis for the Fifth Circuit's decision in this case. The Fifth Circuit's decision also breaks with the long-established position taken by the vast majority of our sister signatories that have addressed this issue. Finally, certiorari is also warranted because the Fifth

Circuit's decision is wrong on the merits, frustrating the goals and operation of the Hague Convention.

I. Federal Courts Are Intractably Divided Over Whether A Ne Exeat Clause Constitutes A "Right Of Custody" Under The Hague Convention.

Four appellate courts – the Second, Fourth, Ninth, and now the Fifth – have held that a ne exeat order does not create a "right of custody" under the Hague Convention. The Eleventh Circuit, and at least three state courts, have reached the opposite conclusion. Numerous federal courts and commentators have recognized this direct split in authority. *See, e.g.*, *Altamiranda Vale v. Avila*, 538 F.3d 581, 586 (7th Cir. 2008) ("[In contrast to *Furnes*,] several cases . . . hold that the doctrine of ne exeat does not create a right of custody."); *Lieberman v. Tabachnik*, No. 07-cv-02415-WYD, 2008 WL 1744353, at *9-*10 (D. Colo. Apr. 10, 2008) ("[T]he Eleventh Circuit reached the opposite conclusion of the *Croll* majority."); Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1070-72 (2005).

1. The first federal appellate court to hold that a ne exeat order does not constitute a right of custody under the Hague Convention was the Second Circuit in *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001). In that case, a divided panel of the Second Circuit held that "a ne exeat clause does not transmute access rights into rights of custody under the Convention." *Id.* at 143. First, relying on several U.S. dictionaries, the majority

concluded that the "ordinary meaning" of custody "entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, etc." *Id.* at 136, 138 (emphasis deleted). Positing that "[n]othing in the Hague Convention suggests that the drafters intended anything other than this ordinary understanding of custody," the majority thus reasoned that "*rights* of custody" refers to a "bundle of rights" relating to control over a child's care and upbringing. *Id.* at 139 (emphasis in original). The court rejected Mr. Croll's contention that the ne exeat clause constituted a "right to determine the child's place of residence" and was thus a "'right of custody' . . . protected by the Convention's return remedy." *Id.* Instead, the majority explained, the right to determine a child's residence is merely "indicative" of who actually has custodial rights, while the "power to pick her home country or territory. . . . protects rights of custody and access alike, and is no clue as to who has custody." *Id.* And in any event, the court reasoned, the ne exeat clause only limited Mrs. Croll's right to expatriate her child; it did not vest Mr. Croll with an affirmative right to determine where the child would live. *See id.* This "single veto power" alone, the court found, "falls short of conferring a joint right to determine the child's residence." *Id.*

Second, the majority found that the removal was not "wrongful" because it was not "in breach of custodial rights of the petitioning parent that 'were *actually exercised* . . . *or* would have been so exercised *but for the removal*.'" *Croll*, 229 F.3d at 140 (quoting Hague Convention art. 3) (emphasis in original). A

ne exeat clause, the majority opined, cannot meet this requirement because "the right itself concerns nothing but removal itself," and would never be exercised absent removal. *Id.*

Third, the majority contended that interpreting the Convention to require a child's return based solely on a violation of a ne exeat right would render the Convention unworkable. *Croll*, 229 F.3d at 140. A "foundational assumption" of the Convention, the majority maintained, is that the remedy of return will place the child back into the care of a custodial parent, not a parent "whose sole right—to visit or veto—imposes no duty to give care." *Id.* Because the return order does not also compel the parent who expatriates the child to return, "the effect of compelling [the child's] return . . . would be to alter custody rights rather than to enforce them." *Id.* at 141.

Fourth and finally, the majority pointed to the Convention's ratification history, finding support in the drafters' understanding that different remedies applied to rights of custody and rights of access *Croll*, 229 F.3d at 141-42.

By contrast, the majority declined to attribute any weight to decisions by foreign courts holding that ne exeat rights do constitute "rights of custody," dismissing the foreign decisions as "few, scattered, [and] conflicting" and thus reflecting no consensus view to which deference might be owed. *Croll*, 229 F.3d at 143.

Judge Sotomayor dissented. In her view, "the Convention's text, object and purpose, as well as the relevant case law" all clearly indicate that a ne exeat

clause confers a right of custody. *Croll*, 229 F.3d at 145. Looking first at "the Convention and its official history," Judge Sotomayor concluded that the Convention's drafters intended "a notably more expansive conception of custody rights" than the "parochial" definition gleaned by the majority from American dictionaries. *Id.* at 145-46. The Convention's primary goals were to "prevent[] parents from unilaterally circumventing the home country's custody law" in search of a friendlier forum. *Id.* at 149. Ordering the return of a child who has been abducted in violation of a ne exeat order "directly and fully advances" these goals, she reasoned, because a parent who violates a ne exeat order in her home country "nullifies that country's custody law as effectively as does the parent who kidnaps a child in violation of the rights of the parent with physical custody of that child." *Id.* at 147, 149.

Countering the majority's description of a ne exeat right as a mere veto power unrelated to custody, Judge Sotomayor emphasized that a ne exeat clause in fact gives a parent significant decision-making authority. *Croll*, 229 F.3d at 146. The Convention is not concerned with a child's location within her country of habitual residence; rather, it is designed specifically to protect parents' rights to determine the country in which their children live. *Id.* at 147. In light of this context, Judge Sotomayor reasoned, the right to choose the country in which a child lives must constitute a "right to determine the child's place of residence" under Article 5 and therefore a "right of custody" under the Convention. *Id.* at 148.

Moreover, Judge Sotomayor explained, ne exeat rights differ fundamentally from rights of access. Ne exeat rights, she emphasized, "circumscribe the choices of the parent with physical custody" in a way that access rights do not, because although a parent with access rights may still be able to exercise those rights even after his or her child has been removed, the removal of a child without mutual consent necessarily violates the other parent's ne exeat rights. *Croll*, 229 F.3d at 148. And – contrary to the majority's characterization of the foreign case law – Judge Sotomayor noted that "most foreign courts to consider the issue" have held that a ne exeat order constitutes a right of custody. *Id.* at 150.

The majority's reasoning in *Croll* has largely been adopted by the Fifth Circuit in this case, as well as the Fourth and Ninth Circuits, both of which have held that a ne exeat clause does not constitute a right of custody. *See Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir.), *cert. denied*, 540 U.S. 1068 (2003); *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002).

2. As the Fifth Circuit acknowledged, Pet. App. 3a-4a, the holding of these courts of appeals conflicts with the Eleventh Circuit's decision in *Furnes v. Reeves*, 362 F.3d 702 (11th Cir.), *cert. denied*, 543 U.S. 978 (2004), holding that a ne exeat right, standing alone, "grant[s] . . . a 'right of custody' under the Convention" because it "amounts to the right to determine the child's place of residence." 362 F.3d at 714 (quotation marks omitted).

The court acknowledged the contrary holdings of the Second, Fourth, and Ninth Circuits, but found their reasoning to be "flawed." *Furnes*, 362 F.3d at 719. Specifically, the court rejected the *Croll*

majority's characterization of the ne exeat right as a mere limitation on the right of the sole custodial parent. *Id.* at 720. Instead, the Eleventh Circuit reasoned, when a ne exeat order is in place parents "share a divided right to determine [the child's] place of residence, and . . . each of their rights serves as a limitation on the other's. Stated simply, they possess a joint right to determine [the child's] place of residence." *Id.* That interpretation, the court also explained, was – unlike the Second Circuit's – most consistent with the purpose of the Convention, the drafter's intent, and the reasoning and conclusions of the majority of the courts of sister signatories that have addressed the issue. *Id.* at 717, 720-22.

Three other courts of appeals, while not directly addressing the question presented, have suggested that they too would construe a ne exeat clause as constituting a "right of custody" for purposes of the Convention. In *Shealy v. Shealy*, 295 F.3d 1117, 1122 (10th Cir.), *cert. denied*, 537 U.S. 1048 (2002), the Tenth Circuit held that the removal of the child from Germany to the United States without the father's permission was not wrongful for purposes of the Convention because the particular ne exeat clause at issue allowed the child's removal without the father's permission in cases of military necessity. In affirming the district court's finding that a military necessity indeed existed, the Tenth Circuit appeared to assume that violation of a ne exeat order would constitute a breach of "rights of custody" under the Convention, as it explained that "[i]f a military necessity did exist, then there was no violation of the ne exeat order or, accordingly, of Mr. Shealy's custody rights under German law." 295 F.3d at 1122 & n.3;

see also Lieberman v. Tabachnik, No. 07-cv-02415-WYD, 2008 WL 1744353, at *11 (D. Colo. Apr. 10, 2008) (relying on *Furnes* to hold that the "only logical construction of the term 'right to determine place of residence' in the Convention must encompass decisions regarding whether a child may live outside of their country of habitual residence"). Similarly, in *Altamiranda Vale v. Avila*, 538 F.3d 581 (7th Cir. 2008) (Posner, J.), the Seventh Circuit suggested that a parent with a ne exeat right "clearly" possesses "the right to determine . . . the child's place of residence," *id.* at 586 (quotation omitted); *see also Friedrich v. Friedrich*, 78 F.3d 1060, 1065 n.4 (6th Cir. 1996) (describing decision in *David S. v. Zamira S.*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991), treating ne exeat rights as "custodial," as "ably resolv[ing] a "particularly difficult situation").

The Fifth Circuit's holding also cannot be reconciled with the decisions of three state courts, all of which have held that a removal in violation of a ne exeat clause is wrongful for purposes of the Convention. *See Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999), *cert. denied*, 531 U.S. 811 (2000); *David S. v. Zamira S.*, 574 N.Y.S.2d 429, 432 (N.Y. Fam. Ct. 1991) (deeming a child's removal "wrongful" under the Hague Convention when the other parent had visitation rights and a ne exeat order was in place); *D'Assignies v. Escalante*, No. BD 051876 (Cal. Super. Ct. Dec. 9, 1991), *available at* http://www.hcch.net/incadat/fullcase/0198.htm (same).

3. This division of authority is considered, mature, and entrenched. In reaching its decision in this case, the Fifth Circuit expressly acknowledged

that the Eleventh Circuit's holding in *Furnes* conflicted with those of the Second, Fourth, and Ninth Circuits and opted to follow the latter circuits in holding that a ne exeat right is not a "right of custody" for purposes of the Convention. *See* Pet. App. 3a-4a. Similarly, in *Furnes* the Eleventh Circuit acknowledged the holdings of the Second, Fourth, and Ninth Circuits, but it nonetheless rejected not only those courts' holdings but also every aspect of their reasoning. *See* 362 F.3d at 719-22. Moreover, there is no reason to believe that any of the circuits will reconsider their positions: the Eleventh Circuit denied rehearing en banc in *Furnes*, 107 Fed. Appx. 186 (11th Cir. 2004), while the Second Circuit has recently reaffirmed its holding in *Croll*, *see Duran v. Beaumont*, 534 F.3d 142 (2d Cir. 2008).

Nor would the question presented benefit from further percolation. Not only have the federal courts of appeals thoroughly ventilated the arguments on both sides of the issue, but numerous foreign courts have also weighed in on the status of ne exeat clauses under the treaty, *see infra* Part II. Moreover, the courts that have confronted the question presented in recent years have simply noted the split in authority and chosen sides. It is therefore unlikely that this conflict will be resolved without this Court's intervention.

4. This Court's intervention is also necessary because the current lack of national uniformity both undermines fundamental constitutional principles and obstructs the Convention's proper operation.

As this Court has consistently recognized, uniformity in federal law is particularly important in the field of international relations, where courts must

remember that "the nation-state, not subdivisions within one nation, is . . . the perspective of our treaty partners." *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 175 (1999). The Framers' emphasis on the need for national uniformity reflected their experience during the early years of this nation, as "the national government's efforts to engage in political and commercial relations with other countries [were] undermined by the States" under the Articles of Confederation. Br. *Amicus Curiae* of the United States 12, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (No. 99-274), 2000 WL 194805. In response, the Framers "propose[d] a Constitution that provided for a single national voice over foreign political and commercial affairs." *Id.* at 13. And although the concerns voiced by the Framers and echoed by this Court involve the prospect that a single state's actions may affect the entire union, such concerns are even more pressing when federal law, which was intended to ensure national uniformity, is itself inconsistent.

Moreover, the lack of a uniform interpretation of the Convention "could produce several anomalies" in federal law. *El Al*, 525 U.S. at 171. The first, and most basic, anomaly is that the same case could be decided differently based solely on the judicial circuit to which a parent has opted to remove her child. Thus, for example, if respondent had chosen to settle in Florida rather than Texas, petitioner's child would have been returned to Chile. Such momentous decisions relating to the course of a child's life should not be determined by an accident of geography.

Venue rules may further exacerbate the situation. ICARA provides that venue is proper "in

any court which has jurisdiction of such action and which 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(b) (emphasis added). Thus, for example, a parent seeking the return of a child currently residing in the Fifth Circuit could avoid that circuit's precedent by serving the other parent with process when he or she takes the child to another circuit – for example, to Disney World in the Eleventh – that applies a contrary interpretation of the Convention. *See Burnham v. Superior Court of Calif.*, 495 U.S. 604 (1990); *cf. Pasten v. Velasquez*, 462 F. Supp. 2d 1206 (M.D. Ala. 2006) (mother moved with child from Texas to Alabama, in violation of Chilean court order limiting mother to three-year stay in Texas to attend school; applying *Furnes*, court reasoned that move was "wrongful" for purposes of Convention because violation of court order "amounts to a violation of [the father's] *ne exeat* right"). In this scenario, ICARA's venue provision would preclude any transfer of the case back to the Fifth Circuit. *See* 28 U.S.C. § 1404(a) ("a district court may transfer any civil action to any other district or division *where it might have been brought*") (emphasis added); *cf. Lops v. Lops*, 140 F.3d 927, 937 (11th Cir. 1998) (children living in South Carolina "located" in Georgia for purposes of ICARA when they were picked up while visiting their grandmother in Georgia).

5. This case is also an ideal vehicle for this Court to resolve the question presented. The facts are undisputed: respondent concedes that she violated the ne exeat order and the Chilean statute prohibiting A.J.A.'s removal, and she does not

contend that any of the Convention's exceptions to the remedy of return in cases of wrongful removal apply here. The question presented is thus squarely raised and outcome determinative in this case, in which the decisions of the courts below rested solely on their conclusion that petitioner lacked "rights of custody."

Nor is there any danger that this case might become moot before this Court can resolve it. Unlike *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir.), *cert. denied*, 540 U.S. 1068 (2003), and *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999), *cert. denied*, 531 U.S. 811 (2000), in which the child was returned pursuant to a lower court order prior to appellate proceedings, petitioner's son remains in the United States. Moreover, because the Convention applies until the child is sixteen, Hague Convention art. 4, and A.J.A. does not reach that age until 2011, Pet. App. 1a, this case offers the opportunity for this Court to consider the question presented unencumbered by any concern that its ultimate decision will have no effect on the parties.

II. The Fifth Circuit's Decision Conflicts With The Position Taken By The Vast Majority Of Sister Signatories That Have Addressed The Issue.

Although certiorari is warranted based solely on the conflict among the federal courts of appeals, certiorari also should be granted because the Fifth Circuit's holding conflicts with the interpretation overwhelmingly adopted by the foreign courts that have addressed this issue. In construing the terms of a treaty, "the opinions of our sister signatories [are]

entitled to considerable weight." *Air France v. Saks*, 470 U.S. 392, 404 (1985) (quotation omitted). But the Fifth Circuit effectively ignored the virtual consensus in favor of treating ne exeat rights as rights of custody.

1. The question presented has arisen in eleven other countries that are signatories to the Convention. In *nine* of those countries, courts have held that ne exeat orders create rights of custody. In so ruling, these courts have relied on the text of the Convention itself and the practical effect of a ne exeat clause, as well as the purpose of the Convention.

One of the first cases to consider the question presented was the English case of *C. v. C.*, in which a mother violated a consent order with a ne exeat clause by taking her child abroad. [1989] 1 W.L.R. 654 (Eng. C.A.). The court held that the ne exeat order conferred rights of custody because the father had "the right to determine that the child should reside in [the country of habitual residence]"; these "limited rights and joint rights," the court explained, are "recognized" under Article 3 and are "within [the] scope" of the Convention. *Id.* at 658.[2] In his concurring opinion, Lord Donaldson acknowledged that "'[c]ustody', as a matter of non-technical English, means 'safe keeping, protection; charge, care, guardianship,'" but he emphasized that "'rights of

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[2] *See also In Re D (a child)* [2007] 1 A.C. 619, ¶ 37 (H.L. 2006) (House of Lords finding removal not wrongful in absence of explicit ne exeat right but also indicating that "a right of veto [requiring consent before child may be removed from country] does amount to 'rights of custody'" for purposes of Convention).

custody' as defined in the convention includes a much more precise meaning . . . . This is 'the right to determine the child's place of residence.'" *Id.* at 663 (Lord Donaldson M.R., concurring). Although this right may take many forms, he continued, "[i]f anyone, be it an individual or the court or other institution or a body, has a right to object [to removal], and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the convention." *Id.* Such a conclusion was also, the court found, consistent with "the whole purpose of this Convention" – that is, "to ensure that parties do not gain adventitious advantage by either removing a child wrongfully from the country of its usual residence, or having taken the child with the agreement of any other party who has custodial rights to another jurisdiction, then wrongfully to retain that child." 1 W.L.R. 654, 661 (citing *Evans v. Evans* [1989] 1 F.L.R. 135, 142 (Eng.)); *see also In the Marriage of: Jose Garcia Resina and Muriel Gislaine Henriette Resina,* Appeal No. 52, 1991 (Fam) (Austl.), ¶ 2, *available at* http://www.austlii.edu.au/au/cases/cth/FamCA/1991/33.html (holding that "[t]he reasoning adopted by the Court of Appeal in *C. v. C.* should be applied in Australia both for reasons of uniformity of interpretation and having regard to the spirit and intendment of the Convention").[3]

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[3] *See also Director-General Department of Families, Youth and Community Care and Hobbs*, 24 Sept. 1999, Family Court of Australia (Brisbane) (rights of custody exist when parental agreement contains a ne exeat clause), *available at* http://www.hcch.net/incadat/fullcase/0294.htm; *State Central*

Courts in six other countries have reached the same conclusion. *See, e.g.*, Oberster Gerichtshof [OGH] [Supreme Court] Feb. 05, 1992, 2 Ob 596/91 (Austria), *available at* http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&code=375&lng=1 (INCADAT summary); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 18, 1997, 2 BvR 1126/97 (F.R.G.), *available at* http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&lng=1&code=338 (INCADAT summary);[4] CA 5271/92 *Foxman v. Foxman* (H.C. 1992) (Isr.) (rights of custody should be "broadly construed," so as to cover cases in which parental consent is required before a child is taken out of the country); *Secretary for Justice v. Abrahams*, Family Court at Taupo, Sept. 3, 2001 (N.Z.), *available at* http://www.hcch.net/incadat/fullcase/0492.htm; *AJ v. FJ*, [2005] CSIH 36, ¶ 7 (Scot.), *available at* http://www.scotcourts.gov.uk/opinions/CSIH36.html (holding that ne exeat clause conferred "the right to determine the children's place of residence and, accordingly, . . . 'custody rights' for the purposes of Article 3 of the Convention"); *M.S.H v. L.H.*, [2000] 3 I.R. 390 (Supreme Court of Ireland), *available at*

Authority v. Ayob, (1997) 137 F.L.R. 283 (Austl.) (same), *available at* http://www.hcch.net/incadat/fullcase/0232.htm.

[4] *See also* Oberlandesgericht Dresden [High Regional Court] Jan. 21, 2002, 10 UF 753/01 (F.R.G.) (rights of custody arose from agreement whereby both parents were obliged to inform the other sixty days before any move), *available at* http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&lng=1&code=486 (INCADAT summary).

http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&lng=1&code=319 (INCADAT summary).

Notably, at least two foreign courts which have held that a ne exeat right is a "right of custody" for purposes of the Convention have expressly rejected the Second Circuit's holding in *Croll* in reaching that conclusion. Thus, in *Sonderup v. Tondelli*, 2000 (1) SA 1171 (CC) (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/2000/26.pdf, the Constitutional Court of South Africa declined to adopt the majority's opinion in *Croll*, siding instead with Judge Sotomayor's dissent. *Id.* ¶¶ 22-23. In so doing, the Court emphasized the decisions of other courts holding that a ne exeat right constitutes a "right of custody" for purposes of the Convention. *Id.* ¶ 21 n.23 (citing cases from Australia, Canada, and England). An English appellate court similarly declined to adopt the *Croll* majority's approach; noting Judge Sotomayor's "forceful dissenting opinion," it concluded instead that rights of custody exist via "autonomous," "purposive and effective interpretation" of the Convention. *Re P (A Child) (Abduction: Acquiescence)* [2004] EWCA (Civ) 971, ¶¶ 57-60 (Eng.), *available at* http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&code=591&lng=1 (INCADAT summary).

2. In holding that a ne exeat right is not a "right of custody" for purposes of the Convention, the Second Circuit accorded no weight to the contrary views of foreign courts, citing a purported lack of consensus. *Croll*, 229 F.3d at 143. Instead, the Second Circuit relied solely on decisions from two countries – France and Canada – that allegedly

supported its construction. *Id.* The Second Circuit's reliance, however, was misplaced.

a. In *Ministere Public v. Mme. Y.*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Perigueux, Mar. 17, 1992, D.S. Jur. 1992 (Fr.), a French lower court declined to order the child's return despite a provision in a custody order that required the mother to raise her children in the United Kingdom. That provision, the court reasoned, did not vest the father with a custody right because such an interpretation would infringe on the mother's right to expatriate. *See Croll*, 229 F.3d at 152 (Sotomayor, J. dissenting). But the French court's decision rested on the mother's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms and "did not address the meaning of [the Hague Convention's treatment in] Article 5" of the "right to determine the child's place of residence." *Id.*

In any event, both the Second Circuit in *Croll* and the Fifth Circuit here overlooked a case that is more directly on point: the decision of a French appellate court holding that a ne exeat order *does* create a right of custody for purposes of the Convention. *Ministere Public c. MB*, Cour d'appel [CA] [regional court of appeal] Aix-en-Provence, Mar. 23, 1989, *reprinted in* 79 Rev. crit. 529 (1990). Significantly, the 1989 Special Commission on the Convention specifically noted that the "result and the reasoning of the Court of Appeal of Aix-en-Provence in this case were broadly approved as being in the spirit of the Convention." Permanent Bureau, Hague Commission, *Overall Conclusions of the Special Commission of October 1989 on the Operation of the*

Hague Convention, 29 I.L.M. 219, 223 (Oct. 26, 1989).[5]

b. The situation in Canada is equally complex. In *D.S. v. V.W.*, [1996] 2 S.C.R. 108 (Can.), the Canadian Supreme Court relied on dicta from a prior case, *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (Can.) to hold that it lacked jurisdiction to order a child's return based on the Convention even when the removal had violated an implicit provision of a custody decree.[6] The *D.S.* Court nonetheless affirmed the lower court's order returning the child on the ground that the return was in the child's best interest. 2 S.C.R. 108, ¶ 94.

As Judge Sotomayor observed in *Croll*, however, there are "serious doubts as to whether the [*D.S. v. V.W.*] opinion's conception of *ne exeat* clauses in relation to the Convention truly represents the rule in Canada." 229 F.3d at 153. Specifically, although all of the justices agreed with the result in the *D.S.*

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[5] This Court "traditionally consider[s] as aids to its interpretation . . . the postratification understanding of the contracting parties." *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999) (quotations omitted). The Secretary General of the Hague Conference convened this Commission, at which thirty countries were represented, to resolve questions about the Convention's scope, operation, and meaning.

[6] *Thomson* had held that violation of an interim ne exeat order was a wrongful removal for purposes of the Convention, 3 S.C.R. 551, ¶ 68, but had suggested that return of a child would not be available for violation of a ne exeat clause in a permanent custody order because such an order would be intended only to "ensure permanent access to the non-custodial parent." *Id.* ¶ 69.

case, six of the nine justices expressed only qualified support for the opinion's reasoning, 2 S.C.R. 108, ¶¶ 1, 96, 97, citing a contemporaneous Canadian Supreme Court decision that rejected "the suggestion that the custodial parent has the 'right' to move where he or she pleases." *Goertz v. Gordon*, [1996] 2 S.C.R. 27. ¶ 46 (Can.). Thus, one year after the Court's decision in *D.S.*, the Court of Appeal for British Columbia acknowledged the decision in *Thomson v. Thomson* but nonetheless concluded that a ne exeat order "reserve[s]" in a parent a "right of custody" for purposes of the Convention because it entails "the right to determine the child's place of residence." *See Thorne v. Dryden-Hall* [1997] 148 D.L.R. (4th) 508, ¶ 27 (Can.).

3. Certiorari is also warranted because the conflict between the Fifth Circuit's decision in this case (as well as the holdings of the Second, Fourth, and Ninth Circuits) and the interpretation advanced by the overwhelming majority of courts in our sister signatories contradicts "the need for uniform international interpretation of the Convention," a need Congress recognized in implementing the Hague Convention. 42 U.S.C. § 11601(b)(3)(B). As the legislative history of ICARA makes clear, both Congress and the Executive understood that an antecedent condition to a uniform international interpretation "is the need for uniformity in its interpretation in the United States." H.R. REP. NO.

100-525, at 10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 386, 392.[7]

III. The Fifth Circuit's Decision Is Wrong On The Merits.

Certiorari is also warranted because the Fifth Circuit's decision is wrong on the merits. An analysis of the Convention's text, particularly when considered in light of its animating goals and purposes, as well as its drafting history, demonstrates that a ne exeat clause does in fact constitute a "right of custody" within the meaning of the Convention.

A. The Convention's Definition Of "Rights Of Custody" Includes A Ne Exeat Right.

When interpreting a treaty, courts should "begin with the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534-35 (1991) (quotation marks omitted); *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999).

1. The Hague Convention provides for the return of a child to the country of habitual residence when the child's removal is "in breach of rights of custody attributed to a person . . . either jointly or alone."

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[7] S*ee also* H.R. REP. NO. 100-525, at 17-18 (Executive Communication submitted by the U.S. Department of State to the House of Representatives on March 6, 1987 ("Executive Communication")) ("It is hoped that enactment of the bill will ensure greater uniformity in the Convention's implementation and interpretation in the United States.").

Hague Convention art. 3. Although the Convention does not provide a comprehensive definition of "rights of custody," it does indicate that they "*include* rights relating to the care of the person of the child and, *in particular*, the right to determine the child's place of residence." *Id.* art. 5 (emphasis added). The text thus singles out as a paradigmatic example of rights of custody decision-making authority over the child's place of residence. The Convention also distinguishes "rights of custody" from "rights of access," which include "the right to take a child for a limited period of time to a place other than the child's habitual residence," and for which the remedy of return is not available. *Id.*

Particularly when considered in the context of the Convention, a ne exeat right is a "right of custody" under Article 3 because petitioner had – jointly with respondent – the right to determine his child's place of residence. Notwithstanding the Fifth Circuit's characterization (like the Second Circuit before it) of a ne exeat clause as providing nothing more than a "veto right" or "partial power," Pet. App. 8a, a ne exeat order in fact provides a parent with significant power over where the child lives. A parent may grant or withhold consent subject to whatever conditions he or she chooses, and therefore effectively determine the country in which the child will live. Because the Convention is concerned with international, not domestic, relocations, that decision "is precisely the kind of choice the Convention is designed to protect." *Croll*, 229 F.3d at 147 (Sotomayor, J., dissenting).

That a ne exeat clause confers shared, rather than unilateral, power over the child's place of

residence is irrelevant, because the treaty specifically provides that rights of custody may be exercised "either jointly or alone." Hague Convention art. 3; *see also Furnes*, 362 F.3d at 720 (recognizing that each parent possesses such a right). Moreover, even if a ne exeat right were nothing more than a veto or negative right, that "does not diminish its status as a right." *See Croll*, 229 F.3d at 148 n.3 (Sotomayor, J., dissenting) (*citing Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 281 (1990)).

2. Construing a ne exeat clause as a right to determine a child's residence, and therefore a "right of custody" for purposes of the Convention, is also consistent with the Convention's intent to protect "*all* the ways in which custody of children can be exercised" through "a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration." Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ("Perez-Vera Report"), *in* ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 429 (1980) (emphasis in original).[8]

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[8] The Perez-Vera Report is recognized "as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention." U.S. Dep't of State, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10503 (Mar. 26, 1986); *see also Croll*, 292 F.3d at 137 n.3 ("[W]e have previously said that [the Perez-Vera Report] is an authoritative source for interpreting the Convention's provisions.").

By contrast, a narrow construction of the phrase "right of custody" (adopted by the Fifth Circuit in this case) rests on a definition of "custody" gleaned solely from U.S. dictionaries – an approach that cannot be reconciled with the drafters' decision to promulgate "an autonomous concept" that is "not necessarily coterminous with rights referred to as 'custody rights' created by the law of any particular country or jurisdiction," Permanent Bureau, Hague Commission, *supra*, at 222, rather than favoring any one signatory's conception of custody rights, Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT'L L. & POL. 221, 228 (2000).

3. The broader purposes of the Convention also support the conclusion that a ne exeat clause constitutes a right of custody. The Convention aims 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." Hague Convention art. 1. The return remedy secures these goals in two ways. First, it deters individuals from taking children across international borders in search of a friendlier forum, by "depriv[ing that] action[] of any practical or juridicial consequences." Perez-Vera Report, *supra*, at 429.[9] Second, it guarantees that

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[9] *See also Croll*, 229 F.3d at 147 (Sotomayor, J., dissenting) (*citing Blondin v. Dubois*, 189 F.3d 240, 245-46 (2d Cir. 1999)); H.R. Rep. No. 100-525 at 18 (Executive Communication) ("It is . . . hoped that [ICARA] will enhance the

custody arrangements ordered by the courts in one member state are respected by the courts in others by "re-establish[ing] a situation unilaterally and forcibly altered by the abductor." *Id.* at 430.

The Convention's interests in deterrence and reciprocal respect for custody arrangements apply just as fully to a ne exeat right as to a physical custody right. A ne exeat order signals – no less clearly than an explicit joint custody order – a court's determination that a child should not be taken from the country absent each parent's consent. It also gives legal effect, in a way that an order granting mere access rights does not, to the court's desire to preserve jurisdiction over the custody dispute. *See* PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 79-80 (1999).

In holding that courts are powerless to order return when a parent violates a ne exeat order, the decision below defeats both of these goals. First, it undercuts deterrence by enabling the abductor to "unilaterally and forcibly alter[]" unsatisfactory custody arrangements. Indeed, because virtually all Hague Convention signatories to consider the question regard ne exeat orders as conferring a "right of custody" and will order the child's return when such an order is violated, would-be abductors have a strong incentive to seek haven in the jurisdictions within the United States that do not. Second, as

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effectiveness of the Convention as a deterrent to future wrongful removals.").

Judge Sotomayor explained in her dissent in *Croll*, *see* 229 F.3d at 147, by failing to accord any respect to the foreign court's expressly stated interest in preserving jurisdiction, the Fifth Circuit's approach effectively nullifies the initial custody determination.

Finally, finding a ne exeat right to be a "right of custody" under the Convention "is the only means of ensuring fairness to all the parties involved," BEAUMONT & MCELEAVY, *supra*, at 87, because "this is the only means of ensuring that the rights of all those concerned are given due consideration in a forum with which all should be familiar," *id.* at 80. Rather than allow one parent to unilaterally alter both parents' custody rights, returning the child allows the debate on the merits to occur in the state of habitual residence, rather than in a new forum that the abducting parent has specifically shopped. *See* Perez-Vera Report, *supra*, at 430.

B. The Convention's *Travaux Préparatoires* Also Support The Conclusion That Ne Exeat Rights Constitute Rights Of Custody.

This Court has long made clear that, in construing a treaty, a court may "traditionally consider[] as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties." *El Al*, 525 U.S. at 167 (emphasis in original) (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)); *Eastern Airlines*, 499 U.S. at 534-35; *Air France v. Saks*, 470 U.S. at 400.

In this case, the *travaux préparatoires* demonstrate that ne exeat rights are rights of

custody under the Convention. During the negotiations leading up to the Convention, the drafters discussed a scenario virtually identical to this case as a hypothetical.[10] The Canadian representative observed that under his reading of the Convention, when a ne exeat order is in place, "[i]f the mother nevertheless leaves the jurisdiction without [the father's] consent, that constitutes wrongful removal." HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 266 (1980). The drafting history makes clear that the participants agreed that "under the present terms of the Convention, the abducted child would have to be sent back immediately," *id.* (statement of Mr. van Boeschoten (Netherlands)); *see also id.* (statement of Mr. Eekelaar (Commonwealth Secretariat)), and thus the text required no additional revision.[11]

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[10] The factual scenario at issue was also one of the earliest problems the Convention was designed to resolve: while discussing the Convention's subject-matter, the Perez-Vera Report directs the reader to the *Questionnaire and Report on International Child Abduction by One Parent*. Perez-Vera Report, *supra*, at 16 n.10. This Questionnaire deals with "five types of situations which are considered to constitute 'child abduction' for the purposes of this questionnaire," including when "[t]he child was removed by a parent from one country to another in violation of a court order which expressly prohibited such removal." Adair Dyer, *Questionnaire and Report on International Child Abduction by One Parent*, *in* ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 9 (1980).

[11] Since the Convention was drafted, scholars have also suggested that the drafters did not revise the text to clarify this point because they failed to recognize that this would become a

In *Croll*, the majority relied on three isolated documents – an article by the chair of the Commission that drafted the Convention, a letter by then-Secretary of State George Schultz, and a snippet from the Perez-Vera Report – that, in its view, demonstrated that "rights of custody" were not intended to encompass a ne exeat right. But the latter two documents are, as Judge Sotomayor explained, entirely question-begging: they both "stand only for the unremarkable proposition that under the Convention, the return remedy is unavailable for breaches of parents' access rights." *Croll*, 229 F.3d at 150 (Sotomayor, J., dissenting). Whether a ne exeat right is merely a right of access is, however, precisely the question presented by this case.

Nor can the statement by A.E. Anton, the chair of the Hague Conference Commission, suggesting that the Commission had "rejected" the view that ne exeat rights fall under "rights of custody," *Croll*, 229 F.3d at 141-42 (citing A. E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L.Q. 537, 546 (1981)), bear the weight that the Second Circuit has attributed to it. First, as *Croll* acknowledges, Anton actually indicated that the issue "is less clear," because Article 5 only

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major point of contention, given the then-prevailing approach to custody settlements that gave one parent full custody and the other "mere periodic visitation." BEAUMONT & MCELEAVY, *supra*, at 75-77. Today, courts in many countries often craft custody rights to allow both parents to play a role in the child's life, especially with respect to deciding where the child should live. *Id.* at 75.

"suggests" such a view. Anton, *supra*. Second, Anton wrote the article purely in his personal capacity, *id.* at 537 n.*, and there is no reason to favor the personal views of a single drafter over the actual drafting history of the official Commission members.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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