No. 08-645

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

REPLY BRIEF FOR THE PETITIONER

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Respondent's Brief in Opposition is as notable for what it fails to address as for what it does say. For the reasons described in this reply brief, the arguments respondent advances are unavailing. However, respondent fails almost entirely to address the arguments made in the *amicus* brief filed by the Permanent Bureau of the Hague Conference on Private International Law. That failure is telling, as the Permanent Bureau – which, as it explains in its *amicus* brief, is the institution "responsible for monitoring and reviewing the practical operation of the" Hague Convention "and for promoting its effective implementation in States Parties" – contends that the Fifth Circuit's decision was erroneous and also emphasizes the need for uniformity in the interpretation of the Convention and the importance of the question presented. The *amicus* brief thus confirms what the petition had already shown: certiorari is warranted to review this important question, which is often determinative of parental rights involving children who are taken from their home countries.

1. Respondent first contends that certiorari is not warranted because there is no division among the courts of appeals regarding whether a ne exeat right constitutes a "right of custody" for purposes of the Convention. Respondent's assertion that there is no division among the circuits is simply wrong, as is her characterization of the decision below as having "easily distinguished," BIO 11, *Furnes*. To the contrary, the Fifth Circuit itself recognized that the courts of appeals are divided on the question

presented: in a section entitled "The Circuit Split," Pet. App. 6a, that court explained that "[t]he Eleventh Circuit . . . held that a *ne exeat* right alone is sufficient to constitute a custody right," *id.* 10a.

The Eleventh Circuit's opinion in *Furnes* confirms that the Fifth Circuit's characterization of that decision is the correct one. To be sure, the Eleventh Circuit's opinion acknowledges that other provisions of Norwegian law "may well grant [a parent] a 'right of custody.'" 362 F.3d 702, 714 (11th Cir.), *cert. denied*, 543 U.S. 978 (2004); *see also* 362 F.3d at 714 (indicating that a ne exeat right, "especially in the context of [the father's] retained rights under" Norwegian law, "constitutes a 'right of custody' as defined in the Convention"). However, the Eleventh Circuit's opinion makes clear that a ne exeat right, standing alone, constitutes a "right of custody" for purposes of the Convention. Thus, for example, the Eleventh Circuit characterized the question before it as "whether the *ne exeat* right amounts to 'the right to determine the child's place of residence.'" *Id.* It concluded that "this *ne exeat* right grants Plaintiff Furnes a right of custody under the Hague Convention." *Id.*; *see also id.* at 716 ("[T]he *ne exeat* right [created by Norwegian law] provides Furnes with a right of custody . . . as defined by the Hague Convention."); *see also id.* at 719 n.14 (observing that "[a]t least one state court has determined, as we do, that custody rights are created by *ne exeat* clauses") (citation omitted).

Further confirmation that the Fifth Circuit correctly understood that its approach conflicts with *Furnes* can be found in the decisions of the district courts in the Eleventh Circuit, which have

characterized the decision in *Furnes* as holding that a ne exeat right does constitute a right of custody for purposes of the Convention. *See, e.g.*, *Lalo v. Malca*, 318 F. Supp. 2d 1152, 1156 (S.D. Fla. 2004) ("In *Furnes*, the Eleventh Circuit . . . held that a *ne exeat* right does constitute a right of custody."); *Garcia v. Angarita*, 440 F. Supp. 2d 1364, 1378 (S.D. Fla. 2006) ("In *Furnes*, the Court expressly ruled that Petitioner's right under Norwegian law to prohibit the child from living abroad, constituted a 'right of custody' within the meaning of the Hague Convention."); *Pasten v. Velasquez*, 462 F. Supp. 2d 1206, 1210 (M.D. Ala. 2006) ("In interpreting the Hague Convention, the Eleventh Circuit has held that violation of the *ne exeat* right is enough to qualify as a violation of custody rights."). These cases are particularly telling because they are the best indication that petitioner's case would have been decided differently in the Eleventh Circuit.

2. Respondent asserts that certiorari is also not warranted because there is no consensus among signatory states regarding the question presented. That argument rests in large part on respondent's quibbling about the details of a few foreign decisions cited in the petition, *see* BIO 18-19, without challenging petitioner's (or the Permanent Bureau's) characterization of the majority of the foreign decisions. More importantly, respondent's argument is belied by the Permanent Bureau's brief, which agrees with petitioner (at 8) that "a broad positive consensus has developed among Contracting State[s] on the question of whether a *ne exeat* provision may give rise to a 'right of custody' under the Convention."

Respondent also asserts that "[e]ven if there were consensus among foreign courts that a *ne exeat* prohibition is a 'right of custody,' the fact that U.S. courts have concluded otherwise would not threaten the effective enforcement of the Convention." BIO 20. Even if that assertion were correct, the present circuit split undermines the explicit congressional goal of a "uniform international interpretation of the Convention." 42 U.S.C. § 11601(b)(3)(B). But as the Permanent Bureau recognizes (at ii), that assertion is not correct: because the decision below "is inconsistent with decisions adopted by courts in many other States Parties, it may have adverse effects on the operation of the Convention more generally."

Nor is there any merit to respondent's assertion that "resolution of the question presented would affect only a narrow class of cases." BIO 20. Ne exeat clauses are widely used "to regulate post-separation, divorce and other custodial arrangements," Perm. Bureau *Amicus* Br. i-ii, and – as the myriad cases cited in the petition and the *amicus* brief demonstrate – the question presented has arisen in a number of cases both in the United States and abroad since the Convention was ratified. Respondent's suggestion that the significance of the question presented might somehow be diminished because a "diverse range of factors . . . bear on whether a petition for removal is granted," BIO 20, is puzzling, because (as respondent herself notes, *see id.* 11-13) the cases she cites do not directly address the question presented. Similarly, although respondent correctly notes that "[a] petition for removal is also subject to four affirmative defenses," *id.* 21, those

affirmative defenses only come into play once the parent seeking a child's return has established that the child's removal was wrongful, *see Garcia*, 440 F. Supp. 2d at 1377; *see also Furnes*, 362 F.3d at 723.

3. Contrary to respondent's assertion (BIO 21-22), this case is an ideal vehicle to consider the question presented. First, respondent's contention that "under Chilean law it is the family court, and not the parent with visitation rights, that holds the power to veto the custodial parent's departure decisions" is erroneous. Minors Law 16,618 of Chile makes clear that once a parent has visitation rights, that parent's written permission is required before the child may leave the country. *See* Pet. App. 61a-62a. Although the court may give the parent seeking to take the child out of the country permission to do so in limited circumstances – if parental consent "cannot be granted or is denied without good reason," *id.* 62a – such a provision does not "vest[] the power of veto *only* in the family court," BIO 21 (emphasis added).

Indeed, neither of the lower court decisions in this case agreed with respondent's characterization of the ne exeat right; instead, both rested only on the premise that the ne exeat right merely provided petitioner with "a veto right over his son's departure from Chile" but did not constitute a "right of custody" under the Convention. *See, e.g.*, Pet. App. 13a; *id.* 22a-23a. Moreover, other cases have considered similar provisions without suggesting that the veto power rested only in the court, *see, e.g.*, *Croll v. Croll*, 229 F.3d 133, 135 (2d Cir. 2000) (ne exeat clause provided that child "'not be removed from Hong Kong until she attains the age of 18 years' without leave of

court or consent of the other parent"), *cert. denied*, 534 U.S. 949 (2001); *Pasten*, 462 F. Supp. 2d at 1210-11 (construing identical Chilean statute as a *father's* ne exeat right). And in any event, respondent does not explain how a ne exeat right such as the one at issue in this case would be materially different from a ne exeat right in a custody agreement that does not expressly authorize the court to allow the child's removal absent parental consent; in such a scenario, the parent seeking to take the child out of the country could simply go to court to seek permission and/or a revision to the custody agreement.

Second, respondent's attempt to raise the specter of a res judicata claim should not preclude this Court from granting certiorari. As petitioner's trial brief in the district court (which is reprinted in part in an appendix to this brief) explains, that claim is meritless. *See* Reply App. 2a-4a. But in any event, at most the issue would remain open on remand from this Court, as neither the district court nor the Fifth Circuit has ever addressed it.

4. Respondent also argues that this case is not a good vehicle because the district court never "reached the question of whether Petitioner was actively 'exercising' any 'rights of custody' he may have had at the time of removal," BIO 22, and that in any event the Court should await "further development of the law" dealing with the purportedly "intertwined" questions of ne exeat rights and the "actively exercising" requirement. Both of these arguments are straw men.

First, as respondent acknowledges, the district court has never determined whether petitioner was actively exercising his right to custody. However,

even if respondent has not waived this argument by failing to address it either in her trial brief or at trial, the question can easily be resolved on remand.

Second, no further development of the law is necessary. Article 3(b) of the Convention requires a parent seeking return of a child to demonstrate that his rights of custody were "actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." *See* Pet. App. 28a. This case is on all fours with the Eleventh Circuit's decision in *Furnes*, which deemed it "clear that Plaintiff Furnes would have exercised his custody rights under the *ne exeat* clause . . . but for [his child's] removal." That court reasoned that the mother was required to seek the father's consent before relocating outside of Norway with the child: "Had [she] complied with that obligation, Furnes would have exercised his right by either consenting to the relocation (with or without conditions) or withholding consent." 362 F.3d at 723.

And in any event, there is no need "to reconcile the unique character of *ne exeat* rights with the Convention's core requirement that the applicant be actively 'exercising' his custodial rights," BIO 25, because the two questions are *not* intertwined. To the contrary, Article 3 makes clear that the inquiry into whether a right of custody has been breached (which necessarily includes a determination whether a right of custody exists) is entirely separate from the determination whether that right was being, or would have been, exercised. *See* Pet. App. 28a.

5. Finally, respondent contends that certiorari is not warranted because the Fifth Circuit's decision is correct. Respondent begins by emphasizing that

"[t]he Convention explicitly defines the difference between 'rights of custody' and 'rights of access," and explains that "[a] proposal to extend Article 3's protection to holders of 'rights of access' was considered and overwhelmingly rejected during Convention negotiations." BIO 26-27. But that argument is circular: the very issue in this case is whether a ne exeat right is a right of custody.

Turning to the merits of the actual question presented, respondent first contends that a "*ne exeat* clause alone does not fall within the rights protected by" the Convention's wrongful removal remedy because "the drafters considered custody rights as plural, a cluster of rights amounting to the right to care for and protect the child." BIO 28. Notably, although respondent quibbles with the portions of the drafting history on which petitioner relies, she does not seriously dispute the three Special Commission reports issued since the Convention's ratification which have confirmed that a ne exeat right *does* constitute a right of custody for purposes of the Convention.[1] *See* Perm. Bureau *Amicus* Br. 12-14 (quoting Report of the Third Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Mar. 1997) and Report on the Second Meeting of the Special

[1] Although respondent describes a "clear distinction" between rights of custody and rights of access, it is hardly clear that a ne exeat right alone does not constitute a "right of custody," such that the Special Commission reports are rendered irrelevant. *Contra* BIO 26.

Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Jan. 1993)); Pet. 22 (citing 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)).

Respondent next argues that the consent power created by a ne exeat right merely serves as a veto power. BIO 29. But this argument is equally unavailing. First, as the petition explained (at 26-27), a ne exeat right does in fact give a parent significant leverage over where the child lives and therefore does effectively determine the country in which the child will live. Second, and in any event, the 1997 Special Commission Report (cited in Perm. Bureau *Amicus* Br. 13-14) specifically observed that, for purposes of Article 5, "rights of custody" were "deemed to cover cases where a parent had rights of access and the right to be consulted before a change of the child's place of residence" – *i.e.*, a veto power. Third, the personal views of A.E. Anton provide little support for respondent's position: as the petition explains (at 32-33), Anton's statement is far less definitive than respondent would have this Court believe, but in any event there is no reason to accord any weight to those personal views when the Permanent Bureau has expressed a contrary official view.

Respondent's final argument is that recognizing a ne exeat right as a "right of custody" for purposes of the Convention would "run directly contrary to th[e] primary objective" of restoring the status quo. BIO 30. In this case, respondent has avowedly flouted a

court order and a statute in removing petitioner's child from Chile without his permission, and for over three years has frustrated petitioner's attempts to have his son returned to Chile. For her now to argue that a ne exeat right should not constitute a right of custody because returning A.J.A. to Chile would "destroy[] . . . the status quo of the *existing* custodial relationship" (emphasis added) literally turns the Convention and its objectives on their head.[2] As Elisa Perez-Vera explains, "the desire to guarantee the re-establishment of the *status quo* disturbed by the actions of the abductor has prevailed in the Convention," which "rests implicitly upon the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal." Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, *in* ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 430 (1980). Requiring the return of a child, such as A.J.A., who has been removed from his country of habitual residence in violation of a ne exeat right would be fully consistent with the objectives of the Convention, as it would allow the courts of that country to make any decisions

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[2] In any event, requiring A.J.A.'s return to Chile would not necessarily disrupt his existing custodial relationship with respondent. Respondent has never asserted that she cannot return to Chile; if she were to return, the Chilean courts could resolve the ongoing custody dispute with petitioner, which might or might not alter her custodial relationship with A.J.A.

regarding the merits of the custody dispute between petitioner and respondent.[3]

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition and the *amicus* brief of the Permanent Bureau, certiorari should be granted.

Respectfully submitted,

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[3] Respondent's suggestion (at 30) that petitioner "has already been determined unfit to exercise custody rights over the child by" a Chilean court is blatantly false. As the petition explained (at 4 n.1), Chilean law vests responsibility for the personal care of a child with the mother unless the father demonstrates that the mother is unfit; there is no implication that the father is an inadequate parent.