No. 16-254

In the Supreme Court of the United States

WATER SPLASH, INC.,

Petitioner,

v.

TARA MENON,

Respondent.

On Writ of Certiorari to the
Fourteenth Court of Appeals, Houston, Texas

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In 1965, the member states of the Hague Conference on Private International Law, including the United States, adopted a treaty known as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention"). Article 10(a) of the Hague Service Convention states:

> "Provided the State of destination does not object, the present Convention shall not interfere with –
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad[.]"

The question presented is:

Does the Hague Service Convention authorize service of process by mail?

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The opinion of the court of appeals is reported at 472 S.W.3d 28 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). J.A. 49-93. The district court's default judgment against respondent is unpublished. J.A. 39-45.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2015. J.A. 49-93. A timely motion for rehearing en banc was denied on October 6, 2015. J.A. 95. A timely petition for review to the Supreme Court of Texas was denied on May 27, 2016. J.A. 97. The petition for certiorari was filed on August 25, 2016. This Court granted certiorari on December 2, 2016, and has jurisdiction under 28 U.S.C. § 1257(a).

TREATY PROVISION INVOLVED

Article 10 of the English version of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361 (1969), states:

> "Provided the State of destination does not object, the present Convention shall not interfere with –
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination."

The full text of the Hague Service Convention is reproduced at pages 5-17 of the Joint Appendix.

STATEMENT

A. The Hague Service Convention

The Hague Conference on Private International Law ("Hague Conference" or "Conference") is an association of sovereign States whose members have met periodically since 1893. See *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 529 (1987). The United States attended sessions as an observer in 1957 and 1960 before joining the Conference as a member in 1964. *Ibid.*

At the Tenth Session in 1965, representatives of twenty-three member States, including the United States, approved the Convention on the Service Abroad of Judicial and Extrajudicial[1] Documents in

[1] "Extrajudicial documents" are those which " 'emanat[e] from authorities and judicial officers' of a state. Hague Service Convention, Art. 17 [J.A. 12]. According to the head of the American delegation to the Convention, "[t]he legislative history of the convention indicates that, in European practice, [the term 'extrajudicial document'] is intended to include the official documents of a European notary. In [American] practice, and also in England and Norway, it is intended to include the official documents of administrative agencies and commissions." Philip W. Amram, Statement to Senate Committee on Foreign Relations, *quoted in Convention on the Service Abroad of Judicial and Extrajudicial Documents*, S. EXEC. REP. NO. 90-6, at 14 (1967). Such documents "differ from judicial documents in that they are not directly related to a trial, and [differ] from strictly private documents in that they require the

Civil or Commercial Matters ("Hague Service Convention" or "Convention"). 20 U.S.T. 361 [J.A. 5-17]; *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 698 (1988).

In 1967, the Senate of the United States advised ratification of the Convention, the President then ratified it, and the United States deposited its ratification with the Ministry of Foreign Affairs of the Netherlands. See 20 U.S.T. 361; *Société Nationale*, 482 U.S., at 530. The treaty entered into force on February 10, 1969. 20 U.S.T 361; Convention, Art. 27 [J.A. 13] (providing that the "Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification."). Presently, seventy-one States have ratified or acceded to the Hague Service Convention.[2]

With respect to the Convention, the term "service" necessarily embraces the concept of "service of process": *i.e.*, the formal transmittal of documents that is "legally sufficient to charge the defendant with notice

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involvement of [public officials and] . . . include . . . demands for payment, notices to quit in connection with leaseholds or contracts of employment, protests with respect to bills of exchange and promissory notes . . . [.] Objections to marriage, consents for adoption, and acceptances of paternity are also in this class." Hague Conference on Private International Law, Permanent Bureau, *Practical Handbook on the Operation of the Hague Convention of 15 November 1965 On the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* ¶ 67 (3d ed. 2006) ("PRACTICAL HANDBOOK (2006)").

[2] See Hague Conference on Private International Law, Hague Service Convention Status Table, *available at* https://www.hcch.net/en/instruments/conventions/status-table.

of a pending action." *Schlunk*, 486 U.S., at 700.[3]

The Convention, a revision of prior treaties from 1954 and 1905 concerning civil procedure, had three related purposes:

> "The revision was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad."

Id., at 698.

The Convention requires each State to establish a "Central Authority" to receive service requests from other countries. Convention, Art. 2 [J.A. 5-6]. The Central Authority may impose requirements, such as requiring the service documents to be translated into an official language of the State. Convention, Art. 5 [J.A. 6-7]. After a Central Authority receives a proper request, it must serve the documents by a method authorized by its State's internal law or by any means designated by the requester that are compatible with that law. *Ibid.* The Central Authority must then provide a certificate of service in conformity with a specified model. Convention, Art. 6 [J.A. 7]; see also *Schlunk*, 486 U.S., at 698-99.[4]

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[3] Although "service of process" is a clear example of "service" of "judicial documents," the Hague Service Convention does not use the term "process" or phrase "service of process." J.A. 5-17.

[4] Give the existence of central authorities, one might question the desire to effectuate service through other methods, such as postal channels. In practice, however, the use of the central authority mechanism has been reported to be, at times, costly, lengthy, and/or unreliable. See Eric Porterfield, *Too Much Process, Not Enough Service: International Service of Process Under the*

Service through a Central Authority is not the only mode of service provided by the Convention, however. Article 8 allows the use of diplomatic or consular agents to serve a foreign defendant. J.A. 8.[5] Article 9 allows diplomatic agents to forward documents to designated authorities in a receiving State who, in turn, effectuate service on the foreign defendant. *Ibid.* And Article 11 allows two States to agree to methods of service not otherwise specified in the Convention. J.A. 9.

At issue in this case is Article 10, which states that:

> "Provided the State of destination does not object, the present Convention shall not interfere with:
>
> (a) the freedom to ***send*** judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect ***service*** of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding to effect ***service*** of judicial

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Hague Service Convention, 86 TEMP. L. REV. 331, 344-47 (2014).

[5] Article 8 specifically provides that "[e]ach contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents." J.A. 8. However, "[a]ny State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate." *Ibid.*

> documents directly through the judicial officers, officials or other competent persons of the State of destination."

J.A. 8-9 (emphasis added). Canada—the foreign State of destination here—acceded to the Convention in 1989 and, pursuant to Article 21, filed an official declaration with the Government of the Netherlands, which stated that "Canada does not object to service by postal channels" under Article 10(a). 1529 U.N.T.S. 499 (1989).

As can be seen above, Article 10(a) uses the word "send," while provisions (b) and (c) use the word "service." In addition, the word "send" does not appear anywhere else in the Convention. By contrast, "service" (or "served") appears in the title, preamble, and Articles 1-3, 5-6, 8-16, and 19 of the Convention. J.A. 5-12.

In the United States, this difference in terminology gave rise to a split of authority on the question presented: "Does the Hague Service Conventions authorize service of process by mail?" The Second, Fourth, Seventh, and Ninth Circuits; some district courts in the First, Third, Sixth and Eleventh Circuits; and appellate courts in at least five States have determined that it does, reasoning that "send" either means or includes "serve."[6] Conversely, the Fifth and

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[6] See *Ackermann* v. *Levine,* 788 F.2d 830, 838-39 (2d Cir.1986); *Koehler* v. *Dodwell*, 152 F.3d 304, 307-08 (4th Cir. 1998); *Research Sys. Corp.* v. *IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir. 2002); *Brockmeyer* v. *May,* 383 F.3d 798, 802 (9th Cir. 2004); *Dierig* v. *Lees Leisure Indus., Ltd.*, CIV.A. 11-125-DLB, 2012 WL 669968 (E.D. Ky. Feb. 28, 2012) (mem. op.); *TracFone Wireless, Inc.* v. *Does*, No. 11-cv-21871-MGC, 2011 WL 4711458, *3 (S. D. Fla. Oct. 4, 2011) (mem. op.); *Girafa.com, Inc.* v. *Smartdevil Inc.*, 728 F.Supp.2d 537, 543 (D. Del. 2010); *Borschow Hospital & Medical Supplies, Inc.* v. *Burdick-Siemens Corp.*, 143 F.R.D. 472 (D.P.R.

Eighth Circuits; some earlier district court decisions in the Third and Eleventh Circuits; and appellate courts in at least four States, including the court below (J.A. 55-56), have reached the contrary conclusion, reasoning that "send" excludes "serve."[7]

B. Statement of Facts

Petitioner Water Splash, Inc. makes aquatic playground systems known as "splash pads." C.R. 8.[8] A splash pad is a recreational area covered with a non-slip surface containing nozzles and other physical features that can spray, mist, and shoot streams of water, thereby creating a place for recreational water play. See C.R. 8, 16, 23-25. Drains in the surface collect water for re-circulation (C.R. 51-53), which keeps the area safe by preventing standing water. Splash pads are popular at municipal recreation areas, such as parks. C.R. 8.

From 2001 to 2013, respondent Tara Menon was

1992); *New York State Thruway Auth.* v. *Fenech*, 94 A.D.3d 17, 22 (N.Y. App. Div. 2012); *Nicholson* v. *Yamaha Motor Co., Ltd.*, 566 A.2d 135, 141 (Md. App. 1989); *Hayes* v. *Evergo Tel. Co., Ltd.*, 397 S.E.2d 325, 328 (N.C. App. 1990); *Sandoval* v. *Honda Motor Co., Ltd.*, 527 A.2d 564, 566 (Pa. Super. 1987); *Shoei Kako Co.* v. *Superior Court*, 33 Cal. App. 3d 808, 821 (Cal. Ct. App. 1973).

[7] See *Nuovo Pignone SpA* v. *STORMAN ASIA M/V*, 310 F.3d 374, 384 (5th Cir. 2002); *Bankston* v. *Toyota Motor Corp.,* 889 F.2d 172, 174 (8th Cir. 1989); *Raffa* v. *Nissan Motor Co. Ltd.*, 141 F.R.D. 45, 46 (E.D. Pa. 1991); *Arco Elec. Control Ltd.* v. *Core Intern.*, 794 F. Supp. 1144, 1147 (S.D. Fla. 1992); *Meek* v. *Nova Steel Processing, Inc.*, 706 N.E.2d 374, 377 (Ohio App. 1997); *Frankenmuth Mut. Ins. Co.* v. *ACO, Inc.*, 484 N.W.2d 718, 722 (Mich. App. 1992); *Honda Motor Co.* v. *Superior Court*, 10 Cal. App. 4th 1043, 1046-47 (Cal. Ct. App. 1992).

[8] Parts of the record outside the Joint Appendix are cited by the page number of the Clerk's Record (C.R.) in the lower courts.

an employee of Water Splash. J.A. 40 ¶ 2. In July 2012, during the middle of her tenure with Water Splash, Menon submitted bids to the City of Galveston to construct splash pads at two parks. J.A. 40 ¶ 3. However, Menon submitted these bids as a sales manager for a Water Splash competitor: South Pool & Spa, Inc. J.A. 40 ¶ 3. Notably, Menon did not have Water Splash's permission to submit these bids, which included trade names and product design information belonging to Water Splash. J.A. 40 ¶ 4.

At the time of those bids, Water Splash had an exclusive distributor agreement with a business known as Adventure Playground. J.A. 40 ¶ 5. With Water Splash's permission, Adventure Playground also submitted bids for the Galveston projects using Water Splash's trade names and design information. *Ibid.* In each case, however, Adventure Playground lost the bid to South Pool and Spa. J.A. 40-41 ¶¶ 6-7.

Water Splash terminated Menon in February 2013. J.A. 41-42 ¶ 10. Even then, however, Menon continued to use and disseminate Water Splash's proprietary information. *Ibid.* In one instance, she sent Water Splash designs to a Turkish company known as AquaTronics, then asked it to modify the plans to make the resulting products look less like Water Splash's own. J.A. 41-42 ¶ 10.

C. Lower Court Proceedings

On February 12, 2013, Water Splash filed suit in Galveston County District Court against Menon, a Canadian resident. J.A. 1; C.R. 6.

To obtain a valid judgment against Menon, Water Splash had to serve her with process. Under federal law, "if the internal law of the forum state"—here,

Texas—"defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies." *Schlunk*, 486 U.S., at 700. This results follows because the Convention "pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies." *Id.*, at 699 (citing U.S. CONST., Art. VI (Supremacy Clause)).

Under Texas law, a plaintiff can serve a foreign defendant in several ways, including (1) by certified mail, return receipt requested, either by sending it to the defendant directly,[9] or, if certain conditions are met,[10] by sending it to the Texas secretary of state;[11] (2) by complying with the provisions of any applicable treaty;[12] and, if certain other conditions are met, (3) by other court-ordered means.[13] As next discussed, Water

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[9] TEX. R. CIV. P. 108(a)(1)(c); TEX. R. CIV. P. 106(a)(2).

[10] If a plaintiff's claims against a nonresident defendant arise from the defendant's business activities in Texas, the Texas secretary of state becomes the defendant's agent for service of process if it has no business presence or appointed agent in Texas. TEX. CIV. PRAC. & REM. CODE § 17.044(b); see also *id.* §§ 17.026(a), 17.045(a).

[11] Under Texas law, service through the Texas secretary of state is not complete until the secretary of state actually sends process to the non-resident. *Whitney* v. *L & L Realty Corp.*, 500 S.W.2d 94, 95 (Tex. 1973). In default judgment proceedings, a certificate from the secretary of state (a "Whitney" certificate) constitutes conclusive proof (absent fraud or mistake) that the nonresident defendant was served. *Capitol Brick, Inc.* v. *Fleming Mfg. Co., Inc.*, 722 S.W.2d 399, 401 (Tex. 1986).

[12] TEX. R. CIV. P. 108(a)(1)(d).

[13] Texas law allows citation by publication when a defendant is transient, has no known residence, is absent from (or a nonresident of) the State, and other allowed efforts have failed. TEX. R.

Splash employed all of these methods here. Because each method required the transmission of documents abroad in order to effectuate service, the Hague Service Convention applies to this case.[14]

1. District Court Proceedings

In its original petition, Water Splash raised state law claims against Menon and her other employer, South Pool and Spa (a Texas corporation), for unfair competition, conversion, tortious interference with prospective business relations, and conspiracy. J.A. 1; C.R. 1, 5-6.

On the same day suit was filed, Water Splash obtained a temporary restraining order against South Pool and Spa and Menon (but only in her capacity as South Pool and Spa's agent), enjoining them from using Water Splash's name or designs without permission. C.R. 136-37. On February 22, 2013, the district court entered an agreed temporary injunction, which extended the TRO during district court proceedings.

CIV. P. 109. When service by publication is authorized, "the court may, on motion, prescribe a different method of substituted service, if the court finds, and so recites in its order, that the method so prescribed would be as likely as publication to give defendant actual notice." TEX. R. CIV. P. 109a.

[14] By contrast, compliance with the Hague Service Convention is not required when state law authorizes service on the domestic agent of a foreign defendant and provides that such service is complete when the *domestic agent* is served (assuming due process concerns are otherwise satisfied). See *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 707 (1988). Even where state law does not require transmittal of documents abroad for service, however, there may be reason for a plaintiff to effectuate service in compliance with the Convention. See *Schlunk*, 486 U.S., at 706 ("[P]arties that comply with the Convention ultimately may find it easier to enforce their judgments abroad.").

C.R. 146-48.

In February 2013, Water Splash served Menon by mailing citation with a copy of its original petition to the Texas secretary of state. J.A. 23. The secretary of state received these materials on February 15, 2013, and forwarded them on February 21, 2013 to Menon's address in Canada by registered mail, return receipt requested. J.A. 23. On April 1, 2013, these materials were returned to the secretary of state with the notation "Non Reclame" (unclaimed). J.A. 23.

On May 10, 2013, pursuant to Texas Rule of Civil Procedure 109a, Water Splash asked the court to authorize substitute service of process on Menon in Canada by first-class mail; certified mail (return receipt requested); Federal Express; and email to four addresses she had been known to use in the prior year. J.A. 18-22. On May 17, 2013, the court granted the motion and ordered that service could be effectuated by first-class mail; certified mail (return receipt requested); Federal Express; and email. J.A. 37-38.

On May 20, 2013, Water Splash used each of those methods to send Menon a copy of the court's order along with Water Splash's original petition and first amended petition, which raised additional claims and added an additional defendant (South Pool and Spa's owner/operator Muhammed "Mike" Tello). C.R. 167-301, 303, 307-18. But the emails were not acknowledged, and the Federal Express package and registered mail were both returned, the latter with a notice stating "Unclaimed" and "Non réclamé." C.R. 314-15.

During the pendency of the case, Water Splash obtained through discovery an email showing Menon's actual notice of the lawsuit beginning on the date suit was filed. C.R. 562, 575 (February 12, 2013 email from

Menon to South Pool and Spa and its counsel, asking to discuss "this litigation").[15] Even so, Menon failed to answer or otherwise appear in the lawsuit and on August 1, 2013, Water Splash moved for a default judgment against her. J.A. 1; C.R. 303-24.

On September 25, 2013, the trial court entered a default judgment and permanent injunction against Menon, which was interlocutory because Water Splash's claims against South Pool and Spa and Tello remained pending. J.A. 39-45. In the default judgment, the district court found that Menon's conduct breached the confidentiality provision of her employment agreement. J.A. 41 ¶ 8. The court also found that, but for South Pool and Spa's bid, Adventure Playground would have won the two park contracts, and that, in turn, Water Splash lost $75,000-$90,000 in income it otherwise would have earned from the sale of its products. J.A. 40-41 ¶¶ 6-7, 9.

The district court held Menon liable on Water Splash's original claims of unfair competition, conversion, tortious interference with prospective business relations, and conspiracy, as well as the claims Water Splash added in its amended petition for fraud, breach of fiduciary duty, and violation of the Texas Theft Liability Act. J.A. 42 ¶¶ 1, 2.

The court found that Menon's conduct was intentional and malicious, and awarded actual damages ($60,000), exemplary damages ($60,000), attorneys' fees, and interest. *Ibid.*; J.A. 42-43 ¶¶ 1-5. The court

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[15] The next day, Menon again emailed South Pool and Spa and stated that its manufacturer needed to make "some changes to the design somewhere so they don't look like [Water Splash's products]" and that Water Splash would "regret this legal action." J.A. 27; CR563, 578.

also entered a permanent injunction barring Menon and those subject to her control from using Water Splash's intellectual property, including product designs and customer lists. J.A. 43-45

In October 2013, Water Splash reached a settlement with the other defendants, which included their agreement on a permanent basis to the terms of the temporary injunction. C.R. 495. On October 28, 2013 (J.A. 2), Menon filed a motion for new trial (C.R. 497-555), which argued that Menon was not properly served because, among other reasons, "requests for service in Quebec of judicial or extrajudicial documents under the Hague Convention must be sent to the Central Authority for Quebec." C.R. 499-500. Menon also argued that, even if she had been properly served, a new trial should be granted because her failure to appear was not intentional or due to conscious indifference but was the result of a mistake or accident; she had a meritorious defense; and a new trial would not prejudice Water Splash. C.R. 501-06.

On January 3, 2014, the district court denied Menon's motion for new trial. J.A. 2; C.R. 584. On December 31, 2013, the district court dismissed Water Splash's claims against South Pool and Spa and Mike Tello (based on the settlement) and made final the default judgment against Menon. J.A. 46-47. On January 5, 2014, Menon filed a notice of appeal. C.R. 585.

2. Appellate Court Proceedings

On appeal, Menon argued that the default judgment should be set aside because Water Splash's attempts to serve process were required to comply with the Hague Service Convention by virtue of the Supremacy Clause, but that they had failed to do so because the Convention does not allow service of process

by mail, private delivery service, or email. Appellant's Brief at 14-25. In opposition, Water Splash argued that service by mail was permitted under the Hague Service Convention. Appellee's Brief at 2-11.

On June 30, 2016, in a divided opinion, the 14th Court of Appeals, Houston, Texas, vacated the default judgment, holding that the Hague Service Convention does not permit service of process by mail. J.A. 49-93. The panel majority defined "[t]he question before us" as turning on "the meaning attributed to 'send' and 'service' " under Article 10(a) of the Hague Service Convention. J.A. 53. The court acknowledged a split of authority (J.A. 54-55) and decided to follow the approach of the Fifth Circuit,[16] which previously held that "send" did not have the same meaning as "service." The panel majority summarized the Fifth Circuit's reasoning as follows:

> "In [*Nuovo Pignone, SpA* v. *STORMAN ASIA M/V*, 310 F.3d 374, 383 (5th Cir. 2002)], plaintiff attempted service by mailing service of process to the defendant's office in Italy. *See Nuovo*, 310 F.3d at 383. Arguing that service by mail violated Fed. R. Civ. P. 4(f)(1) because it did not comply with the Hague Convention, the defendant urged that the drafters used the term 'send' in connection with the delivery of judicial documents, but used 'serve,' 'service,' and 'to effect service' in other sections, including article 10. *Id.* The *Nuovo* court discussed how other courts have construed 'send'

[16] J.A. 55 ("We conclude that the better-reasoned approach is to follow the so-called 'minority view' which adheres to and applies the meaning of the specific words used in article 10(a) and prohibits service of process by mail.").

> and determined that, because 'service' was used throughout the Hague Convention while 'send' was confined solely to article 10(a), this demonstrated that the drafters did not 'intend to give the same meaning to "send" that they intended to give to "service." ' *Id.* at 384."

J.A. 53.

In justifying its conclusion, the panel majority also reiterated two of the Fifth Circuit's supporting rationales. First, the panel majority stated that its conclusion followed from principles of statutory construction:

> " 'Absent a clearly expressed legislative intention to the contrary,' a statute's language 'must ordinarily be regarded as conclusive.' *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct 2051, 64 L.Ed.2d 766 (1980). And because the drafters purposely elected to use forms of the word 'service' through the Hague Convention, while confining use of the word 'send' to article 10(a), we will not presume that the drafters intended to give the same meaning to 'send' that they intended to give to 'service.'
>
> *Nuovo*, 310 F.3d at 384 . . . ."[17]

J.A. 55.

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[17] The panel majority also noted that the Eighth Circuit had reached the same result using essentially the same reasoning. J.A. 56 (citing *Bankston* v. *Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989)).

Second, the panel majority reasoned that it was unlikely that the drafters of the Hague Service Convention would have put in place specific methods of service in Articles 2 through 7 (by a Central Authority or diplomatic channels) " 'while simultaneously permitting the uncertainties of service by mail.' " J.A. 56 (quoting *Nuovo Pignone*, 310 F.3d, at 385).[18] The panel majority then vacated the trial court's judgment and remanded for further proceedings. J.A. 58.

Justice Tracy Christopher dissented. As a threshold matter, she determined that the stated purpose of the Hague Service Convention inherently limited the Convention's scope to service of process transmittals. J.A. 70-72 (citing *Schlunk*, 486 U.S., at 700-01). She thus concluded that "send[ing] judicial documents" meant "serv[ing] judicial documents." J.A. 72.

In addition, the dissent noted that because treaties are contracts between sovereign States, their interpretation is governed by different principles than questions of pure statutory construction, including principles that examine non-textual sources of meaning. J.A. 66-70. The dissent then examined such sources, including the history of prior treaties that led to the Convention, the negotiation and drafting of the Convention itself (including the views of its delegates and reporter), as well as the post-ratification understanding of the Convention by its signatories—including the United States—and their courts and determined that, apart from some domestic courts, all of these sources unanimously supported the view that Article 10(a) permits service by mail. J.A. 77, 73-79.

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[18] The panel majority also stated that this result was consistent with other state and federal decisions in Texas. J.A. 57-58.

The dissent then criticized the countervailing view, including state and federal decisions relied upon by the majority, concluding that cases like *Nuovo Pignone*, *supra*, "follow[] none of the governing precepts of treaty construction." J.A. 81; see J.A. 79-93.

SUMMARY OF ARGUMENT

The stated purpose of the Hague Service Convention is to establish methods for transmitting documents abroad in order to effectuate service. The treaty's negotiation and drafting history confirms that its scope is limited and does not apply to transmittals of documents for non-service purposes. See *Schlunk*, 486 U.S., at 700-01. In turn, the limited scope of the Convention confirms that all transmittals of judicial documents regulated by it must be "service" transmittals, whether the term it uses to describe the transmittal is "send," "service," or anything else. Contrary decisions from lower courts make the fundamental mistake of reading the literal language of Article 10(a) without regard to the specific purpose of the treaty.

The alternative conclusion that "send" at least does not *exclude* the concept of service is supported by other language in Article 10. In particular, the opening proviso of Article 10 lets a State formally object to the use of postal channels for transmitting judicial documents. On the one hand, if Article 10(a) permits service by mail, there is a cognizable basis for a State to object to the use of its postal channels, as the act of service may be seen to infringe upon State sovereignty. On the other hand, if Article 10(a) does not permit service by mail, there is no obvious reason for a State to object to the use of its postal channels for non-service communications, nor would any such objection appear to have any practical purpose.

The history of the prior treaties that led to the Convention also supports the above conclusions. The Convention was a revision of those treaties, and Article 10(a) in particular was based on an analogous provision from a 1954 treaty that was written in French and that more obviously allowed service by mail.

When the Convention was drafted in 1964, however, the 1954 provision was both rearranged and translated from French to English. Although these revisions inexorably led to the present interpretative question, the negotiating and drafting history of the Convention evidences no intent that the revisions were meant to abandon a long-standing understanding that service by mail was permissible absent objection. Indeed, all evidence of the signatories' shared expectations, both at and after the time of adoption—and including the views of both the United States and Canada—reflect the expectation that Article 10(a) permits service by mail.

ARGUMENT

I. The scope of the Convention and the text of Article 10(a) confirm that its use of "send" means or includes the concept of service.

A treaty is in the nature of a contract rather than a legislative act; accordingly, its interpretation is a matter of discerning the contracting parties' intent.[19]

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[19] *BG Group, PLC* v. *Republic of Argentina*, 134 S. Ct. 1198, 1208 (2014) ("As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent."); *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1232-33 (2014) (" 'A treaty is in its nature a contract between . . . nations, not a legislative act.' " (quoting *Foster* v. *Neilson*, 2 Pet. 253, 314 (1829), *overruled in part by United States* v. *Percheman*, 32 U.S. 51, 89

As with most questions of intent, the starting point for treaty interpretation is evidence from the text itself, including statements of purpose, the structure of the treaty and its provisions, and the ordinary meaning of its words in context.[20]

A. "Send" means "serve" because the Convention's scope was limited to regulating service.

1. The stated purpose of the Convention indicates an intent to limit its scope to service transmittals.

The Convention's purpose, as stated in its the preamble,[21] was to create faster and simpler means of ensuring timely notice of documents transmitted abroad

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(1833)).

[20] See *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 534 (1987) ("We therefore begin 'with the text of the treaty and the context in which the written words are used.' " (quoting *Air France* v. *Saks*, 470 U.S. 392, 397 (1985))); *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 168-69 (1999) ("We conclude that the Government's construction of Article 24 is most faithful to the Convention's text, purpose, and overall structure."); *Tseng*, 525 U.S., at 169 (confirming "cardinal purpose" of treaty—achieving "uniformity of rules governing claims arising from international air transportation"—by examining treaty's preamble, which "recognized the advantage of regulating in a uniform manner the conditions of . . . the liability of the carrier").

[21] Consistently, the title of the treaty is "Convention on the *Service* Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters." J.A. 5 (emphasis added); cf. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (noting that " 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute" (quoting *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-529 (1947)).

for service:

> "The States signatory to the present Convention,
>
> Desiring to create appropriate means to ensure that judicial and extrajudicial documents *to be served abroad* shall be brought to the notice of the addressee in sufficient time,
>
> Desiring to improve the organisation of mutual judicial assistance for *that purpose* by simplifying and expediting the procedure,
>
> Have resolved to conclude a Convention to *this effect* and have agreed upon the following provision."

J.A. 5 (emphases added); see *Schlunk*, 486 U.S., at 702-04 (assessing purpose by examining preamble). Because the above statements of purpose are restricted to the regulation of service, there is no reason to infer that any transmittals of judicial or extrajudicial documents regulated by the Convention would be for any purpose beyond efforts to effect service.

2. The negotiating and drafting history of the Convention confirms this conclusion.

The treaty's negotiation and drafting history confirms that its regulation of transmittals of judicial and extrajudicial documents is limited to service purposes. *Schlunk*, 486 U.S., at 700 (examining Hague Service Convention's drafting history and negotiations in determining its scope).[22] In *Schlunk*, this Court examined the drafting history of Article 1:

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[22] See also *Medellín* v. *Texas*, 552 U.S. 491, 507 (2008) ("Because a treaty ratified by the United States is 'an agreement among

> "The preliminary draft of Article 1 said that the present Convention shall apply in all cases in which there are grounds *to transmit* ***or*** *to give formal notice of* a judicial or extrajudicial document in a civil or commercial matter to a person staying abroad. . . .
>
> The delegates . . . criticized the language of the preliminary draft because it suggested that the Convention could apply to transmissions abroad that do not culminate in service. . . . The final text of Article 1 . . . eliminates this possibility and applies only to documents transmitted for service abroad.
>
> The final report (*Rapport Explicatif*) confirms that the Convention does not use more general terms, such as delivery or transmission, to define its scope because it applies only when there is both transmission of a document from the requesting state to the receiving state, and service upon the person for whom it is intended."

Schlunk, 486 U.S., at 700-01 (italics in original; bold, underlining, and paragraph breaks added); see Convention, Art. 1 [J.A. 5] ("The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.").

Based on this analysis, the Court concluded that the drafting history "eliminate[d] the possibility" that

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sovereign powers,' we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." (quoting *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996))).

the Convention could apply to transmissions abroad "that do not culminate in service" (*i.e.*, non-service transmissions). *Ibid.*; see *Schlunk*, 486 U.S., at 710 (Brennan, J., concurring) ("[The Hague Service Convention] covers not every transmission of judicial documents abroad, but only those transmissions abroad that constitute formal 'service.' ").

Accordingly, the *scope* of the Convention is limited to transmittals made to effectuate service. Thus, there is no reason to interpret any of its transmittal provisions for judicial or extrajudicial documents as involving something other than service, regardless of the specific verb ("send," "serve") that may be used therein. For these reasons, "send" in Article 10(a) should be interpreted to mean "serve." Alternatively, and at a very minimum, the specific and limited purpose of the Convention at least means that "send" cannot be read to *exclude* the concept of service; otherwise Article 10(a) would be superfluous.[23]

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[23] *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (noting canon against superfluity as "one of the most basic interpretive canons"); see *New York State Thruway Auth.* v. *Fenech*, 94 A.D.3d 17, 20 (N.Y. App. Div. 2012) ("[T]he express limitation of the Hague Convention's scope to the service of documents renders article 10(a) meaningless if it is interpreted as applying only to documents that are sent, but not served, by mail."); *Hammond* v. *Honda Motor Co., Ltd.*, 128 F.R.D. 638, 641 (D.S.C. 1989) ("Forbidding direct service by mail would render subpart (a) extraneous material."); *Shoei Kako Co.* v. *Superior Court*, 33 Cal. App. 3d 808, 821 (Cal. Ct. App. 1973) ("[The Convention] purports to deal with the subject of service abroad of judicial documents. The reference to 'the freedom to send judicial documents by postal channels, directly to persons abroad' would be superfluous unless it was related to the sending of such documents for the purpose of service.").

The same conclusion may be reached even if the scope of the

3. Contrary decisions ignore the limited scope of the Convention.

Domestic courts determining that Article 10(a) does not permit service by mail primarily rely on the fact that the English version of the Convention uses the terms "serve" and "service" repeatedly, yet uses "send" just once. From that, they conclude that the drafters must have intended the terms to have different—indeed, mutually exclusive—meanings. See, *e.g.*, *Graphic Styles/Styles Intern. LLC* v. *Men's Wear Creations*, 99 F. Supp. 3d 519, 522-23 (E.D. Pa. 2015) ("[W]here the drafters from numerous countries used the words 'serve' or 'service' in fifteen articles of a treaty as well as in Article 10, subsections (b) and (c), it is facile to conclude that they merely chose to select the words 'to send' in Article 10(a) by mistake.").

Such reasoning can be traced to the following principle of statutory construction:

Convention somehow embraced non-service transmittals because the meaning of "send" is at least broad enough to encompass service. In particular, when used as a verb, "serve" is narrower than, but not inconsistent with, more general verbs of transmission, including "send," "mail," or "deliver." Indeed, procedural rules implementing different forms of service often are written in such terms. See TEX. R. CIV. P. 106(a)(2) (process may be served "by . . . *mailing* [it] to the defendant by registered or certified mail, return receipt requested" (emphasis added)); TEX. R. CIV. P. 106(a)(1) (process may be served by "*delivering* [it] to the defendant, in person") (emphasis added)); TEX. CIV. PRAC. & REM. CODE § 17.045(d) (for the Texas secretary of state to effectuate service on a non-resident defendant "process or notice must be *sent* by registered mail or by certified mail, return receipt requested") (emphasis added)); see also FED. R. CIV. P. 4(e)(1) (generally allowing service to be accomplished pursuant to state law, unless provided otherwise by federal law).

> "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

Russello v. *United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

But this presumption is necessarily rebutted when substantial evidence of scope and purpose, as discussed above, leads to a contrary interpretation:

> "There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure."

Cent. Hanover B. & T. Co. v. *C.I.R.*, 159 F.2d 167, 169 (2d Cir. 1947) (Hand, J.). Here, the Convention's specific scope and purpose are limited to the regulation of transmittals for effectuating service abroad. Consequently, there is no basis to apply the interpretive presumptive that "send" must have a different meaning from "serve."[24]

B. The text of Article 10(a) confirms that "send" does not exclude the concept of service.

Independent of the scope of the Convention, other

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[24] That said, even if the Convention's scope were not limited to service transmittals, "send" may be interpreted to include service transmittals. See, *supra*, note 23. In that case, "send" and "serve" would at least have different meanings, thus satisfying any presumption that different words usually do.

textual evidence shows that "send" in Article 10(a) does not *exclude* "service." In particular, the opening proviso of Article 10 makes clear that a State can object to the use of the postal channels to "send" judicial documents under Article 10(a). J.A. 8. In turn, Article 21 requires that States make any such objections known by informing the Ministry of Foreign Affairs of the Netherlands upon or after adoption. J.A. 13.

Of course, if "send" means or includes "serve," this right of objection makes sense to avoid any potential infringements on the sovereignty of civil law States. See 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 471 cmt. b (1987) ("Civil law states generally regard service of judicial process as a sovereign act that may be performed in their territory only by the state's own officials and in accordance with its own law."); *The Schooner Exchange* v*. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute.").

By contrast, if the meaning of "send" excludes the concept of service, then any right of objection would seemingly embrace only transmittals of judicial documents for non-service purposes (*i.e.*, where official notification is neither required nor sought). Yet if official notice—including any rights it may secure—is not required or sought by a particular transmittal, it is unclear what reason a State might have for objecting to the form of its communication. And even if a State *did* object to its postal channels being used for non-service communications, an objection under the Convention would appear ineffective to either prevent them or impose negative consequences. E.g., *Shoei Kako Co.* v*. Superior Court*, 33 Cal. App. 3d 808, 821 (Cal. Ct. App. 1973) ("The mails are open to all.").

Consistent with the above argument, there is no evidence in the negotiation or drafting history of the Convention that any signatory desired to prevent the use of postal channels for non-service transmittals. Rather, as next shown, the very opposite is true: the signatories shared the expectation that the Convention would allow service by such channels, absent formal objection by the State of destination.

II. The signatories shared the expectation that Article 10(a) permitted service by mail.

In addition to a treaty's text and drafting history, other evidence of the contracting parties' "shared expectations" may be employed in order to aid in its interpretation.[25]

A. Treaties that led up to the Convention allowed service by mail.

The contracting parties' intent may be evidenced by historical events leading up to the treaty. *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-32 (1943) ("[T]o ascertain [a treaty's] meaning we may look beyond the written words to the history of the treaty . . . ."); *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 700 (1988) (same).

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[25] *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1233 (2014) ("It is our 'responsibility to read the treaty in a manner "consistent with the *shared* expectations of the contracting parties." ' " (quoting *Olympic Airways* v. *Husain*, 540 U.S. 644, 650 (2004) (quoting *Air France* v. *Saks*, 470 U.S. 392, 399 (1985); emphasis added))); *Zicherman* v. *Korean Air Lines Co., Ltd.*, 516 U.S. 217, 223 (1996) (rejecting proposed treaty interpretation that was "implausible" and "unlikely" in view of "the shared expectations of the contracting parties").

Here, that history includes three prior treaties. In particular, the French text of the Convention was largely copied from prior treaties of 1896, 1905, and 1905, which were drafted solely in French. See Michael O. Eshleman & Stephen A. Wolaver, *Using the Mail to Avoid the Hague Service Convention's Central Authorities*, 12 OR. REV. INT'L L. 283, 333 (2010).

The language used in the earlier treaties sheds light not only on the signatories' shared expectations, but also helps explain why the English version of Article 10(a) was not drafted as precisely as it might have been. The Hague Conference explains what happened as follows:

> "the 1965 Convention was the first text drawn up by the Hague Conference to include an official English version and relating to service abroad. Nevertheless, the verb '*adresser*' used in the French version of Article 10(a) of the 1965 Convention, rendered in English by the verb '*send*,' had been used in substantially the same context in the three predecessor treaties drafted in The Hague (the Convention of 14 November 1896 on Civil Procedure, the Convention of 15 July 1905 on Civil Procedure, replacing the 1896 Convention, and the Convention of 1 March 1954 on Civil Procedure, itself replacing the 1905 Convention).
>
> While '*adresser*' is indeed not equivalent to the concept of '*service,*' it certainly does not exclude the latter. On the contrary, it has been consistently interpreted as meaning service or notice. Accordingly, neither the letter nor the history of the Hague Conventions can be used to sup-

> port the [contrary] approach applied in *Bankston* [v. *Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989) (which held that Article 10(a) did not permit service by mail)]."[26]

Because these prior conventions were written in French, and because the Hague Service Convention was written in both French and English, aspects of the French language explained above are relevant to any inquiry into the meaning of Article 10(a).[27]

Separate and apart from these nuances of translation, there was also a structural difference between the 1954 treaty and the Convention that helps explains the imprecision of Article 10(a). This can be seen by examining the following English translation of Article 6 of the 1954 Convention on Civil Procedure, which is unofficial but provided by the Conference:

> "The provisions of the foregoing Articles shall not interfere with -

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[26] PRACTICAL HANDBOOK (2006), *supra* note 1, ¶ 222 (citing George A.L. Droz, "*Mémoire sur la notification des actes judiciaires et extrajudiciaires à l'étranger*," in 3 THE HAGUE, PROCEEDINGS OF THE TENTH SESSION 12-13, 15-17 (*Imprimerie Nationale* 1965)) (paragraph breaks added).

[27] *Air France* v. *Saks*, 470 U.S. 392, 399 (1985) ("We look to the French legal meaning for guidance as to these expectations because the Warsaw Convention was drafted in French by continental jurists."). Because the Hague Service Convention was drafted "in the English and French languages, both texts being equally authentic," the negotiating and drafting history of the Convention's text in both languages should be considered. See *Schlunk*, 486 U.S., at 699-01 (considering French terms proposed for inclusion and examining the meanings given to them "in some countries, such as France" and "in others, such as the United States").

> (1) the freedom to send documents, through postal channels, directly to the persons concerned abroad;
>
> (2) the freedom of the persons concerned to have service effected directly through the judicial officers or competent officials of the country of destination;
>
> (3) the freedom of each State to have service effected directly by its diplomatic or consular agents of documents intended for persons abroad.
>
> In each of these cases, the freedom mentioned shall only exist if allowed by conventions concluded between the States concerned or if, should there be no convention, the State on the territory of which service must be effected does not object. That State may not object when, in the cases mentioned in sub-paragraph 3 of the above paragraph, the document is to be served without any compulsion on a national of the requesting State."

Hague Convention on Civil Procedure, Art. 6 (1954).[28]

Because provision (1) uses the word "send," it also suffers—at least in isolation—from any lack of clarity possessed by Article 10(a) of the Hague Service Convention. In context, however, any confusion disappears because the final paragraph quoted above clarifies that Article 6 is describing three means of *service*:

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[28] This English translation is available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=33.

"In *each* of these cases, the freedom mentioned shall only exist if . . . the State on the territory of which *service must be effected* does not object." (Emphasis added.)

In 1964, the Conference drafted Article 10(a) using nearly same French words as Article 6(1) of the 1954 treaty.[29] But in the Hague Service Convention, the Conference moved the language concerning a State's right to object from the end of Article 6 of the 1954 Convention to the beginning of Article 10 of the Hague Service Convention. At the same time, the Conference omitted the clarifying language from the last paragraph of Article 6 of the 1954 treaty.

Some might describe the omission of the clarifying language and the use of a less-than-precise English term as "careless drafting." Cf. 2 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, CIVIL AND COMMERCIAL 373 (2000). But it does help explain why the signatories' shared expectations—reflected by all other evidence of intent, as next discussed—were not expressed in the English text as precisely as they might have been.

B. The members of the Conference intended the Convention to permit service by mail.

The shared intentions of the contracting parties may be evidenced by contemporaneous statements

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[29] Compare Article 10(a) of the Hague Service Convention in French: "*à la faculté d'adresser directement, par la voie de la poste, des actes judiciaires aux personnes se trouvant à l'étranger*" (*available at* https://www.hcch.net/fr/instruments/conventions/full-text/?cid=17), with Article 6(1) of the 1954 Convention on Civil Procedure in French: "*à la faculté d'adresser directement, par la voie de la poste, des actes aux intéressés se trouvant à l'étranger*" (*available at* https://www.hcch.net/fr/instruments/conventions/full-text/?cid=33).

from conference delegates and the official reporter (Rapporteur) for the Hague Conference session in question. *Schlunk*, 486 U.S., at 701-703 (considering statements of both the Rapporteur and Philip Amram, head of the United States delegation to the Convention); *Id.*, at 709-10 & n.1, 714, 716 (Brennan, J., concurring) (same); *Société Nationale*, 482 U.S., at 530 n. 13 (1987) (considering statements of Rapporteur).

Here, such evidence further supports the conclusion that "send" either means or includes the concept of service:

1. The Rapporteur's Report

As translated by one commentator, the official French report on the treaty's preliminary draft stated:

> " 'The provision of paragraph 1 [Article 10(a) in the final text] also permits service by telegram if the state where service is to be made does not object. The Commission did not accept the proposal that postal channels be limited to registered mail.' "[30]

Yet if Article 10(a) was expected to include service by telegram—*i.e.*, so as not to be "limited to registered mail"—then Article 10(a) necessarily was intended to permit service by mail.

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[30] Patricia N. McCausland, Note and Comment, *How May I Serve You? Service of Process by Mail Under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 12 PACE L. REV. 177, 186 n.67 (1992) (quoting and translating 3 *Actes et Documents de la Dixième Session* (*Conférence de la Haye de Droit International Privé*) 90 (1964)).

And even more clearly, "[a]ccording to the official Rapporteur's report, the first paragraph of Article 10 of the draft Convention, which 'except for minor editorial changes' is identical to Article 10 of the final Convention, was intended to permit service by mail." *Brockmeyer* v. *May*, 383 F.3d 798, 802–03 (9th Cir. 2004) (citing 1 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE § 4–3–5, at 204-05 (2000)).

2. The U.S. Delegation's Report

Philip Amram, the head of the United States delegation and its chief negotiator, reported to the Senate Foreign Relations Committee that:

> "use of the central authority is not obligatory. Optional techniques may be used, for example—
>
> (1) diplomatic and consular channels (arts. 8 and 9)
>
> (2) unless the requested State objects, direct service by mail or transmission to a process server for service (art. 10)."

Philip W. Amram, Statement to Senate Committee on Foreign Relations, *quoted in Convention on the Service Abroad of Judicial and Extrajudicial Documents*, S. EXEC. REP. NO. 90-6, at 13 (1967); see *Schlunk*, 486 U.S., at 703 (relying on Amram as a member of the U.S. delegation); *Schlunk*, 486 U.S., at 710, 714 (Brennan, J., concurring) (same).

3. The Executive Branch's View

With respect the United States' expectations, "great weight" is given to the Executive Branch's interpretation of a treaty. *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive

Branch's interpretation of a treaty 'is entitled to great weight.' " (quoting *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982)); *Medellín* v. *Texas*, 552 U.S. 491, 513 (2008) (same).

When the Hague Service Convention was negotiated, signed, and ratified, the United States Secretary of State was Dean Rusk. In his official report to President Johnson, he stated: "Article 10 permits direct service by mail . . . unless [the receiving] state objects to such service." Dean Rusk, Secretary of State, Letter to President Lyndon B. Johnson (n.d.), *reprinted in* S. EXEC. DOC. C, 90th Cong., 1st Sess., at 5 (1967).[31]

C. The signatories' post-ratification viewpoints are consistent with their prior expectations.

Courts also consider signatories' post-ratification views as evidence of their intent. *Medellín*, 552 U.S., at 507 (" 'Because a treaty ratified by the United States is 'an agreement among sovereign powers,' we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." (quoting *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996))).

The post-ratification views of the signatories are consistent with the above evidence of their shared expectations:

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[31] President Johnson's letter transmitting the Convention and urging its ratification is reprinted in *Judicial Assistance: Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, 61 AM. J. INT'L L. 799 (1967).

1. The Executive Branch's View

When a federal court of appeals first held that Article 10(a) did not permit service by mail (*Bankston* v. *Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989)), the United States Department of State informed administrators of state and federal courts that:

> "We . . . believe that the decision of the Court of Appeals in *Bankston* is incorrect to the extent that it suggests that the Hague Convention does not permit as a method of service of process the sending of a copy of a summons and complaint by registered mail to a defendant in a foreign country. . . ."

Letter from U.S. Dep't of State Deputy Legal Adviser Alan J. Kreczko to the Administrative Office of the U.S. Courts and the National Center for State Courts (Mar. 14, 1990), *excerpted in United States Department of State Opinion Regarding the Bankston Case and Service by Mail to Japan Under Hague Service Convention*, 30 I.L.M. 260, 261 (1991).[32]

2. The Views of Other Signatories

The views of other signatories are entitled to "considerable weight." *Abbott* v*. Abbott*, 560 U.S. 1, 16 (2010) ("In interpreting any treaty, '[t]he "opinions of our sister signatories" . . . are "entitled to considerable weight." ' " (quoting *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999) (quoting *Air France* v. *Saks*, 470 U.S. 392, 404 (1985))))). Post-rati-

[32] See also *Brockmeyer* v. *May*, 383 F.3d 798, 803 (9th Cir. 2004) ("State Department circulars also indicate that service by mail is permitted in international civil litigation.").

fication, these views may be seen from post-Convention reports by the Hague Conference,[33] including its Special Commission, which repeatedly convened to examine the Hague Convention in actual practice:

In 1977, the Special Commission stated that "[t]he States which object to the utilisation of service by post sent from abroad are known thanks to the declarations made to the [Dutch] Ministry of Foreign Affairs" and that most members "made no objection" to direct mail service.[34]

In 1992, the Hague Conference stated that: "The views of some of the courts in the United States [finding that Article 10(a) does not permit service by mail] . . . contradict what seems to have been the implicit understanding of the delegates at the 1977 Special Commission meeting, and indeed of the legal literature on the Convention and its predecessor treaties."[35]

Then, at the Special Commission's 1989 meeting,

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[33] Cf. *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 182 n. 40 (1993) (examining scholar's references to the Office of United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979), in construing a United Nations Treaty).

[34] Hague Conference on Private International Law, *Report on the Work of the Special Commission on the Operation of the Convention of 15 November 1965 On the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (21-25 November 1977), *reprinted in* 17 I.L.M. 319, 326, 329 (1978), *available at* http://hcch.e-vision.nl/upload/scrpt14 _77e.pdf.

[35] Hague Conference on Private International Law, Permanent Bureau, *Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* 44 (2d ed. 1992) (footnotes omitted).

> "[i]t was pointed out that the postal channel for service constitutes a method which is quite separate from service via the Central Authorities or between judicial officers. Article [10(a)] in effect offered a reservation to Contracting States to consider that service by mail was an infringement of their sovereignty. Thus, theoretical doubts about the legal nature of the procedure were unjustified."[36]

In 2003, the Special Commission "reaffirmed its clear understanding that the term 'send' in Article 10(a) is to be understood as meaning 'service' through postal channels."[37]

In 2006, the Conference stated that "[s]ervice by mail under Article 10(a) is effective if (i) service by mail is allowed by the law of the State of origin and all the conditions imposed by that law for service by mail have been met, and (ii) the State of destination has not objected to the use of Article 10(a)."[38]

In addition, the post-ratification views of other States may be evidenced by their courts' decisions. See *Abbott* v. *Abbott*, 560 U.S. 1, 9-10 (2010) ("This Court's inquiry is shaped by . . . decisions addressing the

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[36] Hague Conference on Private International Law, *Report of the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 On the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 On the Taking of Evidence Abroad in Civil or Commercial Matters* ¶ 16 (Aug. 1989), *reprinted in* 28 I.L.M. 1558, 1561, *available at* http://www.hcch.net/upload/scrpt1989.pdf.

[37] PRACTICAL HANDBOOK (2006), *supra* note 1, App. 6 ¶ 55.

[38] PRACTICAL HANDBOOK (2006), *supra* note 1, ¶ 201.

meaning of 'rights of custody' in courts of other contracting states . . . .").

On this front, several foreign courts, including one in Canada, have held that Article 10(a) permits service by mail:

- *Integral Energy & Envtl. Eng'g Ltd.* v. *Schenker of Canada Ltd.*, 295 A.R. 233 (2001), 2001 WL 454163 (Alberta Queens Bench) ("Article 10(a) of the Hague Convention provides that if the state of destination does not object, judicial documents may be served by postal channels"), *rev'd on other grounds*, 293 A.R. 327 (2001);
- *Crystal Decisions (U.K.), Ltd.* v. *Vedatech Corp.*, EWHC (Ch) 1872 (2004), 2004 WL 1959749 ¶ 21 (High Court, England) (permitting mail service to defendants in the United States and Japan);
- Case C-412/97, *E.D. Srl.* v. *Italo Fenocchio*, 1999 E.C.R. I-3845 ¶ 6, C.M.L.R. 855 (2000) (Court of Justice of the European Communities) ("Article 10(a) of [the Hague Convention] allows service by post."); and
- *R.* v. *Re Recognition of an Italian Judgment*, I.L.Pr. 15 (2002), 2000 WL 33541696 (Thessaloniki Court of Appeal, Greece) ("It should be noted that the possibility of serving judicial documents in civil and commercial cases through postal channels . . . is envisaged in Article 10(a) of the Hague Convention.").[39]

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[39] The Ninth Circuit cited the pre-2004 decisions in reaching its conclusion that the permissibility of service by mail was the "essentially unanimous view of other member countries of the

D. Other scholarship supports the view that Article 10(a) permits service by mail.

In questions of treaty interpretation, the analysis of scholars may also be persuasive. *Abbott*, 560 U.S., at 18 ("Scholars agree that there is an emerging international consensus on the matter."); *Schlunk*, 486 U.S., at 698, 700, 703 (relying on 1 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, CIVIL AND COMMERCIAL (1984 and 1 Supp. 1986)).

Bruno A. Ristau was the American delegate to the 1977 Special Commission on the Convention, as well as the head of the American Central Authority. Ristau has written that the language of Article 10(a) regarding the use of "postal channels" was "intended to include service of process." 1 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, CIVIL AND COMMERCIAL § 4-3-5 (2000).

Similarly, the two top officials of the Hague Conference have written that the Convention allowed service by mail. Georges A.L. Droz & Adair Dyer, *The Hague Conference and the Main Issues of Private International Law for the Eighties*, 3 NW. J. INT'L L. & BUS. 155, 163-64 (1981). Dyer elaborated on this view in a 1992 letter:

> "The view that Article 10(a) does not allow service of process by mail is, so far as we know at the Permanent Bureau, entirely contrary to the historical interpretation of the 1965 Convention as well as the similar language (in French only) in its predecessors, the 1954 Convention on Civil Procedure and the 1905 Convention on

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Hague Convention" *Brockmeyer* v. *May*, 383 F.3d 798, 802 (9th Cir. 2004).

> Civil Procedure. The idea that the Convention permits service of process by mail, not merely sending of documents, was implicit in the conclusions of the Special Commission which met in November 1977 to consider the operation of this Convention, as well as of the Special Commission of April 1989, which met to consider the operation of both Conventions. Service of process by mail under the Convention has also been upheld by courts in Belgium and we at the Permanent Bureau are not aware of any case, except in the United States, where a court has held that the Convention does not allow service of process by mail abroad."[40]

Other scholars concur. See, *e.g.*, Michael O. Eshleman & Stephen A. Wolaver, *Using the Mail to Avoid the Hague Service Convention's Central Authorities*, 12 OR. REV. INT'L L. 283, 343 (2010) (concluding, after an exhaustive analysis of the history of the Convention, that "the only sensible approach is to find mail service is permissible under the Hague Convention" (citing Gary A. Magnarini, *Service of Process Abroad by the Hague Convention*, 71 MARQ. L. REV. 649, 677 (1988))).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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[40] Adair Dyer, First Secretary of the Hague Conference on Private International Law, Letter to Robert B. von Mehren (June 19, 1992), *quoted in* Robert B. von Mehren, *International Control of Civil Procedure: Who Benefits?*, LAW & CONTEMP. PROBS. 13, 17-18 & n.21 (1994).

Respectfully submitted.

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