JUN 02 2009

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

SUPPLEMENTAL BRIEF FOR RESPONDENT

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Pursuant to Supreme Court Rule 15.8, Respondent Jacquelyn Abbott respectfully submits this supplemental brief in response to the Brief for the United States as Amicus Curiae, filed in this matter on May 28, 2009, at this Court's invitation.

1. The Government's brief suggests that the way in which American courts have resolved the question presented conflicts with the "majority" or "prevailing" view among the Convention's 80 other signatories. Govt. Br. 14-16; Resp. Opp. 14. But the Government's brief cites cases from only five of these 80 countries as evidence of this supposed "majority." Govt. Br. 14. Moreover, the Government does not address the facts of the six cases cited, and, as Respondent has previously demonstrated, at least two of them do not turn solely on *ne exeat* rights. *See* Resp. Opp. 18 (discussing *Abrahams* and *Sonderup).* Attempting to cast the decisions of U.S. courts as anomalous, the Government also erroneously dismisses decisions of the Supreme Court of Canada as dicta. Govt. Br. 14 n.11. But the Government fails to refute Respondent's showing that those decisions are not dicta because they were the basis on which the applicants' claims under the Convention were decided. Resp. Opp. 15-16. Finally, the cited practice guide (Govt. Br. 16) also fails to establish the existence of a "majority" position since it simply rehashes the same handful of cases previously discussed in the Petition and Respondent's Opposition. *See* Hague Conference on Private International Law, *Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice,* 43 nn.173-75 (2008). As the guide acknowledges, the question presented is a "more

difficult case" on which "there is a division of judicial opinion...." *Id.* at 42-43. In all events, unlike a circuit split, any conflict among courts of different nations cannot be resolved by this Court.

2. The Government places heavy reliance on criticism of an early French decision in the 1993 *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction* (the "1993 Report"). Govt. Br. 15-16. That reliance is unsound. First, it is the intent of the original signatories as reflected in the 1980 Convention that matters, not the views of attendees of a special commission 13 years after ratification. *See* Resp. Opp. 25-26. The Government does not challenge Respondent's showing that the negotiating States rejected the extension of the return remedy to access-rights holders like Petitioner, Resp. Opp. 27, and it does not disclose the position of the United States in the negotiations. Second, a Special Commission meeting is merely an assembly of "experts" designated by States who review and debate the practical operation of the Convention; these are not diplomatic sessions of representatives with the power to take binding positions on behalf of States. *See* P.R. Beaumont & Peter E. McEleavy, *The Hague Convention On International Child Abduction* 25 (1999). Only 23 signatory States even sent representatives to the 1993 Special Commission meeting. 1993 Report ¶ 1. A report of a Special Commission meeting should have no more interpretive weight in construing the Convention text than, for example, a congressional commission on the

reform of the antitrust laws is given in interpreting those statutes.

3. The Government's brief asserts that the Fifth Circuit's decision and others like it "threaten to undermine the efficacy of the Convention." Govt. Br. 18. However, as just discussed, no such view has been expressed by the Convention's signatories. And the Government's Brief does not demonstrate (or even assert) that a significant number of petitions arising under Article 12 of the Convention turn on the interpretation of *ne exeat* rights. As Respondents have demonstrated, the complexity of family law cases is such that few cases are likely to depend on this issue. Resp. Opp. 20-21.

4. The Government's Brief confirms that Respondent's analysis of existing circuit law, including the Eleventh Circuit's *Furnes* decision, is accurate. As the Government forthrightly observes, *Furnes'* conclusion that the petitioning parent was entitled to return of the child was based not on a *ne exeat* right alone, but on the combination of a *ne exeat* right and rights of "joint parental responsibility" created by Norwegian law. Govt. Br. 17. Consequently, *Furnes'* holding does not contradict the Fifth Circuit's decision in this case. *See* Resp. Opp. 10-11. Unlike Petitioner, the Government does not attempt to suggest that the Tenth Circuit's *Shealy* decision, the Sixth Circuit's *Friedrich* decision or the Seventh Circuit's *Vale* decision address the question presented. *See* Resp. Opp. 11-13.

5. The Government unduly discounts the vehicle problems in this case. No court has considered the implications of a *ne exeat* law that vests the ultimate

power of decision in the court, where the only "right" vested in the non-custodial parent is the right to require a court determination. The Government now advances the novel position that all that is needed for a "right of custody" is "a meaningful ability to participate in the decision whether a relocation should occur." Govt. Br. 20. But no court has equated custodial rights with participation rights, and this simply highlights the *sui generis* nature of this case and the need for further development of this issue.

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The Convention aims to promote a child's best interests by maintaining the *custodial* status quo. U.S. courts have uniformly concluded that this goal is not effectuated by forcing a child in the U.S. to return to a country even in the absence of the parent with full custodial rights, where the remaining parent only previously exercised access rights protected by a *ne exeat* prohibition. Neither the Petition nor the Government's brief offers any basis on which to conclude that this conclusion is incorrect, that it deviates from the result that would obtain in the majority of signatory nations, or that it hampers the Convention's effectiveness.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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