No. 08-645

In the Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT, PETITIONER

v.

JACQUELYN VAYE ABBOTT

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a *ne exeat* order, which prohibits either parent from removing a child from the country without the other parent's consent, confers a "right of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction, thus allowing a parent to seek to have a child who was removed to another country in violation of the *ne exeat* order returned to his or her country of habitual residence.

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INTEREST OF THE UNITED STATES

The question presented in this case is whether a *ne exeat* order, which prohibits either parent from removing a child from the country without the other parent's consent, confers a "right[] of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction. The United States has a substantial interest in the manner in which the Convention is interpreted by the courts of this country. In response to this Court's invitation, the Solicitor General filed a brief at the petition stage on behalf of the United States as amicus curiae, recommending that the Court grant the petition for a writ of certiorari.

STATEMENT

1. The Hague Convention was adopted in 1980 to address the growing problem of international child abduction by persons involved in child custody disputes. *Hague International Child Abduction Convention; Text and Legal Analysis (Convention Text and Legal Analysis)*, 51 Fed. Reg. 10,498 (1986); see The Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention or the Convention), *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 49.[1] To facilitate the international cooperation that is necessary to deter and remedy such abductions, the Convention establishes uniform legal standards and remedies to be employed by States parties when a child is abducted from one country to another. See 42 U.S.C. 11601(a); see also Convention introductory decls., Art. 1. In particular, the Convention provides that children abducted in violation of a parent's custody rights should be promptly returned to their country of habitual residence. See *id.* Art. 1. The return remedy is designed to "protect children internationally from the harmful effects of their wrongful removal or retention" by quickly restoring them to their established family and social networks. See *id.* introductory decls.; 51 Fed. Reg. at 10,504. The remedy also prevents the abducting parent from gaining any legal advantage by removing the child to a different jurisdiction, and ensures that decisions relating to the child's custody are made by the courts of his or her country of habitual residence. See *id*. at 10,498.

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[1] The English-language text of the Convention is reprinted at 51 Fed. Reg. at 10,498-10,502, together with an analysis prepared by the Department of State and submitted to the Senate Committee on Foreign Relations in connection with the Senate's consideration of the Convention. See *id*. at 10,494, 10,503-10,516.

The Convention applies to any child under the age of 16 who is "wrongfully removed" from one contracting State to another. Convention Arts. 1(a), 4. Removal is "wrongful[]" if (1) it is "in breach of rights of custody attributed to a person, * * * either jointly or alone, under the law of the State in which the child was habitually resident," *id*. Art. 3(a), and (2) "at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention," *id.* Art. 3(b). "[R]ights of custody," for purposes of the Convention, "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." *Id.* Art. 5(a).

Upon finding that a child's removal was wrongful—that is, that it violated the custody rights of the left-behind parent—authorities in the State where the child has been brought must, subject to certain defenses, "order the return of the child forthwith."[2] Convention Art. 12. That remedy reflects the Convention's premises that custody determinations should be made by the courts in the child's country of habitual residence, and that the abducting parent should gain no benefit from attempting unilaterally to change the forum. Elisa Perez-Vera, *Explanatory Report*, in 3 *Actes et Documents de la Quatorzième Session (Child Abduction)* 426, paras. 16, 19, at 429-430 (Permanent Bureau trans. 1982) (*Explanatory Report*). Accordingly, a court considering a petition for the return of the child is not to adjudicate who should have custody or adjust the parties'

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[2] In contrast, the Convention does not provide the return remedy for violations of "rights of access," which "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention Art. 5(b). Rather, an individual whose access rights have been violated may petition to "secur[e] the effective exercise of" her rights. *Id.* Art. 21.

respective custody rights, and any decision made concerning return under the Convention "shall not be taken to be a determination on the merits of any custody issue." Convention Arts. 16-17, 19.

The United States participated in the negotiations concerning the Convention's terms, see *Members of the First Commission*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents*, at 253-255, and the Convention entered into force for the United States in 1988. See T.I.A.S. No. 11,670, *supra*. In order to implement the Convention, Congress enacted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 *et seq*., which establishes procedures for requesting return of a child abducted to the United States.[3] In so doing, Congress found that "concerted cooperation pursuant to an international agreement" and "uniform international interpretation of the Convention" were necessary to combat international child abduction. 42 U.S.C. 11601(a)(3) and (b)(3)(B).

ICARA authorizes "[a]ny person" seeking return of a child pursuant to the Convention to file a petition in state or federal court. 42 U.S.C. 11603(b). The court "shall decide the case in accordance with the Convention." 42 U.S.C. 11603(d). A child determined to have been wrongfully removed is to be "promptly returned," unless the party op-

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[3] As required by Article 6 of the Convention, ICARA also provides for a "Central Authority for the United States," to be designated by the President. 42 U.S.C. 11606(a). Each Central Authority is charged with "promot[ing] co-operation amongst the competent authorities in their respective States" and performing various duties, including facilitating voluntary returns and providing legal and investigative resources. Convention Art. 7. The Office of Children's Issues in the Bureau of Consular Affairs in the State Department serves as the Central Authority for the United States. See 22 C.F.R. 94.2.

posing return establishes the applicability of one of the Convention's "narrow exceptions." 42 U.S.C. 11601(a)(4), 11603(e)(2). Those exceptions—which include situations in which the child would face a "grave risk" of harm upon his or her return, Convention Art. 13(b), the child is old enough to object, *id.* Art. 13, or return would violate "fundamental principles of the requested State," *id.* Art. 20—may be raised as affirmative defenses to the return of the child.[4] 42 U.S.C. 11603(e)(2).

2. Petitioner is a British subject who married respondent, a United States citizen, in England in 1992. Pet. App. 1a. In 1995, while living in Hawaii, the couple had a child, A.J.A. *Id*. at 1a, 16a. Eventually, all three moved to Chile. *Id*. at 1a. In March 2003, petitioner and respondent separated. *Id*. at 1a-2a. The Chilean family courts granted respondent daily care and control of A.J.A. and accorded petitioner "'direct and regular' visitation rights," including a full month of summer vacation. *Id*. at 2a, 16a-17a. The courts also entered, at respondent's request, a *ne exeat* order that prohibited either parent from removing A.J.A. from Chile without the other's consent. *Id*. at 17a.[5]

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[4] In the domestic context, the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), 9 U.L.A. §§ 201-202 (1999), similarly provides that a court that makes an initial custody determination maintains exclusive and continuing jurisdiction over that determination. The UCCJEA also attempts to deter interstate child abduction by providing that courts generally must recognize and enforce, by any available remedy, existing custody and visitation decrees entered in other jurisdictions, *id.* § 303.

[5] Petitioner also held a *ne exeat* right under a Chilean statute that requires authorization from a parent having visitation rights before the other parent may take a child out of Chile. See Pet. 4 (citing Minor's Law 16,618 art. 49 (Chile)); Pet. App. 61a; see also *Villegas Duran* v. *Arribada Beaumont*, 534 F.3d 142, 147-148 (2d Cir. 2008) (characterizing Minor's Law 16,618 art. 49 as conferring a *ne exeat* right), petition

In August 2005, respondent removed A.J.A. from Chile without petitioner's consent. At the time, petitioner was seeking to expand his rights with respect to A.J.A., and several motions were pending before the Chilean family court. Subsequently, petitioner hired a private investigator and located his son in Texas. Pet. App. 2a.

3. Petitioner commenced this action in the District Court for the Western District of Texas in May 2006, seeking to have A.J.A. returned to Chile pursuant to the Convention and ICARA. Pet. App. 2a-3a, 18a. The district court denied relief. *Id.* at 15a. The court acknowledged that respondent's removal of A.J.A. without petitioner's consent "violated and frustrated the Chilean court's order." *Id.* at 19a-20a, 24a. The court concluded, however, that the removal was not "wrongful" within the meaning of the Hague Convention because petitioner's *ne exeat* right did not constitute a right of custody under the Convention. *Id.* at 26a.

The court of appeals affirmed. Pet. App. 1a-14a. The court observed that the courts of appeals are divided on the question whether a *ne exeat* right constitutes a "right[] of custody" for purposes of the Convention. *Id.* at 6a-7a. As the court noted, three courts have concluded that a *ne exeat* right is not a custody right. See *Fawcett* v. *McRoberts*, 326 F.3d 491, 500 (4th Cir.), cert. denied, 540 U.S. 1068 (2003); *Gonzalez* v. *Gutierrez*, 311 F.3d 942, 948-949 (9th Cir. 2002); *Croll* v. *Croll*, 229 F.3d 133, 138-139 (2d Cir. 2000), cert. denied, 534 U.S. 949 (2001). The Eleventh Circuit, the court below noted, "has reached the opposite conclusion." Pet. App. 6a-7a (footnote omitted); see *Furnes* v. *Reeves*, 362 F.3d 702, 720, cert. denied, 543 U.S. 978 (2004). The court of appeals also stated that "foreign courts disagree

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for cert. pending, No. 08-775 (filed Dec. 12, 2008).

regarding whether *ne exeat* rights are 'rights of custody' within the meaning of the Hague Convention." Pet. App. 11a.

Adopting the Second Circuit's analysis in *Croll*, the court of appeals held that petitioner was not entitled to have A.J.A. returned to Chile, because the *ne exeat* right is only a "partial power" that gives petitioner "a veto" over A.J.A.'s country of residence, but not a "right[] to determine where in Chile his child would live." Pet. App. 7a-8a, 13a. The court also emphasized the Chilean courts' grant of physical custody to respondent, and determined that petitioner possessed only rights of access (see note 2, *supra*), not rights of custody. *Id.* at 13a-14a. Under the Convention, the court concluded, petitioner's access rights could not provide a basis for ordering the return of the child to Chile. *Ibid.*

SUMMARY OF ARGUMENT

Petitioner's *ne exeat* right is a right of custody within the meaning of the Hague Convention. The Convention defines custody rights broadly, in order to protect from interference all of the ways in which domestic law can accord parents control over decisions affecting a child's care and residence. "[R]ights of custody" under the Convention include the "right to determine the child's place of residence," Convention Art. 5(a), and they may be held "jointly," *id.* Art. 3(a), or divided between parents. This broad definition easily encompasses a *ne exeat* right. A parent who holds such a right possesses a joint "right to determine the child's place of residence," because he has the ability to decide whether the child may be taken outside of the country of habitual residence. In addition, the holder of a *ne exeat* right has the ability to take part in decisions

about the child's residence even outside the country by imposing conditions on the relocation.

Understanding a *ne exeat* right as a "right[] of custody" also best gives effect to the Convention's object and purpose. A *ne exeat* order reflects the intent of the country of habitual residence that, if the parents cannot agree on whether the child may leave the country, the home country's authorities should have the opportunity to adjudicate the dispute and, if necessary, to adjust custody arrangements. Construing the phrase "rights of custody" to include *ne exeat* rights furthers the Convention's purpose of ensuring that decisions relating to the child's custody are made by these home country authorities, rather than by authorities in the country to which the child has been abducted. This interpretation accords with the Convention's negotiating history. And it best serves the United States' interests. The United States has the greatest opportunity to obtain the return of abducted American children, regardless of their nationality, if the Convention is applied consistently to ensure that children are returned to their country of habitual residence when they have been wrongfully removed from that country in breach of a parent's right of custody.

Other States parties to the Convention, whose interpretations of the Convention are "entitled to considerable weight," *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (citation omitted), have concluded, nearly unanimously, that a *ne exeat* right is a right of custody under the Convention. In addition, the multilateral Special Commission to Review the Operation of the Hague Convention (Special Commission), convened by the Permanent Bureau of the Hague Conference on Private International Law, has twice expressed the view—reflecting a consensus among attending States parties—that a *ne exeat* right is a right of custody.

ARGUMENT

A *NE EXEAT* RIGHT IS A RIGHT OF CUSTODY UNDER THE HAGUE CONVENTION

The task of interpreting a treaty "begin[s] with the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 534 (1991) (internal quotation marks omitted). Because multilateral treaties are negotiated and drafted by numerous international delegates, however, "[t]reaties are construed more liberally than private agreements, and to ascertain their meaning [the Court] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Air France* v. *Saks*, 470 U.S. 392, 396 (1985); see *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (citation omitted). Accord Vienna Convention on the Law of Treaties, *concluded on* May 23, 1969, Art. 31(1), 1155 U.N.T.S. 331, 340 (a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"); *id.* Art. 31(3)(b), 32.[6] Here, the Convention's text, purposes, and negotiating history establish that a *ne exeat* right is a "right[] of custody," and the States parties have overwhelmingly interpreted the Convention to provide for the return of the child when a *ne exeat* right is violated.

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[6] Although the United States has not ratified the Vienna Convention on the Law of Treaties, the United States generally recognizes the Convention as an authoritative guide to treaty interpretation. See, *e.g.*, *Fujitsu Ltd.* v. *Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir.), cert. denied, 534 U.S. 891 (2001).

I. THE CONVENTION'S TEXT, PURPOSES AND NEGOTIATING HISTORY INDICATE THAT A *NE EXEAT* RIGHT SHOULD BE CHARACTERIZED AS A "RIGHT[] OF CUSTODY"

A. The Convention's Definition Of Rights Of Custody Is Broad And Encompasses Joint And Single Rights

The text of the Convention provides that "the removal * * * of a child is to be considered wrongful where * * * it is in breach of rights of custody attributed to a person * * * either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention." Convention Art. 3(a). The Convention defines "rights of custody" expansively, stating that they "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." See *id.* Art. 5(a). The definition is purposefully phrased in inclusive, rather than exhaustive, language: the Convention seeks "to protect *all* the ways in which custody of children can be exercised." *Explanatory Report* para. 71.[7]

Consistent with that intent, Article 3(a) explicitly provides that the Convention recognizes "rights of custody" not only when they are vested in a single person holding sole custody, but also when they are held "jointly" with another person. Convention Art. 3(a). Because the Conven-

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[7] Because the *Explanatory Report* is the "official history" and commentary on the Convention and "a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it," 51 Fed. Reg. at 10,503, it is proper to look to the *Explanatory Report* to illuminate the meaning of the Convention's text. See *Saks*, 470 U.S. at 400; see also *Croll* v. *Croll*, 229 F.3d 133, 137 n.3 (2d Cir. 2000) (*Explanatory Report* is "authoritative" interpretive guide), cert. denied, 534 U.S. 949 (2001).

tion's drafters recognized that "courts are increasingly * * * in favour, where circumstances permit, of dividing the responsibilities inherent in custody rights between both parents," the Convention is designed to protect all "types of joint custody" created by "internal law." *Explanatory Report* para. 71. Thus, removal of a child by a parent is "equally wrongful" when the parent shares custody, as when she has none at all, because "such action * * * disregard[s] the rights of the other parent which are also protected by law." *Ibid.*; see 51 Fed. Reg. at 10,506 (Department of State explanation that "[i]f one parent [with joint custody] interferes with the other's equal rights by unilaterally removing * * * the child abroad without consent of the other parent, such interference could constitute wrongful conduct within the meaning of the Convention").

In addition, the Convention contemplates that the "bundle" of custody rights with respect to a child can be divided among two or more people, such that "the violation of a *single* custody right suffices to make removal of a child wrongful." *Furnes* v. *Reeves*, 362 F.3d 702, 714-715 (11th Cir.), cert. denied, 543 U.S. 978 (2004); *id*. at 722 n.17. For instance, the Explanatory Report notes that a parent has "rights of custody" even if the child possesses the right to determine his own residence, because "the right to decide a child's place of residence is only one possible element of the right to custody." *Explanatory Report* para. 78. Thus, a parent who possesses only one or some custody rights within the bundle may seek a child's return. See *C.* v. *C.*, [1989] 1 W.L.R. 654, 662 (Neill, L.J.) (Eng. C.A.) (petitioning parent's possession of one right "included" in the definition of rights of custody is sufficient to make the return remedy available); see also *Whallon* v. *Lynn*, 230 F.3d 450, 457 (1st Cir. 2000) (parent who possessed parental decision-

making authority, but not physical custody, was entitled to return of child).

In sum, the Convention is intended to encompass *all* of the ways in which the domestic law of the various parties may create—and divide—rights of custody. *Explanatory Report* para. 71; *id.* para. 67; see *Furnes*, 362 F.3d at 716 & n.12; *C.*, 1 W.L.R. at 658 (Butler-Sloss, L.J.) (recognizing "limited rights and joint rights"). As a result, the Convention's definition of custody rights is an "autonomous concept," which may be more expansive than a given participating country's domestic conception of custody. Hague Conference on Private International Law, *Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 29 I.L.M. 219, para. 9, at 222 (1990) (*Conclusions of the Special Commission of October 1989*); see *C.*, 1 W.L.R. at 658 (Butler-Sloss, L.J.) ("The words of article 5 * * * may in certain circumstances extend the concept of custody beyond the ordinarily understood domestic approach."); *In re D*, [2007] 1 A.C. 619, 635 (H.L.) (U.K.); see also *Furnes*, 362 F.3d at 711.

B. Petitioner's *Ne Exeat* Right Is A Right Of Custody Under Articles 3(a) And 5(a) Of The Convention

1. a. Under Chilean law, petitioner had the right to refuse to permit A.J.A. to leave Chile. This right arose both from a Chilean statute providing that the "authorization of the father or mother who has the right to visit a child shall also be required" before the child may leave Chile, see Pet. App. 6a (quoting Minor's Law 16,618 art. 49); *id.* at 61a, and from a specific 2004 Chilean court order "prohibiting A.J.A.'s removal from Chile by either [petitioner or respondent] without their mutual consent," *id.* at 17a, 68a-70a.

b. These rights conferred by Chilean law—collectively, the *ne exeat* right—provide petitioner with a jointly shared "right to determine the child's place of residence," and therefore a "right[] of custody." See *Furnes*, 362 F.3d at 714-716, 719-722; *Croll*, 229 F.3d at 146 (Sotomayor, J., dissenting).

The *ne exeat* right provides a joint right to "determine" residence within the meaning of Article 5(a) because a parent who holds a *ne exeat* right has the ability to decide whether the child may be taken outside of the country of habitual residence. See *Furnes*, 362 F.3d at 715. If the parent with physical custody wishes to leave the country, any "determin[ation]" as to the child's country of residence will be the result of a decision made jointly with the *ne exeat* holder.[8]

Decision-making authority with respect to the child's country of residence pertains to "the child's place of residence" within the meaning of Article 5(a). The phrase "place of residence" encompasses both the country and the more particular locale in which the child lives. See *Furnes*, 362 F.3d at 715; *C.*, 1 W.L.R. at 658. The Convention's essential focus is on the country as a place of residence: its entire purpose is to prevent the wrongful removal of chil-

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[8] Respondent argued in opposition to certiorari (Br. in Opp. 21-22) that the *ne exeat* right does not confer sufficient decision-making authority because a Chilean court may override an unreasonable exercise of the right. But the same can be said of *any* custody right, in that courts generally have the power, upon application, to override or modify a prior grant of custody rights. And regardless of the possibility of judicial override, the parent who wishes to relocate must petition the court for permission, rather than leaving unilaterally, thus giving the *ne exeat* holder a meaningful ability to participate in the decision whether any relocation should occur. See, *e.g.*, *C.*, 1 W.L.R. at 663 (Donaldson, M.R.) (*ne exeat* right is a "joint right subject always * * * to the overriding rights of the court," and is a right of custody).

dren across international borders. Convention Art. 1(a); see *Explanatory Report* paras. 15, 56. Therefore, "the only logical construction of the term 'place of residence' in the Convention" is that it "necessarily encompass[es] decisions regarding whether [a child] may live outside of" the child's home country. *Furnes*, 362 F.3d at 715. Even viewing a *ne exeat* right as an unadorned power to veto the other parent's decision to remove the child from the country, it affords the parent holding the right significant say over where the child will live—*i.e.*, inside the country or outside of it, with all the difference that entails. See *id.* at 714; *id.* at 716.

Moreover, inherent in the *ne exeat* right is the affirmative ability to take part in more specific decisions about the child's residence (as well as many other matters). In deciding whether to agree to relocation outside the country, a parent with a *ne exeat* right has the opportunity to impose conditions on the relocation, thereby having a say in which new country, or community within that country, a child will reside. See *Furnes*, 362 F.3d at 715; *C.*, 1 W.L.R. at 663 (Neill, L.J.) ("[T]his right to give or withhold consent[,] * * * coupled with the implicit right to impose conditions, is a right to determine the child's place of residence."); *Croll*, 229 F.3d at 145 (Sotomayor, J., dissenting) (parent holding *ne exeat* right may influence other parent's "selection of the destination country").

In according a parent effective control over the country in which the child will grow up, a *ne exeat* order gives the parent a substantial say in the child's care and development. The choice of country will determine everything from the child's primary cultural identity—the languages she speaks, the games she plays—to the character of the schools that she attends and the opportunities that she will have as an adult. The *ne exeat* right thus confers on the

parent significant, if indirect, "decision-making authority over the child's care." *Furnes*, 362 F.3d at 716 (parent can thus "ensure that [the child] will speak Norwegian, participate in Norwegian culture, enroll in the Norwegian school system, and have Norwegian friends[, and] * * * effectively can decide that [she] will *be Norwegian*."). Petitioner's *ne exeat* right is therefore a right of custody under the Convention.[9]

2. The court of appeals based its contrary holding primarily on two characteristics of the *ne exeat* right that it incorrectly believed rendered it something less than a right of custody. First, the court characterized the *ne exeat* right not as an affirmative right to "determine" residence, but a mere "veto right," Pet. App. 13a, conferring insufficient decision-making authority to count as custodial. See *Croll*, 229 F.3d at 139; Br. in Opp. 28-29. But that reasoning is a mistaken attempt to pry apart two sides of a single coin. To be sure, a *ne exeat* right can be characterized as a veto right that prevents the other parent from removing a child from the country. But as explained above, a veto power necessarily affords the parent holding it an important role in deciding the child's place of residence. And for this reason, a *ne exeat* right can be understood no less accurately as an affirmative right to participate with the other parent

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[9] The Chilean Central Authority considers the *ne exeat* right conferred by Chilean law to merit the return remedy under the Convention. See C.A. App. 38 (letter dated Aug. 16, 2006, from the Chilean Central Authority to United States Central Authority requesting the return of A.J.A. because he "was abducted by [respondent] * * * from La Serena, Chile, in violation of [petitioner's] access rights and in violation of a Court order, which prohibited the child leaving the Country"). Given the Convention's emphasis on promoting uniformity and deterring forum-shopping, 42 U.S.C. 11601(b)(3)(B), the Chilean Central Authority's view that respondent's removal of A.J.A. was wrongful under the Convention is entitled to weight.

in the residence decision. The "veto" implies and effectuates a joint right of control—and as earlier noted, the Convention contemplates that joint rights may count as fully custodial. See *In re D*, 1 A.C. at 635 ("[A] right of veto does amount to 'rights of custody' within the meaning of article 5(a).").

Second, the court relied on what it regarded as the Convention's sharp distinction between "rights of custody" and "rights of access," and concluded that the *ne exeat* right cannot be a right of custody because its purpose is to protect rights of access. See Pet. App. 14a; *id.* at 12a. The Convention does indeed distinguish between access and custody rights, but the court erred in assimilating the *ne exeat* right to a right of access. Unlike the holder of a *ne exeat* right, a parent with access rights has only rights of visitation, see 42 U.S.C. 11602(7), which can be exercised wherever the child resides; the parent does not have the right to participate in decisions concerning the child's country of residence. This difference is fundamental under the terms of the Convention. It explains why the holder of a *ne exeat* right, but not the parent with simple access rights, can invoke the Convention's remedy of return.

3. Construing the *ne exeat* right as a "right[] of custody" also best effectuates the Convention's underlying purpose that decisions regarding custody rights "should take place before the competent authorities in the State where the child had its habitual residence prior to its removal." *Explanatory Report* para. 19. A *ne exeat* order implicates this principle because, in addition to conferring decision-making authority on its holder, it gives the authorities of the country of habitual residence the opportunity to reconsider custody arrangements—for instance, by lifting or modifying the *ne exeat* order or, alternatively, by granting the *ne exeat* holder additional custody rights—if the

parent with physical custody wants to leave the country but cannot obtain the agreement of the *ne exeat* holder. By violating a *ne exeat* order, the parent with physical custody not only disregards the other parent's custody rights, but also unilaterally and wrongfully circumvents the authorities of the country of habitual residence. In so doing, she obtains a new, and perhaps more favorable, forum in which to litigate where the child should live. Refusing to order the return of the child in this situation thus disregards the jurisdiction of the country of habitual residence, and permits the abducting parent to seek and potentially obtain greater custody rights than she was accorded in that country. That is precisely the result that the Convention aims to prevent. See *id.* para. 13; *id*. para. 15.

Respondent contends (Br. in Opp. 30) that the return remedy should not be triggered by a violation of a *ne exeat* right because the parent seeking return—the *ne exeat* holder—does not have physical custody rights. See *Croll*, 229 F.3d at 140 (refusing to order return of child in part because the child would be returned to a parent "whose sole right—to visit or veto—imposes no duty to give care"). The return contemplated by the Convention, however, is a return to the child's country of habitual residence—not a return to a particular person. See *In re D*, 1 A.C. at 634. The return remedy permits the courts of that country to determine whether the child's custody should be adjusted—including, on the petition of the parent with physical custody, whether the *ne exeat* order should be lifted. That effectuates one of the purposes for which the *ne exeat* order was imposed in the first place—namely, permitting the home country's authorities to reconsider custodial arrangements if one parent wants to move to another country—as well as the Convention's goal of ensuring the continuing authority of the country of habitual residence. See

Explanatory Report para. 19; *In re D*, 1 A.C. at 635. And the abducting parent is of course free to return with the child to the country of habitual residence. See *Furnes*, 362 F.3d at 717.

C. The Negotiating History Indicates That The Convention's Drafters Understood A *Ne Exeat* Right To Be A Right Of Custody

"In interpreting a treaty it is proper * * * to refer to the records of its drafting and negotiation." *Saks*, 470 U.S. at 400 (relying on delegates' discussions about treaty language); *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 184-187 (1993) (same). Accord Vienna Convention on the Law of Treaties, *supra*, Art. 32. During the negotiations over the Hague Convention, several of the drafters indicated that they believed that a *ne exeat* right would fall within Article 5's definition of "rights of custody," and that violation of a *ne exeat* order would warrant the Convention's return remedy.

Although the primary abduction scenario envisioned by the Convention's drafters involved an individual without custody rights abducting a child away from her sole custodian, see Adair Dyer, *Report on International Child Abduction by One Parent ('Legal Kidnapping')*, in 3 *Actes et Documents* 12, 19-20, the drafters took care to define custody broadly so that the return remedy would apply beyond that situation. See, *e.g.*, *Procès-verbal No. 4*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 268, 271 (*Procès-verbal No. 4*) (statements of Israeli delegate and Chairman); *Procès-verbal No. 2*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 257, 260 (statement of Chairman that Article 3 should use a "formulation which would embrace as many persons and entities

as possible"); *Explanatory Report* para. 71. Thus, the drafters agreed that Article 5 encompassed joint and divisible custody rights, even though the concept of shared or divided custody was relatively new in some States parties' domestic legal systems. *Procès-verbal No. 3*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 263, 264 (*Procès-verbal No. 3*); *id.* at 267; *Explanatory Report* para. 71.[10]

With respect to *ne exeat* rights specifically, the preliminary questionnaire submitted to the Hague Conference's member States for consideration posited that removing a child in violation of a *ne exeat* order would constitute wrongful removal. Adair Dyer, *Questionnaire on International Child Abduction by One Parent*, in 3 *Actes et Documents* 9, 9 explanatory note D (describing as abduction the removal of a child "by a parent from one country to another in violation of a court order which expressly prohibited such removal"). Prior to drafting the Convention, the Hague Conference's Special Commission on international child abduction met to discuss the questionnaire and other preliminary documents, and concluded that the Convention

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[10] Although the representative of the Commonwealth Secretariat (an intergovernmental association based in the United Kingdom), who was an observer in the negotiations, suggested that Article 5(a) should be "clarif[ied]" to make explicit its inclusion of "separable" custody rights—for instance, when the right to determine the child's residence and the right to care for the child were vested in different people, *Procès-verbal No. 4*, at 271—the drafting committee ultimately decided not to make any revisions. In reporting that decision, Adair Dyer, First Secretary at the Permanent Bureau, stated that "the existing definition of custody rights embraced the situation where rights of [physical] custody and the right to determine a child's place of residence were vested in different persons." *Procès-verbal No. 14*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 342, 344. No delegate objected to this characterization.

should be drafted to "cover *all* types" of abduction described in the questionnaire. *Conclusions Drawn from the Discussions of the Special Commission of March 1979 on Legal Kidnapping*, in 3 *Actes et Documents* 162, 162-163 (synthesizing the "discussions held by the Special Commission"); see Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 18 (1999).

When the subject arose during negotiations, the Canadian delegate characterized the *ne exeat* right as a "right[] of access,"[11] and urged that violation of a *ne exeat* right should constitute a "wrongful removal" and therefore that Article 3 of the Convention should provide the return remedy for violations of access rights as well as custody rights. *Procès-verbal No. 3*, at 266. The delegate from the Netherlands responded that "under the present terms of the Convention," which included a substantially similar version of Articles 3 and 5(a), "the abducted child would have to be sent back immediately"—thus indicating that he understood the *ne exeat* right to be a "right[] of custody" that would trigger the return remedy. *Ibid.* No other delegate disagreed, and the representative of the Commonwealth Secretariat concurred that "article 5 * * * could cover cases where the non-custodial parent had a right to be consulted."[12] *Ibid*. The Canadian proposal to expand Article

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[11] The Canadian delegate's characterization may have been influenced by his understanding of Canadian law, which, he noted, generally awarded sole "custody" to one parent and "access" rights to the other. *Procès-verbal No. 3*, at 267.

[12] The chair of the negotiations, A.E. Anton, later wrote that it was "less clear" whether a *ne exeat* order should be viewed as a right of custody under Article 5(a)'s definition, and that "[a] suggestion that the definition of 'abduction' be widened to cover this case was not pursued.' " A.E. Anton, *The Hague Convention on International Child*

3 to make the return remedy available for access rights was defeated, *id.* at 267, suggesting that the delegates understood the existing language of custody rights in Articles 3 and 5(a) to encompass the rights arising from *ne exeat* orders.

D. The Executive Branch Interprets The Convention To Provide The Return Remedy For *Ne Exeat* Violations

Consistent with this history, the Department of State, whose Office of Children's Issues serves as the Central Authority for the United States under the Convention, has long understood the Convention as including *ne exeat* rights among the protected "rights of custody."[13] The Executive Branch's interpretation of a treaty "is entitled to great weight." *Medellin* v. *Texas*, 128 S. Ct. 1346, 1361 (2008) (quoting *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982)); see *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999). The Executive Branch's interpretation should not be rejected here, particularly because it is consistent with the interpretation by the great majority of parties that have addressed the issue. As this Court observed in *Sumitomo*, where the States parties are in agreement, the Court's role—absent extraordinary

Abduction, 30 Int'l & Comp. L.Q. 537, 546 (1981). Anton stressed, however, that his statements reflected his views alone, not those of the drafters. *Id.* at 537 n.*. The negotiating history strongly indicates that the drafters believed that the existing language of Articles 3 and 5(a) was broad enough to encompass the *ne exeat* right.

[13] Prior to the United States' filing, upon the Court's invitation, of a brief amicus curiae supporting certiorari in this case, the State Department had not formally memorialized its interpretation, although that filing in itself represents the Department's "considered judgment on the matter." *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997). But the State Department has informed this Office that the position set forth in that brief and this one has long been its view.

circumstances not present here—is to "giv[e] effect to the intent of the Treaty parties." 457 U.S. at 185.

II. THE POST-RATIFICATION UNDERSTANDING OF THE CONVENTION SUPPORTS THE CONCLUSION THAT A *NE EXEAT* RIGHT IS A CUSTODY RIGHT

In interpreting the language of a treaty, "the opinions of our sister signatories [are] entitled to considerable weight." *Saks*, 470 U.S. at 404 (citation omitted) (relying on foreign intermediate and highest court decisions); *El Al*, 525 U.S. at 175-176 & n.16 (same). That is particularly so with respect to the Hague Convention. Disagreement among States parties provides abducting parents with the ability to forum shop in order to obtain the most favorable rule, and uniformity in application therefore is key to the Convention's goals of deterring international parental abduction and achieving the prompt return of abducted children. See Convention Art. 1; *Explanatory Report* para. 16; *In re D*, 1 A.C. at 632. Indeed, in enacting the Convention's implementing legislation, Congress explicitly recognized "the need for uniform international interpretation of the Convention." 42 U.S.C. 11601(b)(3)(B).

It thus is significant that there is near-unanimous agreement among the States parties to the Convention that *ne exeat* rights are "rights of custody" within the meaning of Articles 3(a) and 5(a). Outside of the United States, all but one of the judicial decisions to squarely consider the issue have held that a *ne exeat* right is a custody right, and the States parties, in multilateral meetings addressing the operation of the Convention, have expressed a consensus that the majority rule is the correct one.

A. All But One Of The Courts In Other States Parties To Consider The Issue Have Held That A *Ne Exeat* Right Is A Right Of Custody

1. Courts in the United Kingdom, Germany, Austria, South Africa, Australia, New Zealand, and Israel have adopted the view that a *ne exeat* right creates a right of custody. That represents a majority of the courts to address the question. See *In re D*, 1 A.C. at 635 (noting agreement of a "majority of the common law world").

In *C.* v. *C.*, one of the earliest decisions to consider the issue, the English High Court of Justice held that the Convention recognizes custody rights "held jointly or alone," and that because the *ne exeat* right gave the father "the right to ensure that the child remain[ed] in Australia or live[d] anywhere outside Australia only with his approval," the *ne exeat* right was a "limited" or "joint" custody right under the Convention. 1 W.L.R. at 658. The House of Lords subsequently reaffirmed that holding, noting that the *ne exeat* right—which it referred to as a "veto right"—provided the right to determine residence in a "general" sense, namely, the country of residence. *In re D*, 1 A.C. at 633; see also *A.J.* v. *F.J.*, [2005] ScotCS CSIH_36.

The Federal Constitutional Court of Germany also held that a *ne exeat* right is a "right to have a say in the child's place of residence," and affirmed an intermediate court's conclusion that removal in violation of the *ne exeat* right was wrongful because the mother "should have obtained a judicial decision in Argentina if the father refused to agree to the move to Germany." Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 18, 1997, 2 BvR 1126/97 (F.R.G.), para. 15.[14] Similarly, the Austrian

[14] Although the petitioning father also possessed the right to consult regarding the children's care, the court focused on the *ne exeat* right

Supreme Court characterized the *ne exeat* right as a joint right to determine residence, stating that a violation of "an express order by the competent court not to remove a child from the country without the consent of the other parent" implicates the core purposes of the Convention. Oberster Gerichtshof [OGH] [Supreme Court] Feb. 5, 1992, 2 Ob 596/91.

Courts in Australia and New Zealand agree. In *In the Marriage of Resina*, the Family Court of Australia "follow[ed]" *C.* v. *C.* in concluding that a *ne exeat* right is a right of custody, noting that "uniformity itself is highly desirable." [1991] FamCA 33, para. 26 (Austl. Fam.). Similarly, in *Secretary for Justice* v. *Abrahams, ex parte Brown*, [2001] FP 069/134/00 (Fam. Ct.) (Taupo, N.Z.), a New Zealand family court held that because "guardianship" rights under South African law included a *ne exeat* right, the holder of guardianship rights had a "right to determine the children's place of residence" under the Convention.[15]

In *Sonderup* v. *Tondelli*, 2000(1) Constitutional Court of South Africa 1171, para. 25, the Constitutional Court of South Africa held that a *ne exeat* clause in an interim custody order constituted a custody right because it limited the conditions under which the parent who had the right to

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because it viewed the right to jointly determine the children's residence to be a "central element" of custody rights under the Convention. 2 BvR 1126/97, *supra*, para. 13(a).

[15] Although respondent contends (Br. in Opp. 18) that the *Abrahams* court relied on the existence of broader "co-guardianship" rights in addition to the *ne exeat* right, the court based its decision on a finding that the requesting parent "must consent to the removal of the children" from the country and therefore "ha[d] a right to determine the child's place of residence." *Abrahams*, *supra*.

physical custody could exercise her rights.[16] The court emphasized that the Convention "seeks to ensure that custody issues are determined by the court in the best position to do so by reason of the relationship between its jurisdiction and the child," *id.* para. 30, and concluded that ordering the return of a child removed in violation of a *ne exeat* order would further that purpose.

Finally, the Supreme Court of Israel has also concluded that a *ne exeat* right is a custody right, holding that "for the purpose of the Convention and the law, 'custodial rights' should be broadly construed, so as to cover cases in which parental consent is required before a child may be taken from one country to another." C.A. 5271/92 *Foxman* v. *Foxman*, para. 4(d), [1992] (H.C.) (Isr.). The court concluded that "it is clearly necessary to return the daughters to the place from which they were taken to enable the litigants to litigate in the competent court regarding custody and visitation rights." *Id.* para. 5.

2. To our knowledge, only one court in another State party has held that a *ne exeat* right does not constitute a right of custody. In *Ministère Public* c. *Mme. S.*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Perigueux, Mar. 17, 1992, D.S. Jur. 1992 (Fr.), a French trial court refused to order return of children to Great Britain because it viewed the *ne exeat* order as a mere condition on the mother's exercise of her custody rights, and also as an impermissible restriction on the mother's right to expatriate under the European Convention for the Protection of Human Rights and Fundamental

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[16] Respondent argues (Br. in Opp. 18) that the court's decision rested on the interim status of the custody order in which the *ne exeat* right appeared, but the court's conclusion that the *ne exeat* right limited the rights of the parent with physical custody did not depend on the interim nature of the order. *Sonderup*, *supra*, para. 25.

Freedoms. That decision, however, is inconsistent with an earlier French appellate decision, see *Ministère Public* c. *M.B.*, Cour d'appel [CA] [regional court of appeal] Aix-en-Provence, Mar. 23, 1989, which held that by "granting the [petitioning parent] the right to accept or reject the change of the children's residence outside of a certain region, the order dated November 27, 1987 established joint exercise of the rights of custody in the sense of the Hague Convention."

Respondent also relies on two decisions of the Supreme Court of Canada, but in both cases the statement that a *ne exeat* right may not be a right of custody was dicta. See *Thomson* v. *Thomson,* [1994] 119 D.L.R. (4th) 253; *D.S.* v. *V.W.*, [1996] 134 D.L.R. (4th) 481. In *Thomson*, the court ordered the return of a child based on violation of a *ne exeat* clause in an interim custody order, but suggested that a final *ne exeat* order would "raise[] quite different issues" because such an order is "usually intended" to protect access rights. In *D.S.*, the petitioning parent had no *ne exeat* right, but asserted that a similar restriction—the "right to oppose the child's removal"—was "implicit" in a court order. *Id.* para. 42. The court held that this argument conflated "custody rights in the strict sense with the right to apply for a modification of custody rights after the child is removed," *id*. para. 45, and also noted that *Thomson* had stated that a removal restriction in a permanent custody order "might" constitute only an access right, *id.* para. 26. The court therefore concluded that a return remedy was not available. Because neither decision squarely confronted the question whether a *ne exeat* clause in a permanent custody order constitutes a custody right, both courts' statements were *dicta*. See *In re D*, 1 A.C. at 634 (characterizing statements of Supreme Court of Canada as dicta).

In sum, the prevailing view among courts in States parties to have considered the issue is that a *ne exeat* right constitutes a right of custody. See *In re D*, 1 A.C. at 634 (surveying case law, and noting that opinion in common-law countries was virtually "united"); Hague Conference on Private International Law, *Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice* 43 (2008) <http://www.hcch.net/upload/guidecontact_e.pdf> ("preponderance of the case law" holds that *ne exeat* is a custody right, and the opposing view "does not command widespread support").

B. States Parties Have Expressed The View In Subsequent Special Commission Meetings That A *Ne Exeat* Right Is A Custody Right

The Special Commission to review the operation of the Hague Convention has expressed its agreement with the majority judicial view that *ne exeat* rights are custody rights. The Special Commission is convened every four years by the Hague Conference on Private International Law to assist in implementation of the Convention by providing a forum for States parties to discuss interpretive problems arising from the Convention. See *Statute of the Hague Conference on Private Int'l Law* Art. 7, *formulated*, Oct. 9-31, 1951, 15 U.S.T. 2228, T.I.A.S. No. 5710 (2007) (Conference may set up special commissions to study "any questions of private international law that come within the purpose of the Conference"); *Conclusions of the Special Commission of October 1989* paras. 1-2; see also Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. Int'l L. & Pol. 221, 228-229 & n.28 (2000). The Special Commission is composed of representatives from many of the States parties to the Convention, and in particular, their

Central Authorities, who are responsible for administering the Convention.[17] The Commission's reports reflect the consensus views of the participating representatives. In those reports, the Commission has twice stated that a *ne exeat* right is a custody right.[18]

The first Special Commission, meeting in 1989, expressed the opinion that a "parent who has not been awarded 'custody'" under domestic law, but nonetheless has "the right to be consulted and to give or refuse consent before the child is permanently removed" from the country, has a right of custody. *Conclusions of the Special Commission of October 1989* para. 9. A *ne exeat* right, the Commission opined, is a "form of joint holding by the two parents of 'rights of custody' within the meaning of the Convention." *Id.* para. 8. The Commission also discussed *M.B.*, *supra*, as an example of that view. And the Commission noted that *M.B.*'s holding that "the right of the mother to

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[17] All States parties to the Convention, as well as members of the Hague Conference, are invited to participate in each Special Commission meeting, but not all attend. The United States has participated in each meeting since the Commission's inception. Other regular participants include England, Canada, and Germany—some of the parties that most often confront requests for the return of wrongfully removed children. See *A Statistical Analysis of Applications Made in 2003 Under the Hague Convention 25 October 1980 on the Civil Aspects of International Child Abduction* 11-13 (2007); see, *e.g.*, *Report on the Fifth 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* 5-19 (2007).

[18] Respondent notes that views expressed at Special Commission meetings are not legally binding. Cert. Supp. Br. 2-3. Of course it is the treaty itself that is legally binding. Nonetheless, the Commission's participants are official representatives who have extensive experience in implementing and construing the Convention. The Commission's conclusions are a reliable indication of the manner in which States parties are interpreting the Convention.

give or refuse consent to removal of the children, coupled with the father's award of 'custody,' had created a form of joint custody within the meaning of the Convention," *id.* para. 10, was "broadly approved as being in the spirit of the Convention." *Ibid.*

The second Special Commission also touched on the *ne exeat* issue, discussing *Mme. S.*, the French decision holding that violation of a *ne exeat* right did not merit the return remedy. The Commission stated that the court's conclusion that a *ne exeat* right "constituted only a 'modality' attached to the right of custody and not a situation of joint custody, gathered no support." *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, Question 5 (1993). Moreover, the Commission noted, *Mme. S.*'s holding "had been rejected by the *Cour d'appel d'Aix-en-Provence*, as well as by courts in Austria, Australia, the United Kingdom and the United States of America." *Ibid.*

III. THIS COURT SHOULD REMAND FOR FURTHER PROCEEDINGS

Because petitioner's *ne exeat* right is a right of custody, respondent's removal of A.J.A. was wrongful under the Convention. See Convention Art. 3. The Convention's return remedy is therefore available to petitioner, assuming that he actually exercised his custody right, or would have exercised it but for the removal, and that no defense to return applies. *Id.* Arts. 1(a), 3, 13, 20. The courts below did not reach those questions. Although the evidence here strongly suggests that petitioner would have exercised his *ne exeat* right but for the wrongful removal, see *Furnes*, 362 F.3d at 724—it was respondent's failure to comply with the *ne exeat* order that prevented petitioner from exercis-

ing his right—the lower courts may consider that question, as well as the existence of any defenses, see 42 U.S.C. 11601(a)(4), 11603(e)(2), on remand.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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