

No. 08-645

IN THE
Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT,

Petitioner,

v.

JACQUELYN VAYE ABBOTT,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

With the dismissive phrase “[r]espondent and A.J.A. relocated to Texas” (Resp. Br. 8), respondent Jacquelyn Abbott backhandedly acknowledges the dispositive fact in this case: that just as the Chilean courts were about to consider petitioner Timothy Abbott’s petition to expand his parental rights, Mrs. Abbott abducted the couple’s son from Chile in violation of Mr. Abbott’s right to require that his son either remain resident in Chile or live in another country only under conditions to which he agreed. Having abducted A.J.A. to her own home in Texas – where A.J.A. had never lived – Mrs. Abbott then instituted state court proceedings to negate the rights attributed to Mr. Abbott by Chilean law.

This frequently recurring factual scenario – in which one parent abducts a child to another nation in violation of a *ne exeat* order and seeks to nullify the jurisdiction of the courts of the country of habitual residence – falls squarely within the return remedy of the Hague Convention on the Civil Aspects of International Child Abduction. The Convention’s foundational premise is that one parent should not be able to defeat the other parent’s rights of custody in the country of habitual residence by taking the law into his or her own hands – that is, by abducting their child to another country. The Convention provides a return remedy to ensure that such disputes are resolved by the courts in the child’s country of habitual residence – an approach that the Convention’s signatories have concluded best serves the interests of children. Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* (“Pérez-Vera Report”), in

ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III (“TOME III”), at 426, 429-32 (1982); Preamble (Pet. App. 27a).

Mrs. Abbott’s contention that Chilean law granted Mr. Abbott a mere “right of access” rather than a “right of custody” makes no sense, and it is contrary to the Convention’s text, purposes, and drafting history. A *ne exeat* right does not provide for “access” to the child – it has nothing directly to do with visitation rights – but instead confers a right to keep the child within the country. The function of a *ne exeat* right thus precisely corresponds to the purposes of the Convention.

Moreover, adopting Mrs. Abbott’s position would require this Court to reject the straightforward position of the Central Authorities charged with ensuring the signatories’ compliance with obligations under the Convention. Both the U.S. State Department and the Chilean Corporation of Judicial Assistance agree that the *ne exeat* right possessed by Mr. Abbott is a “right of custody” triggering the return remedy. That understanding is consistent with both the drafting history of the Convention and the holding of *every* court decision issued by other Convention signatories, save the single French trial court ruling on which Mrs. Abbott relies.

Mrs. Abbott’s remaining arguments are merely unpersuasive attacks on the Hague Convention itself. She objects to construing it as a “vehicle for enforcing court orders.” Resp. Br. 42. And she claims that enforcing the Convention would separate a child from an abducting parent who is unable to return to the

country of habitual residence. But those arguments would equally immunize even abductions in violation of court orders granting the left-behind parent complete care and control of the child. Neither argument justifies her attempt to render the Convention an empty vessel.

The judgment of the court of appeals should accordingly be reversed.

I. *Ne Exeat* Rights Easily Fall Within The Broad Category Of “Rights Of Custody” Under The Convention

The Convention’s return remedy is triggered when a parent removes a child to another country in violation of the left-behind parent’s rights of “custody.” Art. 3 (Pet. App. 28a). By contrast, when a child is removed in violation of the left-behind parent’s rights of “access,” the left-behind parent may only seek the assistance of the Central Authorities. Art. 21 (Pet. App. 35a-36a). Petitioner’s opening brief and the brief of the United States established that Mr. Abbott holds a “right of custody,” not a mere “right of access.” Respondent’s arguments to the contrary are unpersuasive.

A. A *Ne Exeat* Right Constitutes A “Right of Custody” – Specifically, The Right To Determine The Residence Of The Child

Mrs. Abbott principally argues that Mr. Abbott’s *ne exeat* right is merely a right of access because Chilean law granted Mrs. Abbott daily care and control of A.J.A., but limited Mr. Abbott to visitation and, at most, a “veto” over Mrs. Abbott’s departure

from Chile with A.J.A. Resp. Br. 20-24. That assertion misapprehends the meaning of a “right of custody” under the Convention and the nature of a *ne exeat* right.

Article 5(a) of the Convention defines “rights of custody” as “includ[ing] rights relating to the care of the person of the child, and, in particular, the right to determine the child’s place of residence.” Pet. App. 28a. Mr. Abbott’s *ne exeat* right gives him precisely that power. He has the shared right to make any determinations regarding where his son will live. Most obviously, he can insist that his son remain in Chile. If he instead decides to authorize Mrs. Abbott to take A.J.A. out of Chile, he can do so with reasonable conditions, including conditions on the location within a particular country in which A.J.A. lives. In either scenario, Mr. Abbott’s *ne exeat* right gives him a significant say in the culture in which his child is raised, the languages that his child will speak, or the kinds of schools that he will attend. See Pet. Br. 15-16.¹

¹ Mrs. Abbott’s argument that Mr. Abbott holds no rights at all under the Chilean court order (the *orden de arraigo*) is irrelevant: he clearly does hold a *ne exeat* right granted by a Chilean statute, rendering the court order surplusage. Further, the lower courts decided this case on the premise that the court order and statute impose indistinguishable *ne exeat* rights. Pet. App. 6a, 20a n.3. Mrs. Abbott accepted that premise in the court of appeals, see Resp. C.A. Br. 9, and affirmatively embraced it in the brief in opposition, see BIO 5 (order “prohibited either parent from removing the child from Chile without the other parent’s consent”). That is furthermore the

But whether or not regarded as the right to determine the place of the child's "residence," a *ne exeat* right constitutes a "right of custody." As Mr. Abbott's opening brief recounts (and Mrs. Abbott fails to address), the Convention's drafters understood from the outset that the definition of "rights of custody" would encompass a *ne exeat* right. See Pet. Br. 42-43. Mrs. Abbott offers literally no support at all for her sweeping statement that "at the time of the Convention, . . . not a single Contracting State had identified a *ne exeat* clause as the source of custody rights," Resp. Br. 14, but in any event, the opening questionnaire distributed to potential signatory nations identified the violation of a *ne exeat* right as one of five examples of a wrongful "abduction." The terminology of a "right of custody" was first adopted by the formal report of the 1979 Special Commission charged with the initial drafting of the Convention. That report expressly adopted those cited examples of "abductions" as falling within the Convention, and importantly not only described them as embodying violations of a "custodial order" but also explained that the Convention would cover

better reading of the court's ruling, which merely imposes a "*ne exeat*" order, a term of art that (as the citations throughout the parties' briefs reflect) is understood to permit consent by one parent. Mrs. Abbott's new reversal of position asks this Court to assume that the Chilean court would illogically override a decision by Mr. Abbott to *permit* Mrs. Abbott to leave Chile with A.J.A.

such a “removal of a child” that occurs “in breach of custody.” TOME III, at 183, ¶ 37.²

Mrs. Abbott’s contrary argument that the “place of residence” is the child’s “residential address,” Resp. Br. 20, and does not also refer to the child’s country of habitual residence, is unpersuasive. There is no textual basis for her narrower reading, and the term “right of custody” is more naturally read to “correspond[] with the use of habitual residence as the connecting factor employed by the Convention.” PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 75-76 n.191 (1999). It would be passing strange for a convention whose operation hinges on a child’s country of residence to be concerned instead with the child’s street address. After all, the Convention comes into play when a child is abducted from, for example, Athens, Georgia to Athens, Greece; the Convention would not be triggered if a parent moves *within* Athens, Georgia or even to Athens, Ohio. Indeed, Mrs. Abbott seems to make that very point: “Article 5 refers to the right to determine the child’s residence as a ‘particular’ right of care, singled out because it is generally abridged by the removal of children to foreign countries.” Resp. Br. 19.

² The Special Commission expressed doubt about only one of the five categories, which is not at issue here: the entry of a custody order only *after* the abduction. TOME III, at 183.

Mrs. Abbott also attempts to support her argument that the phrase “place of residence” refers narrowly to the child’s physical home rather than his country of habitual residence by pointing to Article 5(b)’s definition of “rights of access.” *See* Resp. Br. 21-22. Mrs. Abbott asserts that the Convention’s example of a right of access – the “right to take a child for a limited period of time to a place other than the child’s habitual residence,” Pet. App. 28a – refers to the home, and asserts that the parallel phrase “residence” in Article 5(a) must have the same meaning. But that argument simply assumes its own conclusion – *i.e.*, that Article 5(b) refers only to a right to take the child away from the home. In fact, the *travaux préparatoires* explain that the drafters actually included that illustration in the definition precisely in order “to emphasize that such a notion also extended to *the right to take the child abroad*, such a right being, within the access right, a manifestation most dreaded by the rightful custodian.” Special Commission Report, TOME III, at 195 (emphasis added).³

Mrs. Abbott’s defense of the ruling below fails in any event because the Convention defines “right of custody” capaciously, and includes the power to

³ The Pérez-Vera Report subsequently adopted the same view, incorporating the Special Commission report and explaining that the example was included “to emphasize that access rights extend also to what is called ‘residential access’, that aspect of access rights about which the person who has custody of the child is particularly apprehensive.” Pérez-Vera Report, at 452.

determine the child’s place of residence only as a subset of that broader right. The Convention’s definition of custody thus “include[s]” – but is not limited to – that example.⁴ The drafters agreed that the definition should “protect *all* the ways in which custody of children can be exercised,” including novel joint arrangements, so that the Convention applied to as many cases as possible. Pérez-Vera Report, at 447 (emphasis in original). As a matter of interpretation, this Court has repeatedly made clear that treaties should be “construed more liberally than private agreements.” *Air France v. Saks*, 470 U.S. 392, 396 (1985) (internal quotations omitted). Thus, whether or not regarded as the right to determine the place of the child’s “residence,” a *ne exeat* right constitutes a “right of custody” under the Convention.⁵

⁴ Mrs. Abbott would strain the text to read “include” as meaning “is.” But the only two examples she gives of that usage are easily distinguished. Both involve a term defined to “include any” member of some broad category that has diverse members – *i.e.*, “any employee” and “any process.” In that limited context, “include any” signifies that the term includes every member of the broad category. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90 (1995) (when “employee” is defined to “include any employee,” it encompasses all forms of employees); *Snider v. All States Administrators, Inc.*, 414 U.S. 685, 686 (1974) (when “printing” is defined to “include any process capable of producing a clear black image on white paper,” it encompasses all such processes).

⁵ Article 5(a) as originally drafted more narrowly provided that “rights of custody *are* rights relating to the care of the child and, in particular, the right to determine the child’s place of residence” (emphasis added). But the drafters changed the text

B. A *Ne Exeat* Right Is Not A Mere “Right of Access”

The Hague Convention divides “rights” relating to the child into two categories: those of “custody” (discussed above) and those of “access.” Mrs. Abbott contends that a *ne exeat* right constitutes a mere “right of access,” which does not give rise to the return remedy. That argument lacks merit. Precisely because a *ne exeat* right does not fall within the category of a “right of access,” it *ipso facto* constitutes a “right of custody.” For the Convention recognizes only those two categories. Nothing in either the text or history of the Convention indicates that the drafters would have contemplated a third category of free-floating parental rights relevant to the subject matter of the Convention that are neither “rights of custody” nor “rights of access.”

Indeed, because a *ne exeat* right cannot be characterized as a “right of access,” if this Court were to affirm the judgment below, many left-behind parents holding *ne exeat* rights would be left in the anomalous position of having *no* remedy at all under the Convention for a violation of that right – not even the more limited remedy available for access rights. That cannot have been the Convention’s intention.

The Convention defines “rights of access” to include “the right to take the child for a limited

to provide more broadly that “rights of custody *shall include* rights relating to the care of the person of the child.” *Procès-verbal No. 14*, TOME III, at 344.

period of time to a place other than the child's habitual residence." Art. 5(b) (Pet. App. 28a). "Rights of access" thus involve the right to spend time with the child – that is, visitation rights. For example, in discussing whether to extend the return remedy to rights of access, the Canadian delegate cited the example of a father with "extremely limited rights of access (e.g. two hours each Saturday afternoon)." *Procès-verbal No. 3*, TOME III, at 266. In turn, the U.S. legislation implementing the Convention defines "rights of access" as "visitation rights." Pet. App. 47a-48a (42 U.S.C. § 11602(7)).

Contrary to Mrs. Abbott's submission, a *ne exeat* right – which does not provide for visitation – does not give the parent "access." Nor can the *ne exeat* right be dismissed as merely a tool to facilitate access to the child; it no more enables visitation than it enables direct care and control. The *ne exeat* right instead allows the parent holding the right to share in the decision whether the child will leave the country, as well as a variety of other substantive rights. *See supra* Part I.

Nor would it be consistent with the Convention's purposes to trivialize a *ne exeat* right as a mere "right of access." A "right of custody" is necessarily disrupted by the child's abduction and can only be restored through the child's return to the country of habitual residence. As discussed, a *ne exeat* right directly implicates those concerns. By contrast, rights of access – *i.e.*, visitation rights – can be exercised even if the child is removed to another country. Further, when the abducting parent does no more than obstruct the often-brief period guaranteed

by a visitation right, it is understandable that the Convention's drafters elected not to automatically impose the remedy of return but instead to adopt the more limited right to request assistance under Article 21.⁶

C. The State Department's Position Is Entitled To Deference

To the extent there remains any ambiguity regarding whether Mrs. Abbott's abduction of A.J.A. was "wrongful," the considered interpretation of the State Department, which is the entity charged under the Convention with ensuring that the United States complies with its treaty obligations, Exec. Order No. 12,648, 53 Fed. Reg. 30,637 (Aug. 15, 1988), should resolve it. As the brief of the United States explains, the government has consistently understood *ne exeat* rights to constitute rights of custody under the Convention.

⁶ Mrs. Abbott's assertion that in the district court Mr. Abbott "conceded . . . that he had only been granted 'access,'" Resp. Br. 9, is a significant misstatement. The documents she cites say precisely the opposite. The complaint states: "[A.J.A.'s] removal was in breach of 'rights of custody'" and "[t]he rights of custody mentioned above were being actually exercised at the time of [A.J.A.'s] removal." J.A. 53. Mr. Abbott's accompanying factual affidavit notes that he has been granted rights of "access" – *i.e.*, his visitation right, J.A. 55 – but explains that Mrs. Abbott's abduction of A.J.A. violated Mr. Abbott's *distinct* rights under "a Chilean statute and . . . a *ne exeat* order that had been entered by the Family Court." J.A. 56.

This view is entitled to substantial deference. As this Court has put it, absent extraordinary circumstances, the meaning given treaties “by the departments of government particularly charged with their negotiation and enforcement is given great weight.” *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006) (quoting *Kolvarat v. Oregon*, 366 U.S. 187, 194 (1961)). See also *El Al Israel Airlines v. Tseng*, 525 U.S. 155, 168 (1999) (adopting government’s position when text of treaty open to “divergent interpretation”). Here, the State Department not only implements the Convention, but was actively involved in its drafting. *Members of the First Commission*, TOME III, at 254. Indeed, the State Department’s Peter Pfund, who was the head of the U.S. delegation at the 1980 Diplomatic Conference, served as Chairman of the 1993 Special Commission meeting.⁷ *Members of the First Commission*, TOME III, at 254; *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, ¶ 3 (1993).

The cases Mrs. Abbott cites to argue against deference are easily distinguishable. Those cases involved treaty interpretations that were either flatly contradicted by the text or inconsistent with the government’s previously expressed views. See, e.g.,

⁷ Notably, the 1993 Special Commission report reflected the consensus among the delegates that a *ne exeat* right is a right of custody, as it noted that the French trial court decision on which Mrs. Abbott relies garnered no support. See Pet. Br. 31-32.

Chan v. Korean Air Lines, 490 U.S. 122, 133-34 (1989) (refusing to adopt government’s position that clear text and structure of Warsaw Convention limiting airline liability was “drafting error”); *Perkins v. Elg*, 307 U.S. 325, 337-42, 347-49 (1939) (refusing to adopt Attorney General’s position that was contrary to “repeated rulings of the Department of State” over more than fifty years).

Mrs. Abbott’s further contention that the United States has in fact changed its interpretation, *see* Resp. Br. 58-59, misstates the relevant history. As noted, and as the brief of the United States explains, U.S. Br. 21 n.13, the government’s position has never wavered. The statement cited by Mrs. Abbott merely recognizes the uncontroversial point that a breach of access rights does not trigger the return remedy.⁸

⁸ The contemporaneously held views of the United States stand in marked contrast to the *amicus* submission of just two (of fifty-one) delegates of their nearly thirty-year-old “recollections.” That submission does not compare to the official meeting minutes that this Court considered persuasive in *Air France v. Saks*, 470 U.S. 392, 401-02 (1985). It also bears noting that one of the two delegates, Mr. Savolainen, in 1997 wrote a law review article taking precisely the opposite position. 66 *NORDIC J. INT’L L.* 101, 161 (1997) (deeming “undoubtedly correct” a case ordering the return of a child to the United States based on a *ne exeat* right).

D. Petitioner’s Position Is Most Consistent With The Decisions Of Courts In Other Contracting States, Which Are Due Respect

Petitioner’s opening brief both demonstrated that the judgment below is contrary to the overwhelming weight of judicial authority from other Convention signatories and established that this resolution of the very question now before this Court is entitled to considerable respect. The decisions of our sister signatories logically take on particular significance when, as here, Congress in subscribing to the treaty explicitly emphasizes the need for its uniform interpretation. Pet. App. 47a (42 U.S.C. § 11601(b)(3)(B)). Mrs. Abbott’s contrary argument that the decisions of foreign courts should be ignored misapprehends one decision she cites, *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 227-28 (1996), which in fact relies on just such a ruling as relevant postratification conduct. *See id.* at 228 (citing decision by Canadian court). *See also Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) (“We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties.”).

It is therefore significant that every court of another sovereign to decide the question presented by this case – with the lone exception of a French trial court, *see* Resp. Br. 56-57 – has concluded that a *ne exeat* right is a right of custody under the Convention. Though Mrs. Abbott attempts to articulate various distinctions regarding some of

those rulings, she fails to address the holdings of five foreign courts.⁹ Nor does she dispute that *ne exeat* rights can confer “rights of custody” in all twenty-seven member countries of the European Union. Pet. Br. 21 n.10.

Respondent chastises petitioner for purportedly “overlook[ing]” the fact that there was no *ne exeat* right at issue in *In re D (A Child)*, (2007) 1 A.C. 619 (H.L. 2006), *compare* Resp. Br. 55 *with* Pet. Br. 33-34, but she herself overlooks the House of Lords’ conclusion that it is well-settled that a *ne exeat* right is a “right of custody.” Pet. Br. 33-34. And although she attempts to distinguish other cases on the ground that the left-behind parents had other rights in addition to the *ne exeat* right, those cases nonetheless hinged on the *ne exeat* right. *See, e.g., C v. C*, (1989) 1 W.L.R. 654 (Eng. C.A.) (although parents were joint guardians, guardianship involves the right to care for the child’s property; father’s *ne exeat* right was the only “right of custody” at issue); Bundesverfassungsgericht [BVerfG] [Fed. Const’l Ct. of Germany] July 18, 1997, 2 BvR 1126/97 (F.R.G.) ¶ 5 (affirming lower court order requiring child’s return, which it described as holding that “[e]ven a parent who only has the right to oppose the removal of the child to another country also has a custody

⁹ *See Sonderup v. Tondelli* 2000 (1) SA 1171 (CC) (S. Afr.); CA 5271/92 *Foxman v. Foxman* [1992] IsrSC; Oberster Gerichtshof [OGH] [Supreme Ct.] May 2, 1992, 2Ob596/91 (Austria); *AJ v. FJ* [2005] CSIH 36 (Scot.); *Gross v. Boda* (1995) 1 NZLR 569 (C.A. Wellington) (N.Z.).

right within the meaning of the Hague Child Abduction Convention”).¹⁰

Beyond the lone French trial court ruling, Mrs. Abbott’s search for authority affirmatively supporting her position rests entirely on dicta in *Thomson v. Thomson*, [1997] 3 S.C.R. 551 (Can.), and *D.S. v. V.W.*, [1996] 2 S.C.R. 108 (Can.). Resp. Br. 53-55. In *D.S. v. V.W.*, however, there was *no ne exeat right at issue*. Instead, the Canadian Supreme Court determined that a parent’s theoretical right to go to court to oppose a child’s removal did not confer rights of custody under the Convention – the same conclusion reached by the House of Lords in *In re D*, (2007) 1 A.C. 619, ¶ 37 (H.L. 2006).

¹⁰ *Amici* Eleven Law Professors similarly distinguish the South African decision, *Sonderup v. Tondelli* 2001 (1) SA 1171 (CC) (S. Afr.), as involving a “contingent custody transfer.” Law Prof. Br. 23. Here too, however, it is clear that the court’s decision rested on the father’s *ne exeat* right, as its return order was conditioned on the father’s agreement not to enforce a court order that, if violated, transferred custody to the father. *Amici* also inexplicably quarrel with the Israeli decision, Law Prof. Br. 24-25, CA 5271/02 *Foxman v. Foxman* [1992] IsrSC, which specifically held that “every case of removing children from one country to another without the consent of the parent who had a right to give or to not give consent would be an abduction.”

II. Mrs. Abbott's Remaining Contentions Lack Merit

A. Mrs. Abbott's Arguments That The Phrase "Rights Of Custody" Should Be Read To Exclude *Ne Exeat* Rights Misconstrue The Text

Mrs. Abbott attempts to locate support for her anomalous position in various provisions of the Convention. None in fact supports the judgment below.

First, Mrs. Abbott contends that "custody" embodies a "complex" of rights. Resp. Br. 18-20. But this is a *non sequitur*. Though the term "custody" can encompass an array of rights, that fact does nothing to refute the fact that a *ne exeat* right is among them. Certainly, no inference arises from the use of the plural "*rights of custody*." The equally authoritative French-language version of Article 5(a) refers only in the singular to a "right of custody" ("*le droit de garde*"). And in any event, a parent holding a *ne exeat* right has a variety of additional substantive rights. Pet. Br. 15-16.¹¹

¹¹ To the extent Mrs. Abbott is suggesting that a parent must possess the entire "complex" in order to have a "right of custody," that is obviously wrong. The definition of "rights of custody" itself specifies that a single power – the ability to determine the child's place of residence – is, standing alone, a right of custody. Art. 5(a) (Pet. App. 28a). Also, as noted, the Convention contemplates joint custody arrangements, under which various rights may be divided among the parents. The drafters further anticipated that the rights would be divided

Second, Mrs. Abbott contends that Mr. Abbott possesses no “right” at all, but instead a “veto.” But Mrs. Abbott never even attempts to justify why the signatories to the Convention would have intended her narrow conception of a “right,” which is just one among many. As the domestic and foreign authorities cited in the parties’ briefs illustrate, it is common to refer to a *ne exeat* provision as conferring a “right.” The court of appeals decision on which Mrs. Abbott relies understood it as such. *See, e.g.*, Pet. App. 1a (“This case requires us to determine whether *ne exeat* rights constitute ‘rights of custody’ within the meaning of the Hague Convention.”); *id.* 14a (“*ne exeat* rights . . . do not constitute ‘rights of custody’ within the meaning of the Hague Convention”). Indeed, she has done so herself throughout the case. *See, e.g.*, BIO 23 (“[e]ven if *ne exeat* rights were at issue here”); *id.* 24 (“even if arguing a *ne exeat* right sometimes operates as a custodial right . . . the exercise of *ne exeat* rights

among different parties when “the right to care for the person of a child was vested in one person, and the right to determine the child’s place of residence in another.” *Procès-verbal No. 4*, TOME III, at 271. When, following the Chairman’s suggestion, the drafters returned to this scenario, the First Secretary of the Permanent Bureau (Adair Dyer) explained that there was no need to modify the text of Article 5, as “the existing definition of custody rights embraced the situation where rights of custody and the right to determine a child’s place of residence were vested in different persons.” *Procès-verbal No. 14*, TOME III, at 344. No one disagreed. *Id.*

would constitute the exercise of custodial rights at the time of removal only in rare circumstances”).

Further, as discussed above, what Mrs. Abbott characterizes as a “veto” is in fact the power to ensure that A.J.A. is not taken from the country without Mr. Abbott’s permission. That is a central concern of the Convention, and it defies common sense to believe that the text intends such a narrow conception of a “right.”

Mrs. Abbott argues to the contrary that two parties cannot “share” a right if one may only reject the choices of the other. But that is an argument that the power is not “shared,” not that is not a “right.” Rights are shared all the time, a fact that simply means that they are not absolute. Mrs. Abbott has the right to determine that A.J.A. will reside outside Chile, so long as Mr. Abbott agrees. Mr. Abbott has the corresponding right to ensure that A.J.A. remains in the country. Such a purely negative power is still a right. *See, e.g., Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 278-81 (1990) (assuming a due process right to refuse life-sustaining medical treatment); *see also Georgia v. Randolph*, 547 U.S. 103, 106 (2006) (co-occupant’s refusal to permit entry into home, despite consent of other co-occupant, makes warrantless search unreasonable as to him); *United States v. Bajakajian*, 524 U.S. 321 (1998) (holding that forfeiture of entire sum of undeclared currency violates right to be free from excessive fines).

Third, Mrs. Abbott contends that Mr. Abbott does not have a “right of custody” because he cannot

“determine” A.J.A.’s place of residence. This argument founders at the outset, however, because the definition of “right of custody” does not depend on any “determination.” The “determination” of the child’s residence is just one illustration of a right of custody. *See supra* at 5-8.

Mrs. Abbott nonetheless focuses on the word “determine,” arguing that the possibility of a judicial override by a Chilean court means that Mr. Abbott cannot “decide or settle [A.J.A.’s residence] conclusively and authoritatively.” Resp. Br. 20-21 (citing AMERICAN HERITAGE COLLEGE DICTIONARY 379 (3d ed. 1997)). But that definition of “determine” is inappropriate for the context of the Convention, which all agree recognizes “joint” custody rights under which neither parent has such a conclusive power. In this context, “determine” is more naturally defined as “to set bounds or limits to” – for example, “a: to fix the boundaries of[; or] b: to limit in extent or scope.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 616 (3d ed. 1993). Mr. Abbott certainly has the right to fix the boundaries, or limit the scope, of A.J.A.’s residence at the Chilean border. It is furthermore unremarkable that the Chilean court can override Mr. Abbott’s refusal to authorize A.J.A.’s departure from the country if the refusal is made “without good reason”; virtually all custody rights can be overridden or altered by a court. *See, e.g.*, Tex. Fam. Code § 156.101 (allowing for modification of orders when modification “would be in the best interest of the child” and at least one criterion, such as change in circumstances, is established).

Fourth, Mrs. Abbott contends that a *ne exeat* right cannot be “exercised,” drawing on the provision of Convention Article 3 which provides that a removal is wrongful when it occurs “in breach of rights of custody . . . and at the time of removal . . . those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.” See Resp. Br. 32. That is plainly incorrect. Mr. Abbott *would have* exercised his right to prevent Mrs. Abbott from taking A.J.A out of Chile had he been aware of her plans, but her covert conduct – providing incomplete documentation to the law enforcement officers, see Pet. Br. 7 – deprived him of the opportunity to do so. One delegate from the United Kingdom explained that the “actual exercise” requirement was intended to “eliminate the possibility of a person demanding custody purely as a harassing tactic,” even if he had no actual involvement in the child’s life. *Procès-verbal No. 3*, TOME III, at 264; see also Pérez-Vera Report, at 448.

Fifth, Mrs. Abbott seeks to narrow the class of rights of custody by arguing that they are limited to only those powers that can be exercised by the parent who has “care of the child.” Resp. Br. 33. In support, she cites Article 13 of the Convention, which provides a defense to the remedy of automatic return if “the person . . . having the care of the person of the child was not actually exercising the custody rights.” Pet. App. 33a. But the definition of “right of custody” is set forth in Article 5, not Article 13, and it is explicitly broader than the right to care for the child. See Pet. App. 28a (Art. 5(a), custody “include[s]” right

to care). The reference in a separate defense is far too thin a reed on which to rest a significant narrowing of a central term of the Convention that is elsewhere defined, particularly given that the drafters intended the “actual exercise” requirement to be easily satisfied in order not to limit the Convention’s reach. *Procès-verbal No. 3*, TOME III, at 265 (Statement of Miss Selby of the United States).

In any event, Mrs. Abbott’s argument once again assumes its own conclusion – that the phrase “care of the child” narrowly describes day-to-day decisions regarding the child’s welfare, as opposed to more broadly encompassing decisions relating to the country of habitual residence. That assumption is unwarranted. The definitional provision of Article 5(a) describes the right to decide the child’s “residence” as a “particular” right within the broader right of “care.” And as noted above, the better view is that the right to determine the child’s “residence” refers equally to the *country* of residence.

Finally, Mrs. Abbott cites the rejection of a Canadian proposal to extend the Convention’s return remedy to rights of access. Resp. Br. 35-38 (citing *Procès-verbal No. 3*, TOME III, at 266-67). She notes that one Canadian official stated that this proposal would have extended the return remedy to *ne exeat* rights. *Id.* But there is no indication that any other person in the drafting process agreed, and in particular that anyone else believed that *ne exeat* rights were not already encompassed within the term “right of custody.” To the contrary, other speakers immediately responded that the Convention’s return

remedy would already apply to *ne exeat* rights. See Pet. Br. 43-45.

B. Mrs. Abbott’s Argument That Local Law Defines “Right of Custody” Is Incorrect

Mrs. Abbott separately argues that whether Mr. Abbott had a “right of custody” turns on how Chile characterizes a *ne exeat* right under its domestic law. Resp. Br. 26-29; *id.* 15-16. This contention flatly contradicts her other arguments, discussed above, that invoke various terms in the Convention. For example, Mrs. Abbott argues vigorously that the term “rights of custody” should be construed according to its “ordinary sense,” a term she seeks to define universally for all cases under the Convention, without regard to the domestic law of any particular signatory. She similarly argues that the meaning of “custody” should be informed by her construction of “right,” “care,” “determine,” and “exercise” – *see supra* Part II.A – all without regard to the meaning of those terms under Chilean law.

Mrs. Abbott’s argument is also self-defeating. Chilean law regards a *ne exeat* right at the least as a “right of custody” *for purposes of the Convention*, which is the relevant context. The Chilean ministry charged with implementing the Convention has thus advised the U.S. courts in another Hague Convention proceeding that “the right to authorize the minors’ exit of the country” under Article 49 of Minors Law 16,618 of Chile “establishes the right to determine the place of residence,” thereby creating “rights of custody” for purposes of the Convention. See *Duran v. Beaumont*, 534 F.3d 142 (2d Cir. 2008), *pet. for*

cert. filed, 77 U.S.L.W. 3369 (U.S. Dec. 12, 2008) (No. 08-775), *Duran* Pet. App. 35a.

The Convention’s text and history make clear that the term “rights of custody” is, in fact, properly interpreted autonomously of domestic law. *See* Pet. Br. 3, 30. Article 5 explicitly sets forth a definition of “rights of custody” that, while framed in illustrative terms, necessarily precludes resort to a different, domestic concept of “custody.” The drafters adopted the term “custody” not because they intended to incorporate local law but because of the “absence of any established legal definition of the phenomenon which is to be fought.” TOME III, at 183, ¶ 37. The *conduct* that the Convention seeks to deter and redress – *i.e.*, abduction – is no more or less “wrongful” whether a particular country categorizes the left-behind parent’s rights as involving “custody.” Further, allowing the Convention’s application to turn on a contracting state’s characterization of a parent’s rights would be unworkable given the diversity of the legal systems and terminologies in use when the Convention was drafted. Adair Dyer, *Questionnaire and Report on International Child Abduction by One Parent*, in TOME III, at 35.¹²

¹² For example, except as it is used in the Uniform Child Custody Jurisdiction and Enforcement Act, Texas does not employ the term “custody” in its family law. In the divorce proceedings that she filed in that state after leaving Chile, Mrs. Abbott sought to be appointed as A.J.A.’s “sole managing conservator,” which is the term used in the Texas Family Code, § 153.132.

Courts and leading commentators accordingly agree that the term “rights of custody” should be construed autonomously. *See, e.g., C v. C*, (1989) 1 W.L.R. 654 (Eng. C.A.) (opinion of Lord Donaldson); BEAUMONT & MCELEAVY, *supra*, at 74. Participants at the first Special Commission meeting held after the Convention’s adoption similarly clarified – without any recorded dissents – that “rights of custody’ as referred to in the Convention . . . constitute an autonomous concept.” Perm. Bureau of the Hague Conf. on Priv. Int’l Law, *Overall Conclusions of the Special Commission of Oct. 1989 on the Operation of the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction* ¶ 9 (1989).

Mrs. Abbott asserts that her contrary view follows from Article 3, which refers to “rights of custody attributed to a person . . . under the law of the state” of habitual residence, Pet. App. 28a, and the similarly worded *travaux préparatoires*, Resp. Br. 26-27. She misunderstands the text. The term “attributed” refers to the word “rights,” not the broader phrase “rights of custody.” Article 3 thus requires that the party invoking the Convention have rights recognized by the country of habitual residence, to which the child is to be returned. As noted, the Convention is unconcerned with whether that country categorizes the rights as involving “custody.”¹³

¹³ The Special Commission concluded that a right of custody originally granted under foreign law should suffice to trigger the

C. Concerns About Domestic Violence Have No Bearing On the Question Before This Court

Amici Domestic Violence Legal Empowerment and Appeals Project (“LEAP”) et al. urge this Court to reject the consistent view of the Central Authorities and courts of signatory nations that a *ne exeat* right is a “right of custody” because that view will “significantly . . . impact adult and child victims of abuse.” LEAP Br. 7. But their argument amounts to nothing more than an attack on the Convention itself because it is simply an argument against enforcing the return remedy. The difference between a *ne exeat*

return remedy if the country of habitual residence would recognize that foreign-granted right. It explained that “this aspect is covered in the present text of article 3 which insists that such a custody order be characterized as such under the law of the State of child’s habitual residence.” Elisa Pérez-Vera, *Report of the Special Commission*, TOME III, at 191. Mrs. Abbott’s attempt to use this language to support the proposition that “rights of custody” are only those defined as such under domestic law wrenches the words from their entirely different context. The final Pérez-Vera report avoids any such ambiguity in the use of the phrase “as such,” explaining: “when custody rights were exercised in the State of the child’s habitual residence on the basis of a foreign decree, the Convention does not require that the decree had been formally recognized. Consequently, in order to have the effect described, it is sufficient that the decision be regarded as such by the State of habitual residence, *i.e.*, that it contain in principle certain minimum characteristics which are necessary for setting in motion the means by which it may be confirmed or recognized.” Pérez-Vera Report, at 447.

right and a more extensive right to care bears no intrinsic relationship to the prospect of spousal abuse. Indeed, while asserting that *ne exeat* rights are a “tool for batterers,” LEAP Br. 34, they cite no cases actually involving *ne exeat* rights. Often, as in this case, the *ne exeat* right is imposed by law or at the request of the spouse who later claims abuse.

The Convention contains a separate provision, Article 13(b), to address cases involving domestic violence. The existence of that carefully drawn provision is a complete answer to the suggestion that the Court should narrowly construe “rights of custody” in all cases, including the great many that do not involve abuse. The answer of the *amici* that the exception is too narrowly drawn is, once again, nothing more than a complaint about the Convention itself. The Convention’s signatories have made a considered judgment that the best interests of children generally are served by their prompt return to the country of habitual residence. Preamble (Pet. App. 27a); *see also* Pérez-Vera Report, at 432. *Amici* simply seek to re-visit the balance already drawn by the Convention regarding the circumstances in which it is appropriate to trigger a right of return to permit such issues to be decided in the courts of the country of habitual residence. But any change to the Convention’s return remedy should be made not by this Court but instead by the contracting parties, who (as LEAP acknowledges) are aware of issues posed by domestic violence and are attempting to address them. LEAP Br. 5-6.

Further, the protests regarding the exception are unfounded. There is no reason to assume that the

courts have failed to faithfully apply Article 13(b). To the contrary, courts in the United States have applied Article 13(b) to deny return in cases involving serious abuse of the spouse and/or children. *See, e.g., Baran v. Beaty*, 526 F.3d 1340, 1352-53 (11th Cir. 2008); *Walsh v. Walsh*, 221 F.3d 204, 220-21 (1st Cir. 2000). Even in those cases in which courts reject that defense to the return remedy, the abducting parent remains free to seek the protections of the court of the country of habitual residence.

For her part, Mrs. Abbott makes a passing attempt to sway this Court's resolution of this case by making unsubstantiated accusations and implying that her domestic situation forced her to leave Chile. Mrs. Abbott suggests that she was a victim of domestic violence throughout her marriage but omits that she has never before made that claim in *either* these proceedings or the state court proceedings that she initiated after abducting A.J.A. to Texas, a significant omission that speaks volumes regarding the credibility of her claims. Mrs. Abbott's allegations rest solely on her own early accusations in the Chilean family courts, accusations that were never accepted by the Chilean courts, which in fact found "no proof that [Mr. Abbott] was not qualified to exercise" his rights to a direct and regular relationship with his son. J.A. 14.

Similarly, Mrs. Abbott's insinuation that she was forced to "relocate[]," Resp. Br. 8, due to visa problems and a dearth of funds rests solely on a single paragraph in her trial brief that she herself subsequently acknowledged as "unsupported allegations." C.A. Rec. 129, ¶ 14 (response to motion

for a new trial). But in any event, that fact only highlights that her interest in this case lies principally in her own personal convenience, which is no justification for her to abduct Mr. Abbott's son and deprive Mr. Abbott of his enforceable rights under the Convention relating to A.J.A.

Finally, to the extent Mrs. Abbott has any legitimate concerns, she gives no reason to doubt that the courts of Chile provide a suitable forum to resolve them. Among other things, as Mrs. Abbott herself emphasizes, a court has the power to override Mr. Abbott's *ne exeat* right if it concludes that Mr. Abbott has unreasonably withheld permission for Mrs. Abbott to leave the country with A.J.A. The Convention contemplates that such a question should be resolved by courts in the child's country of habitual residence, and this Court should so hold.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's opening brief and the brief of the United States, the decision of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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