

No. 08-645

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In The  
**Supreme Court of the United States**

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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**

—◆—  
**BRIEF OF THE DOMESTIC VIOLENCE LEGAL  
EMPOWERMENT & APPEALS PROJECT  
(DV LEAP), THE BATTERED WOMEN'S JUSTICE  
PROJECT - DOMESTIC ABUSE INTERVENTION  
PROGRAMS, INC., THE NATIONAL COALITION  
AGAINST DOMESTIC VIOLENCE, LEGAL  
MOMENTUM, AND THE NATIONAL NETWORK  
TO END DOMESTIC VIOLENCE AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENT**

—◆—  
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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF THE ARGUMENT .....	2
ARGUMENT.....	3
I. MANY HAGUE CASES INVOLVE MOTHERS AND CHILDREN FLEEING ABUSE ..	3
A. Hague Cases Commonly Involve Mothers and Children Fleeing Domestic Violence and Child Abuse.....	3
1. Domestic Violence is Frequently Alleged as a Reason for Removal .....	3
2. Where Mothers are Abused, Children are at Risk.....	7
3. This Case, Too, Entails a History of Domestic Violence and Alleged Child Abuse .....	10
B. Abused Women Overseas Often Have Little Alternative to Fleeing with their Children to Escape Abuse .....	12
1. Host Countries Often Lack Adequate Legal Protections .....	17
2. Legal Protections or Orders Often are Ineffectual .....	21
3. American Women and Children Victimized Overseas Are Particularly Vulnerable to Isolation and Lack of Social Supports.....	23

## TABLE OF CONTENTS – Continued

	Page
II. DESPITE THE CONVENTION’S UNDISPUTED PURPOSE OF PROTECTING CHILDREN, AND EXPLICIT PROVISIONS INTENDED TO AVOID RETURNS THAT ARE HARMFUL, IN PRACTICE THE CONVENTION OFTEN FAILS CHILDREN AT RISK .....	24
A. The Convention’s Focus is on the Interests of Children .....	24
1. The Remedy of Return is Available <i>Only</i> to the Custodial Parent.....	25
2. Even the Custodial Parent’s Return Remedy is Subject to Defenses in the Interest of the Child.....	26
B. Many Courts are Reluctant to Apply the Defenses to Return.....	28
III. EXTENSION OF THE RETURN REMEDY TO HOLDERS OF <i>NE EXEAT</i> ORDERS IS INCONSISTENT WITH THE CONVENTION’S INTENT TO PROTECT CHILDREN.....	33
A. <i>Ne Exeat</i> Orders Often are a Tool for Batterers.....	34
B. Requiring Returns in More Domestic Violence/Child Abuse Cases will Increase Harm to Children.....	36
CONCLUSION .....	39

## TABLE OF AUTHORITIES

	Page
CASES	
<i>In re A.V.P.G.</i> , 251 S.W.3d 117 (Tex. App. 2008).....	30
<i>Aldinger v. Segler</i> , 263 F.Supp.2d 284 (D.P.R. 2003) .....	30
<i>Baran v. Beaty</i> , 526 F.3d 1340 (11th Cir. 2008).....	31
<i>Belay v. Getachew</i> , 272 F.Supp.2d 553 (D. Md. 2003) .....	30, 38
<i>Blondin v. Dubois</i> , 189 F.3d 240 (2d Cir. 1999).....	22, 31
<i>Croll v. Croll</i> , 229 F.3d 133 (2d Cir. 2000) .....	25
<i>Dallemagne v. Dallemagne</i> , 440 F.Supp.2d 1283 (M.D. Fla. 2006) .....	18, 19
<i>Dalmasso v. Dalmasso</i> , 9 P.3d 551 (Kan. 2000) .....	30
<i>Friedrich v. Friedrich</i> , 78 F.3d 1060 (6th Cir. 1996) .....	17, 31
<i>Jaet v. Siso</i> , No. 08-81232-CIV, 2009 WL 35270 (S.D. Fla. Jan. 5, 2009) .....	38
<i>Janakakis-Kostun v. Janakakis</i> , 6 S.W.3d 843 (Ky. Ct. App. 1999) .....	30
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<i>Mendez Lynch v. Mendez Lynch</i> , 220 F.Supp.2d 1347 (M.D. Fla. 2002) .....	30
<i>Simcox v. Simcox</i> , 511 F.3d 594 (6th Cir. 2007) .....	23, 27
<i>Steffen v. Severina</i> , 966 F.Supp. 922 (D. Ariz. 1997) .....	38

## TABLE OF AUTHORITIES – Continued

	Page
<i>Tabacchi v. Harrison</i> , No. 99 C 4130, 2000 WL 190576 (N.D. Ill. Feb. 10, 2000).....	9, 29, 30, 38
<i>Town of Castle Rock, Colorado v. Gonzales</i> , 545 U.S. 748 (2005).....	15
<i>Van de Sande v. Van de Sande</i> , 431 F.3d 567 (7th Cir. 2005) .....	20, 31
<i>In re Walsh</i> , 31 F.Supp.2d 200 (D. Mass. 1998), <i>aff'd in part, rev'd in part</i> , 221 F.3d 204 (1st Cir. 2000) .....	8
<i>Walsh v. Walsh</i> , 221 F.3d 204 (1st Cir. 2000).....	23

## STATUTES AND TREATIES

Hague Convention, Preamble, <i>reprinted in</i> 51 Fed. Reg. 10,494 (Mar. 26, 1986).....	33
Hague Convention, Article 1 .....	24, 25, 33
Hague Convention, Article 3 .....	25
Hague Convention, Article 12 .....	27
Hague Convention, Article 13 .....	<i>passim</i>
Hague Convention, Article 20 .....	27, 28, 29
UCCJEA § 208 cmt. (1997).....	33
18 U.S.C. § 1204(c)(2) (1994).....	33
28 U.S.C. § 1738A(c)(2)(C) (2000) .....	33

## TABLE OF AUTHORITIES – Continued

Page

## RULES AND REGULATIONS

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S. Ct. Rule 37.6.....	1
Hague International Child Abduction Convention, Text and Legal Analysis, 51 Fed. Reg. 10,498, 10,503 (Mar. 26, 1986) .....	25

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Sense of Congress Respecting Child Custody Determinations, H.R. Rep. No. 101-737 (1990).....	33
Battered Immigrant Women Protection Act of 2000, § 1503, Pub. L. No. 106-386, 114 Stat. 1464 .....	33

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Carol S. Bruch, <i>The Unmet Needs of Domestic Violence Victims &amp; Their Children in Hague Child Abduction Convention Cases</i> , 38 Fam. L.Q. 529 (2004).....	<i>passim</i>
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## TABLE OF AUTHORITIES – Continued

	Page
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Evan Stark & Ann Flitcraft, <i>Women and Children at Risk: A Feminist Perspective on Child Abuse</i> , 18 (1) Int'l J. of Health Servs. 97-119 (1988).....	13, 15
G. Anne Bogat, <i>Trauma Symptoms Among Infants Exposed to Intimate Partner Violence</i> , 30 Abuse & Neglect 109 (2006).....	9
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Janet R. Johnston & Linda K. Girdner, <i>Early Identification of Parents at Risk for Custody Violations &amp; Prevention of Child Abductions</i> , 36 Fam. & Conciliation Cts. Rev. 392 (1998).....	12, 13, 19, 24
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## TABLE OF AUTHORITIES – Continued

	Page
Lynn Hecht Schafran, <i>Evaluating the Evaluators: Problems with “Outside Neutrals,”</i> The Judges Journal 10 (2003).....	8
Martha Mahoney, <i>Legal Images of Battered Women: Redefining the Issue of Separation Assault</i> , 90 Mich. L. Rev. 1 (1991) .....	13
Mary C. Wagner, <i>Belem do Para: Moving toward Eradication of Domestic Violence in Mexico</i> , 22 Penn. St. Int’l L. Rev. 349 (2003) .....	18
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## TABLE OF AUTHORITIES – Continued

	Page
Miranda Kaye, <i>The Hague Convention and the Flight from Domestic Violence: How Women &amp; Children are Being Returned by Coach &amp; Four</i> , 13 Int'l J.L., Pol'y & Fam. 191 (1999) ..... <i>passim</i>	
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Suddha Shetty & Jeffrey L. Edleson, <i>Adult Domestic Violence in Cases of International Parental Child Abduction, 11 Violence Against Women</i> 115 (2005) .....5, 8	
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	Page
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Evan Stark, <i>Coercive Control: The Entrapment of Women in Personal Life</i> (2007) .....	13
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## TABLE OF AUTHORITIES – Continued

	Page
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Jeffrey Edleson, <i>et al.</i> , <i>Multiple Perspectives on Battered Mothers and Their Children Fleeing to the U.S. for Safety: A Study of Hague Convention Cases</i> (Draft Final Report to the National Institute of Justice) St. Paul, MN: University of Minnesota (2009).....	8, 9, 13, 29, 32
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	Page
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TABLE OF AUTHORITIES – Continued

	Page
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**INTEREST OF THE *AMICI CURIAE*<sup>1</sup>**

*Amici* are organizations combating domestic violence through litigation, legislation, and policy initiatives. *Amici* have extensive experience working with survivors of domestic violence and engaging in legal and policy reform efforts on behalf of them.

*Amici* are concerned about the detrimental applications of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670 (the “Convention”) to abused women and children. *Amici* are aware that many children who must return to the country from which they fled are ultimately re-abused or suffer other significant harms. Extension of the Convention’s return remedy to non-custodial parents who possess a *ne exeat* order will exacerbate this problem and is inconsistent with the language and purpose of the Convention. *Amici* therefore submit this brief in support of Respondent.



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<sup>1</sup> The identities and interests of *Amici* are described in Appendix C to this brief. The parties have consented to the filing of this brief in letters filed with the Clerk. *See* S. Ct. Rule 37.3(a). No counsel for any party had any role in authoring this brief, and no one other than *Amici* provided any monetary contribution to its preparation or submission. *See* S. Ct. Rule 37.6.

## SUMMARY OF THE ARGUMENT

The Court's ruling in this case will have a significant impact on American women fleeing spousal or child abuse with their children. The Convention's original focus – on child abductions by non-custodial parents – has been overtaken by a new reality: primary caretaker mothers fleeing with their children. Because domestic violence and child abuse are at issue in many of these cases, and because *ne exeat* orders are a frequent tool of batterers, the Court's resolution of this case will have a disproportionate impact on battered women and their children.

The Convention's over-arching purpose in reducing child abduction was to prevent harm to children. Indeed, children's interests take priority over the rights of the left-behind parent in numerous provisions. Yet courts frequently interpret the Convention as requiring a child's return even in situations where return will subject the child or the child's mother to the same violence and abuse from which they just escaped. Such returns risk the child's direct abuse, traumatic exposure to the mother's abuse, and/or the devastating loss of the primary caretaker. These results are inconsistent with the aims of the Convention, which explicitly recognizes that some returns are harmful to children and should not be ordered. Despite the Convention's explicit exceptions to return – for example, where there are “grave risks” of physical *or psychological* harm to children (Article 13(b)) – many courts interpret these defenses so narrowly as to render them ineffective.

Extending the return remedy to non-custodial parties who hold *ne exeat* orders, often batterers, will only exacerbate the difficulty abuse victims already face under the Convention and harm children. Such an outcome is contrary to the Convention's language and fundamental purpose. *Amici* therefore urge the Court to affirm the decision below.



## ARGUMENT

### I. MANY HAGUE CASES INVOLVE MOTHERS AND CHILDREN FLEEING ABUSE

Because a significant proportion of Convention cases now involve primary caretaker mothers fleeing abuse, ordering their return is often harmful to children.

#### A. Hague Cases Commonly Involve Mothers and Children Fleeing Domestic Violence and Child Abuse

##### 1. Domestic Violence is Frequently Alleged as a Reason for Removal

The international community's need for the Convention was fueled by an idea of a typical parental abduction in which a father who had lost custody abducted the children and sought a more favorable custody determination in another country. Merle H. Weiner, *International Child Abduction & the Escape from Domestic Violence*, 69 *Fordham L. Rev.* 593, 602-03, 607-09 (2000) (describing "prototype" of

male non-custodial abductor which fueled Congressional ratification and to lesser extent drafting of Convention). To the extent domestic violence was considered at the time, it was primarily in connection with the recognition that abusers often abduct children. *Id.* at 605-10.

The current reality in Convention cases, however, is very different from the original paradigm. Empirical research confirms that 68 to 69 percent of “taking persons” are now mothers, not fathers. Nigel Lowe, *A Statistical Analysis of Applications Made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, at 21, Prelim. Doc. No. 3 (2006) (discussing 2003 data from 58 responding signatory states and 1999 data from 39 states); *see also* Marilyn Freeman, *International Child Abduction: The Effects, reunite International Child Abduction Centre* (2006) (study sample consisted of 63 percent female parent abductors). Of these mothers, it appears the majority (84 percent) are sole or joint custodial parents. Lowe, *Statistical Analysis, supra*, at 23.

Many of these women are fleeing domestic violence and/or child abuse. Violence against women has been characterized as “a notable risk marker for parental abduction.” Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women & Children are Being Returned by Coach & Four*, 13 Int’l J.L., Pol’y & Fam. 191, 193 (1999). Indeed, one study observed, “Family violence is characteristic of most of these families [who experience

international child abduction]. Allegations of spouse abuse, child abuse and serious child neglect are frequent, with many having sought restraining orders or reporting abuse to authorities.” Kaye, *supra*, at 193 (quoting Linda Girdner, *et al.*, *International Child Abductors: Profile of the Abductors Most Likely to Succeed*, paper presented at the Second World Congress on Family Law and the Rights of Children and Youth, June 3, 1997, San Francisco, CA). Even though court decisions do not always reflect violence that has occurred – as in this case – one study found that approximately one-third of all published and unpublished U.S. Convention cases mentioned violence within the home. Suddha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*, 11 *Violence Against Women* 115, 120 (2005).

Convention contracting states appear to have reached a general consensus that domestic violence is now a leading – if not *the* leading – problem in Convention cases. In the pre-meeting questionnaire preceding the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention, “country after country, including the United States, recognized that domestic violence is frequently raised as an issue by the respondent” in Hague proceedings. Merle H. Weiner, *Half-Truths, Mistakes, & Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the*

*Civil Aspects of International Child Abduction*, 1 Utah L. Rev. 222, 223 n.5 (2008) (citing Hague Conference on Private International Law, *Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, at 309-319, Prelim. Doc. No. 2 (Oct. 2006), available at <http://www.hcch.net/> (“Collated Responses”)).<sup>2</sup>

Domestic violence was explicitly on the agenda of the Fifth Meeting, and both the Special Commission Chair, Justice Catherine McGuinness of the Supreme Court of Ireland, and country representatives expressed serious concern about the way the Convention was “being used by abusive (usually male) parents to seek the return of children and primary carers . . . and that the Convention is moving away

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<sup>2</sup> The Collated Responses indicate the following about the frequency of abductors’ reports of domestic violence: Argentina: “often allege these doings”; Canada (British Columbia): “routinely raised”; Canada (Quebec): “increasingly”; Colombia (“almost always”; Ecuador: “often used”; Finland: “quite frequently used”; France: “frequently invoked”; Iceland: “often raised”; Ireland: “used increasingly”; Israel: “often raised”; Netherlands: “frequently invoked”; New Zealand: “often raised”; Poland: “frequent occurrence”; Romania: “frequently invoked”; Slovakia: “raised in almost every case”; South Africa: “vast majority”; Sweden: “quite frequently”; Spain: “[e]very day there are more cases in which international removal of minors is produced as a result of domestic violence”; United Kingdom (Scotland): “growing incidence of such allegations”; United States: “frequently raised”. Weiner, *Int’l Child Abduction*, *supra*, at 223 n.5.

from what it was meant to deter.” Weiner, *Half-Truths, supra*, at 282-83 (quoting Australia’s statement in Collated Responses, *supra*, at 458-59).

Thus, because domestic violence is associated with so many Convention cases, and because *ne exeat* orders are particularly likely in abuse cases, *see* Section III.C., *infra*, the resolution of this case will significantly – if not primarily – impact adult and child victims of abuse.

## **2. Where Mothers are Abused, Children are at Risk**

The growing recognition of domestic violence as an issue in Convention cases directly implicates not just adult victims, but also children:

Children in violent homes suffer increased physical and psychological illnesses that undermine their health, social and emotional development, and interpersonal behaviors. Children exposed to domestic violence are more prone to anxiety, depression, learning disabilities, and delinquency. A high percentage of men who batter their wives also batter their children, but domestic violence is traumatic for children even if they simply witness abuses or live in homes suffused with the tension and fear violence generates. Even toddlers are quite aware of what is going on around them, and often suffer slowed development, sleep disturbances,

depression, anxiety, and feelings of helplessness and fear as a result.

Lynn Hecht Schafran, *Evaluating the Evaluators: Problems with “Outside Neutrals,”* The Judges’ Journal at 10, 13 (Winter 2003) (citations omitted). Where domestic violence occurs, often so does child maltreatment. They co-occur 30 to 60 percent of the time, for a median of 41 percent. Shetty & Edleson, *supra*, at 126. See, e.g., *In re Walsh*, 31 F.Supp.2d 200, 202-03 (D. Mass. 1998), *aff’d in part, rev’d in part*, 221 F.3d 204 (1st Cir. 2000) (describing abusive husband slapping daughter as punishment and punching son for breaking beer bottle). See also Interviews 4, 11, and 13 (children’s fathers physically abused mothers and children); Interview 14 (children’s father attacked mother with gun and sexually abused daughters).<sup>3</sup> Children may be physically hurt when they intervene in their parents’ violence. Jeffrey L. Edleson, *Emerging Responses to Children Exposed to Domestic Violence*, National

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<sup>3</sup> As part of a research study for the National Institute of Justice, noted domestic violence researchers Dr. Jeffrey Edleson, Dr. Taryn Lindhorst, and their research team interviewed 22 female victims of abuse who fled across borders with their children. See Jeffrey Edleson, *et al.*, *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the U.S. for Safety: A Study of Hague Convention Cases* (Draft Final Report to the National Institute of Justice) St. Paul, MN: University of Minnesota (2009) (hereinafter “*Multiple Perspectives*”). Portions of those interviews are referenced throughout this brief. Complete summaries of cited interviews, which were prepared by Dr. Edleson and his team, are attached as Appendix A.

Online Resource Center on Violence Against Women 2 (Oct. 2006), available at <http://www.vawnet.org>. See also Interview 12 (young son unsuccessfully tried to stop father from hitting his mother). And the psychological and emotional injuries to children at all ages, including anxiety, depression and other trauma symptoms, from “merely” witnessing adult abuse, are well-documented. Abigail H. Gewirtz & Jeffrey L. Edleson, *Young Children’s Exposure to Intimate Partner Violence: Towards a Developmental Risk & Resilience Framework for Research & Intervention*, 22 J. of Family Violence 151, 151-52, 156 (2007); G. Anne Bogat, *Trauma Symptoms Among Infants Exposed to Intimate Partner Violence*, 30 Abuse & Neglect 109 (2006); see also Interview 10 (children were not directly abused but required therapy); Interview 13 (boys returned to father who abused their mother now have psychological issues, including aggression).

Young children – typically found in these cases – are especially vulnerable. Edleson, *Multiple Perspectives*, *supra* (median age of children in Hague domestic violence cases is six). First, they are more likely to be with their mothers in the middle of an assault. Edleson, *Emerging Responses*, *supra*, at 3; see also *Tabacchi v. Harrison*, No. 99 C 4130, 2000 WL 190576, at \*5 (N.D. Ill. Feb. 10, 2000) (father allegedly shook infant daughter and yelled at wife when she asked him to stop); Interview 11 (young son elbowed in forehead by drunken father). Second, younger children are less emotionally and psychologically resilient. Gewirtz & Edleson, *supra*, at 155-57;

see Weiner, *Int'l Child Abduction, supra*, at 627 (discussing author's interview with battered mother in *Prevot v. Prevot*, 855 F.Supp. 915 (W.D. Tenn. 1994)) (“[t]he [2 and 4 year old] children were so traumatized by the family violence that they hardly spoke when they returned to the United States”).

Children who both suffer direct violence and witness their mother's victimization often develop the most severe behavioral problems. See David Finkelhor, *et al.*, *Poly-victimization: A Neglected Component in Child Victimization*, 31 *Child Abuse & Neglect* 7, 8-9, 15-16 (2007).

In short, where adult domestic violence is at issue, so is potential physical or psychological harm to children.

### **3. This Case, Too, Entails a History of Domestic Violence and Alleged Child Abuse**

While it is not apparent from the decisions below, like so many Convention cases, this case also involves a history of domestic violence. Ms. Abbott alleged in the Chilean custody litigation that Mr. Abbott physically and psychologically abused her for more than a decade, continuing after their son was born. JA 10. Ms. Abbott documented her “moderate injuries” for the Chilean court by providing a police report and copies of a civil action and criminal court action (in Hawaii) filed against Mr. Abbott. JA 12. Ms. Abbott testified Mr. Abbott also physically and

psychologically abused the boy. JA 10. A psychologist referred by the school testified, “the minor must be protected until it is clear that the father can control himself in conflictive situations.” JA 11. The psychologist further testified that, while the “child loves his father,” he “continues to show some fear of bewildering reactions thereof, which are largely directed towards the mother, which logically has an effect on the child.” JA 36. A neuropsychiatrist, who treated the parties’ son for over a year, testified he had a “severe depressive disorder secondary to family abuse that has been going on for a long time,” he was “highly irritable,” and “has great mood swings.” JA 21-23. Ultimately, a report from the Family Orientation and Diagnostic center found Mr. Abbott “represent[ed] no danger to his child” and recommended visitation. JA 12-13.<sup>4</sup>

Mr. Abbott also threatened not to return the boy to his mother. *See* JA 17-21, 37. On one occasion, Mr. Abbott withheld their son for 16 days after Ms. Abbott had allowed him an additional four-day visit not contemplated by the parties’ provisional visitation agreement. JA 20-21, 37. Mr. Abbott returned the boy only after *several hours of negotiations with police*. JA 20-21, 37. The *ne exeat* order upon which Mr. Abbott now relies was initiated by Ms. Abbott in response to this incident. *See* Kaye, *supra*, at 194 (noting mothers

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<sup>4</sup> *See* Section I.B., *infra*, for discussion of the frequent failure of family courts to adequately respond to domestic violence and child abuse in custody litigation.

sometimes flee with children to protect them from being kidnapped by their abusive fathers).

### **B. Abused Women Overseas Often Have Little Alternative to Fleeing with their Children to Escape Abuse**

The need to protect their children from violence has been identified as a significant motivator for many mothers who flee with their children. *See* Janet R. Johnston, *et al.*, *Early Identification of Risk Factors for Parental Abduction*, *Juvenile Justice Bulletin* 3-5 (March 2001), *available at* <http://www.ncjrs.gov/pdffiles1/ojjdp/185026.pdf> (finding domestic violence victims more likely to abduct their children and “more likely to see the abduction as an attempt to protect their children”); Janet R. Johnston & Linda K. Girdner, *Early Identification of Parents at Risk for Custody Violations & Prevention of Child Abductions*, 36 *Fam. & Conciliation Cts. Rev.* 392, 397-98 (1998). While courts and observers often assume abduction is unnecessary because safety can and should be achieved through the legal process, the realities of domestic violence suggest there are no legal panaceas for abuse. The painful reality is that often the only way to ensure the safety of oneself and one’s children is to get completely away – and in most cases women seek to do so by returning home. *See, e.g.*, Interviews

3, 4, 6, 9, 10, 22 (women fled with children to home in U.S.).<sup>5</sup>

Most domestic violence is characterized by the use of violence to control the victim and her life and to deny her autonomy or independence. Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* 4-5, *passim* (2007); Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation Assault*, 90 Mich. L. Rev. 1, 54-60 (1991). This dynamic means that when a victim leaves an abuser, or asserts her rights through the legal system, violence often escalates, both in retaliation, and as an intensification of his efforts to maintain control over her. Thus, it is at or after separation that “[a]busive husbands are more likely to seriously harm or kill their wives. . . .” Johnston, *et al.*, *Early Identification of Risk Factors*, *supra*, at 10; *accord* Mahoney, *supra*, at 5-6 (“At the moment of separation or attempted separation – for many women, the first encounter with the authority of law – the batterer’s quest for control often becomes most acutely violent and potentially lethal.”); Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and*

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<sup>5</sup> The typical fact pattern in U.S. Hague Convention cases involving domestic violence is, overwhelmingly, one where American mothers remove their children from a foreign country, leave the American children’s father behind, and return to the United States. Edleson, *et al.*, *Multiple Perspectives*, *supra*. Out of the 48 American Hague cases involving domestic violence identified by a prominent researcher in the field, 44 (92 percent) followed this pattern. *Id.*

*Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey* 37-38, U.S. Dept. of Justice, National Institute of Justice, NCJ 181867 (2000) available at <http://ncjrs.org/pdffiles1/nij/181867.pdf> (termination of relationship was associated with increased violence). Since filing for legal protection is a powerful assertion of autonomy and independence, taking legal action can *itself*, as a significant form of separation, also trigger more violence. Deborah Epstein, *et al.*, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-term Safety in the Prosecution of Domestic Violence Cases*, 11 Am. U. J. Gender, Soc. Pol'y & Law 465, 467-68 & n.4, 476 (2003) (victims "are most likely to be killed while taking steps to end the relationship with the abuser or while seeking help from the legal system"). See Interview 4 (after divorce papers filed, father kidnapped son, then attacked mother and son); Interview 12 (after divorce, father repeatedly broke into mother's new home and attacked her).

Separation of the adults also increases the risks to children. Even if an abuser has not previously abused the children, once the mother is no longer accessible or present, the perpetrator's rage and abusiveness can be, and often is, turned against the children:

Abuse of children by batterers may be more likely when the marriage is dissolving, the couple has separated, and the husband and father is highly committed to continued

dominance and control of the mother and children. Since . . . abuse by husbands and fathers is instrumental, directed at subjugating, controlling and isolating, when a woman has separated from her batterer and is seeking to establish autonomy and independence from him, his struggle to . . . dominate her may increase and he may turn to abuse and subjugation of the children as a tactic of . . . control of their mother.

Evan Stark & Ann Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 (1) *Int'l J. of Health Servs.*, 97-119 (1988); accord Lundy Bancroft & Jay Silverman, *The Batterer as Parent* 154 (2002) (“after separation . . . there are many sound reasons to believe that [risk to children] actually *increases* as a result of the mother’s inability to monitor or to intervene in the batterer’s parenting and of the retaliatory style common to many batterers after separation”). See, e.g., *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005) (father killed all three children after protection order awarded to mother although no previous history of violence toward the children); Interview 4 (after separation husband snatched, hid five-year-old boy and then assaulted both mother and child); Interview 6 (after mother required to return children, father abused and neglected them).<sup>6</sup>

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<sup>6</sup> In a recent tragedy in Maryland, a father drowned his three young children during an unsupervised visit, which had  
(Continued on following page)

Mothers often resort to fleeing with their children when violence to the children escalates or they sense their lives are in danger. *See, e.g.,* Weiner, *Int'l Child Abduction, supra*, at 627 (describing one mother's reason for fleeing France with her children: "When I caught him standing over my son with his arms raised at him I knew I had to get out."); Paula Lucas, *Help for American Women and Children Abused Abroad*, Domestic Violence Report, 14:6, 81, 89 (Aug./Sept. 2009) (author describes potential order to return as a "certain death sentence"); Interview 17 (victim fled to U.S. after husband's drinking and abuse escalated, he described various ways of killing her, and exhibited suicidal behavior). They also may flee to the United States because their attempts to achieve safety in the host country have failed. *See* Interview 12 (victim fled to U.S. with children after abuser, despite divorce, repeatedly broke into her new home and violently attacked her, and neither the police nor the Red Cross would assist her); Interview 13 (victim fled after court and family development agency failed to intervene leading to increased violence).

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been awarded over the mother's desperate objections. *Maryland v. Castillo*, No. 108119017-22 (Balt. Cir. Ct. filed Mar. 31, 2008) (guilty plea entered Oct. 14, 2009). She begged the court to protect the children because of the father's threat that "the worst thing [he] could do to [her] would be to kill the children and not [her]." Jonathan Bor, "What Drives Parents to Kill?," Balt. Sun, Apr. 20, 2008. He later admitted to drowning the children to punish their mother. *Id.*

## 1. Host Countries Often Lack Adequate Legal Protections

While courts are often reluctant to conclude that other countries may not protect victims of abuse, *see, e.g., Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996), inadequate laws, law enforcement, and social norms often obstruct protections for victims of abuse overseas.

The U.S. State Department's Human Rights Reports document these inadequacies among many signatories to the Convention, including Chile.<sup>7</sup> *See* Weiner, *Int'l Child Abduction, supra*, at 624-25 n.139 (noting Reports' documentation of similar failures in other countries including Colombia, Poland, Hungary, Macedonia, Spain, South Africa, and Venezuela). Even in countries with laws on the books, inadequate

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<sup>7</sup> *See, e.g.*, Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Human Rights Reports: Chile (2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119152.htm> ("Domestic violence against women remained a serious problem . . . [Additionally], 72 percent of children had suffered some form of violence including psychological abuse."); Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Human Rights Reports: Greece (2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119082.htm> ("[The government failed] to provide adequate protection to victims of domestic violence."); Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Human Rights Reports: Mexico (2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119166.htm> ("Domestic violence was pervasive and mostly unexposed . . . [s]even states do not criminalize domestic violence, and 15 states punish family violence only when it is a repeated offense.").

law enforcement and longstanding conflicting cultural norms often make them ineffective. *See, e.g.*, Patricia M. Hernandez, *The Myth of Machismo: An Everyday Reality for Latin American Women*, 15 St. Thomas L. Rev. 859, 877 (2003) (although many Latin American countries have adopted domestic violence laws since 1994, “the issue of lax enforcement remains”). For instance, in Mexico,<sup>8</sup> social attitudes and customs are tolerant of violence against women. Mary C. Wagner, *Belem do Para: Moving toward Eradication of Domestic Violence in Mexico*, 22 Penn. St. Int’l L. Rev. 349, 350-54, 367-68 (2003). This both frustrates the Mexican government’s efforts to stop domestic violence, and discourages women from seeking protection from local police.<sup>9</sup> Wagner, *supra*, at 365.

Nor is Mexico unique. In *Dallemagne v. Dallemagne*, 440 F.Supp.2d 1283 (M.D. Fla. 2006), a Convention respondent testified that calling the

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<sup>8</sup> Mexico is the Convention signatory country with the highest incidence of reported abductions to the U.S., and thus the Convention country with the largest number of potential petitioners in U.S. courts. U.S. Department of State, *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction*, 5 (2009) (detailing signatory and non-signatory countries and charting rates of abduction).

<sup>9</sup> Just three percent of domestic violence victims seek assistance from Mexico’s judicial system, even though domestic violence is reported in one out of three Mexican homes. Yvette Lopez, *Sleeping with the Enemy: Mexico & Domestic Violence, Out for a Rude Awakening or Rising in Time?*, 25 Women’s Rts. L. Rep. 1, 7 (2003).

French police to stop her husband's violence was "a joke," because the police would refuse to intervene and tell her to simply "forgive her husband." *Id.* at 1289. *See also* Weiner, *Int'l Child Abduction, supra*, at 627 (describing French police's insistence that victim could do nothing to stop her husband's violence, could not change the locks, and could not restrict his access to the children; attorney referred by American consulate also offered no legal avenue to stop violence); Interview 12 (victim hit, raped, and beaten, but refused help by police and Red Cross); Interview 20 (after particularly violent episode, victim called local police who told her she was "crazy" and warned her husband to "guard the[ir] son's paper[s] since he was married to an American woman").

Not surprisingly, victims of domestic violence are more likely to flee with their children "when the courts and community have failed to take the necessary steps to protect them from abuse or to hold the abuser accountable." Johnston, *Early Identification of Risk Factors, supra*, at 3; *accord* Weiner, *Int'l Child Abduction, supra*, at 628 (if Ms. Prevot could have obtained any financial means to live and any legal protection, such as an arrest of her abuser, "she would have stayed in France and fought for custody there"); Interview 4 (mother fled with children to U.S. after local police told her they could not stop her husband from following and threatening them); Interview 21 (mother fled after police refused to enforce restraining order).

Chile, the country from which Ms. Abbott fled, did not have laws against domestic violence until 1994. Hernandez, *supra*, at 876-77. The law enacted in Chile, however, provides a maximum sentence of just six months imprisonment, regardless of the degree of violence, and Chilean courts rarely impose penal sentences in any event. *Id.*

Such a critique of other countries' inadequate protections for domestic violence victims does not stem from a nationalistic indictment of foreign countries but rather from objective observations about the realities faced by abuse victims around the world. See *Van de Sande v. Van de Sande*, 431 F.3d 567, 570-71 (7th Cir. 2005) (Posner, J.) ("To give a father custody of children who are at great risk of harm from him, on the ground that they will be protected by the police of the father's country, would be to act on an unrealistic premise."). In fact, few if any legal systems have achieved consistent protection for victims of abuse. See Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims & Their Children in Hague Child Abduction Convention Cases*, 38 Fam. L.Q. 529, 544 (2004) ("Of course every legal system is imperfect in this regard.").

Courts' weak or unprotective responses to abuse victims are often particularly pronounced in the custody litigation context. A growing body of research has documented family courts' surprisingly frequent grants of unsafe access, and even child custody, to abusive fathers. See Joan S. Meier, *Domestic Violence Child Custody and Child Protection: Understanding*

*Judicial Resistance and Imagining the Solutions*, 11 Am. U. J. Gender, Soc. Pol'y & the Law 657, 661-62 & n.19 (2003) (survey found American trial courts awarded sole and joint custody to alleged and adjudicated batterers more often than not); Peter G. Jaffe, *et al.*, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 Juv. & Fam. Ct. J. 57-65 (2003) (describing multiple misconceptions which result in family courts' inadequate responses to abuse). Similar trends are being documented in other countries as well. *See, e.g., Failure to Protect? Domestic violence and the experiences of abused women and children in the family courts*, Women's Aid, Nov. 11, 2003, available at <http://www.womensaid.org.uk/domestic-violence-articles.asp?section=00010001002200020001&itemid=1194&page=2> (in 2003 study of 178 shelter organizations in England and Wales, respondents reported 101 children were given to abusive fathers by courts; only 3 percent of respondents thought appropriate measures are taken to ensure safety of child and resident parent in most custody/visitation cases involving domestic violence).

## **2. Legal Protections or Orders Often are Ineffectual**

Even where courts issue protective orders, they often fail to work. As leading commentators have noted, "[a]busers flout court orders." Bruch, *supra*, at 544; accord Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits*, NIJ Research Report 24 (1996) (60 percent of women with

protective orders were subjected to at least one violent episode in following year); Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims, in Do Arrests and Restraining Orders Work?* 233 (Eve S. Buzawa & Carl G. Buzawa eds., Sage 1996) (women with children who had protection orders 70 percent more likely to face violence than women without children).

Courts considering the return of children to countries where there is a serious risk of abuse frequently seek to reduce the risks to adult and child victims by issuing orders to the abuser, based on his “undertakings” or promises of good behavior. *See, e.g., Blondin v. Dubois (Blondin II)*, 189 F.3d 240, 242, 249 (2d Cir. 1999) (affirming district court’s determination that returning children would expose them to grave risk of physical abuse but remanding for “more complete analysis of the full panoply of arrangements that might allow the children to be returned”). Yet research indicates violent parents virtually never comply with Convention undertakings orders regulating their conduct toward the other party. The leading study of the efficacy of undertakings found that protective undertakings prohibiting violence between the parties were consistently violated. reunite Research Unit, *The Outcomes for Children Returned Following an Abduction*, 31-32 (Sept. 2003) (undertakings specifically related to violence were broken in 100 percent of cases, and undertakings overall, regardless of activity restricted, were violated in two thirds of cases). Thus, “[w]here a grave risk of

harm has been established, ordering return with feckless undertakings is worse than not ordering it at all.” *Simcox v. Simcox*, 511 F.3d 594, 608 (6th Cir. 2007); *see also Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000) (reversing return order where father’s undertakings and possibility of Irish court orders did not mitigate the grave risk of harm).

### **3. American Women and Children Victimized Overseas Are Particularly Vulnerable to Isolation and Lack of Social Supports**

Abused mothers overseas often flee to the United States because they lack adequate support networks to take care of themselves and their children in the foreign country. “Any lack of support in the country of habitual residence will be exacerbated if [a mother] is experiencing violence.” Kaye, *supra*, at 194. Language barriers and cultural differences limit women’s access to help. *See* Paula Lucas, Domestic Violence Rep., *supra* (abuse victims living in foreign country face additional barriers including being undocumented, lacking access to passports or travel documents, or being subjected to travel bans by the abuser). Financial barriers – which are often exacerbated when an American woman overseas is financially dependent on her abusive husband and cannot work in the country – can be especially significant in this context. *See, e.g.,* Paula Lucas, *Founder’s Story*, Americans Overseas Domestic Violence Crisis Ctr. (2009), <http://www.866uswomen.org/Founders-Story>.

aspx (professional woman had no access to funds and forged husband's signature on check to get out of country); Weiner, *Int'l Child Abduction, supra*, at 627-28 (abuser in France transferred all money to his sole account, and hid his wife's and children's identification papers, passports, and birth certificates). Even a working knowledge of the language may not be enough to adequately assert legal rights or navigate the channels of a foreign legal system. See Johnston & Girdner, *supra*, at 403-04 (concluding domestic violence victims who feel disenfranchised from legal system are more likely to flee with their children).

## **II. DESPITE THE CONVENTION'S UNDISPUTED PURPOSE OF PROTECTING CHILDREN, AND EXPLICIT PROVISIONS INTENDED TO AVOID RETURNS THAT ARE HARMFUL, IN PRACTICE THE CONVENTION OFTEN FAILS CHILDREN AT RISK**

### **A. The Convention's Focus is on the Interests of Children**

The Convention expressly proclaims: "[T]he interests of children are of paramount importance in matters relating to their custody." Convention, art. 1. The Convention's official history records that it was "inspired by the desire to protect children and should be based upon an interpretation of their true interests." Elisa Pérez-Vera, Explanatory Report: Hague Conference on Private International Law, 3 Acts and Documents of the Fourteenth Session (Child

Abduction) (1980), ¶ 24 (hereinafter the “Explanatory Report”), *available at* [http://www.hcch.net/index\\_en.php?act=publications.details&pid=2779](http://www.hcch.net/index_en.php?act=publications.details&pid=2779).<sup>10</sup>

### **1. The Remedy of Return is Available Only to the Custodial Parent**

The Convention provides for the return of children “*wrongfully* removed to or retained in any Contracting State.” Convention, art. 1 (emphasis added). A removal or retention is to be considered “wrongful” where “it is in breach of *rights of custody* . . . under the law of the State in which the child was habitually resident immediately before the removal or retention.” *Id.* art. 3 (emphasis added). “Rights of custody are distinguished from *rights of access*. . . . The Convention provides recourse in the event a child is removed from a[] habitual residence in breach of access rights, but those remedies *do not* include an order of return. . . .” *Croll v. Croll*, 229 F.3d 133, 137 (2d Cir. 2000) (emphasis in original).

The treaty’s focus on “wrongful” removals and the grant of a right of return *only* for those removals interfering with “rights of custody” was driven by a specific vision of what children need: their primary caretaker. Return was the priority because it aimed

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<sup>10</sup> The Pérez-Vera Explanatory Report is the official commentary to the Convention. *See* Hague International Child Abduction Convention, Text and Legal Analysis, 51 Fed. Reg. 10,498, 10,503 (Mar. 26, 1986).

to remedy “the traumatic loss of contact with the [custodial] parent who has been in charge of his upbringing.” See Explanatory Report, *supra*. The Convention’s *refusal* to denominate absconding by the *custodial* parent as “wrongful” naturally flowed from this view of children’s interests – because requiring return in that instance would detrimentally subject the child to the very same “traumatic loss of contact” with his or her caretaking mother. While a litigant who has violated a court order may not be viewed favorably by courts, fidelity to the Convention requires recognition of its policy choice – which puts the interests and needs of children above the injured rights of the parent and the court whose order has been violated.

## **2. Even the Custodial Parent’s Return Remedy is Subject to Defenses in the Interest of the Child**

The Convention’s drafters also recognized that even when the petition for return was filed by a *custodial* caregiver, children’s “best interests” would not always be protected by return:

[T]he Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the overly vague principle whereby

the interests of the child are stated to be the guiding criterion in this area.

Explanatory Report, ¶ 25. Thus, even where the petitioning parent does hold rights of custody (and is exercising them), and the abduction violates a custody order, the Convention contemplates exceptions to the usual return order in several situations. Among these are cases where there is “a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation,” Convention, art. 13(b); and cases where “the return is not permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms. *Id.* at art. 20.<sup>11</sup> Thus, the Convention’s core purpose – to protect children’s interests – “[would] not . . . be furthered by forcing the return of children who were the direct or indirect victims of domestic violence.” *Simcox*, 511 F.3d at 604-05 (citing Merle H. Wiener, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention On the Civil Aspects of International Child Abduction*, 33 Colum. Hum. Rts. L. Rev. 275, 330, 352-53 (2002)).

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<sup>11</sup> Additional exceptions to the return remedy include Article 13 (no return if mature child objects), and Article 12 (no return if child is settled for more than one year in new environment). In each of these instances, a custodial parent’s legal rights may have been violated, but the Convention puts the child’s well-being ahead of vindication of either those rights or the original court’s order.

The adoption of these exceptions to the custodial parent's right of return reflected a "major drafting compromise" between delegates who feared a "public policy defense" to treaty obligations would create too large a loophole to the return mandate and others who felt a blanket return mandate would be harmful to children. Bruch, *supra*, at 531. The specific defenses in Articles 13 and 20 were intended, *inter alia*, to provide protection for adult and child victims of domestic violence. *Id.* Indeed, the language "or otherwise place the child into an intolerable situation" was specifically inserted into Article 13(b) to ensure that return would not be mandated where a child's *mother* was being abused *but the child was not*. See Weiner, *Half-Truths, supra*, at 292-93 (noting Commonwealth Secretariat representative J. David McClean, who helped draft the Convention, said during the Fifth Meeting of the Special Commission to Review Operation of the Convention, the "phrase 'intolerable situation' had been added to provide flexibility and to include an exception for domestic violence victims"). As the Explanatory Report says, "the interest of the child in not being removed from its habitual residence . . . gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation." Explanatory Report, ¶ 29.

### **B. Many Courts are Reluctant to Apply the Defenses to Return**

Despite the foregoing provisions, many courts seem to presume that "a decision to return a child is a

‘good’ decision *per se*.” Kaye, *supra*, at 196. As a leading commentator characterizes the situation, “courts’ appropriate concern that the Convention’s exceptions not be permitted to swallow the return rule has sometimes developed into an improper disregard for the Convention’s intended protections against danger.” Bruch, *supra*, at 535.

Courts have invoked a number of narrowing principles in declining to apply the “grave risk” defense.<sup>12</sup> Most commonly, courts fail to recognize abuse of a child’s mother as indicative of grave risk of “physical and psychological harm” to the child or an “intolerable situation” under Article 13(b). For instance, in *Tabacchi*, the court heard evidence Mr. Tabacchi had thrown objects at Ms. Harrison, slapped her, choked her in front of the baby while she was driving, punched her in the head, caused her a black eye and loosened teeth, all inflicting post traumatic stress disorder. 2000 WL 190576, at \*1, \*3, \*7. Nonetheless, the court concluded this evidence did not prove grave risk of either physical or psychological harm to the baby in the future. *Id.* at \*13. The court assumed there would be no further abuse of the mother and therefore the child would not be exposed

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<sup>12</sup> Article 20 is broader than Article 13(b), but it has been invoked very infrequently and is successful even less often. See Merle H. Weiner, *Strengthening Article 20*, 38 U.S.F. L. Rev. 701, 705, 718-720 (2004) (quoting commentators who have stated that “article 20 has ‘nearly faded without a trace’”) (citation omitted); Edleson, *Multiple Perspectives*, *supra* (Article 20 is asserted in less than 15 percent of U.S. Hague cases involving domestic violence).

to further violence. *Id.* at \*13-14. *See also Aldinger v. Segler*, 263 F.Supp.2d 284, 289 (D.P.R. 2003) (violence between adults does not implicate children); *Belay v. Getachew*, 272 F.Supp.2d 553, 560 (D. Md. 2003) (asserting abuse “will never occur again” because parties are now divorced); *Dalmasso v. Dalmasso*, 9 P.3d 551, 558-59 (Kan. 2000) (returning children despite father allegedly threatening mother’s life, attacking her in front of the children, hitting and kicking her, pulling her hair); *In re A.V.P.G.*, 251 S.W.3d 117, 128 (Tex. App. 2008) (“Even with allegations of physical abuse to the spouse, grave risk is not proven where there is no evidence that the non-abducting party physically abused the children.”).

Some courts even fail to treat evidence of child abuse as indicative of grave risk to the children. *See, e.g., Dalmasso*, 9 P.3d 551 (father used belt on children if they spoke at meals).

Other courts reject evidence of abuse as improperly inviting a re-determination of custody. *See Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 850 (Ky. Ct. App. 1999) (despite evidence Mr. Janakakis slapped their young daughter on the back and had pulled Ms. Janakakis-Kostun’s hair so violently she was hospitalized for severe neck injuries, court held Article 13 “must be narrowly construed” and treated abuse evidence as “more closely akin to that which might be relevant in a custody proceeding”). *See also Mendez Lynch v. Mendez Lynch*, 220 F.Supp.2d 1347, 1364 (M.D. Fla. 2002) (“[t]he exception for grave harm to the child is not license for a court in the

abducted-to country to speculate on where the child would be happiest”) (internal quotations omitted).

Third, many American courts refuse to apply the defense unless respondents can prove a negative: that courts of the habitual residence are “unable” or unwilling to protect them from abuse. *See, e.g., Friedrich*, 78 F.3d at 1068 (stating “that courts in the abducted-from country are as ready and able as we are to protect children”); *Kaye, supra*, at 198 (noting that many courts feel it is offensive to presume foreign courts are incapable of protecting abuse victims). This position, however, is inconsistent with the often inadequate legal responses to domestic violence in many countries. *See* Section I.B., *supra*; *Van de Sande*, 431 F.3d at 570-71 (criticizing and rejecting *Friedrich* standard); *Baran v. Beaty*, 526 F.3d 1340, 1347 (11th Cir. 2008) (same).

Fourth, courts often rely on “undertakings” which are largely unenforceable, to purportedly alleviate the risks to the children and mother upon return. *See, e.g., Blondin II*, 189 F.3d at 242, 249 (regardless of evidence of danger, Second Circuit felt “every effort” should be made to honor return mechanism. . . .”). As noted in Section I.B.2., such undertakings are largely futile and even deceptive – as abusers typically fail to comply with them.<sup>13</sup>

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<sup>13</sup> The Australian Law Reform Commission has stated that the lack of enforcement mechanism for undertakings allows the Convention to be “misused by men as a means of exercising  
(Continued on following page)

The foregoing examples suggest that while the Article 13 grave risk/intolerable situation defense is the most frequently asserted defense in Convention cases involving domestic violence, it is rarely successful. Dr. Edleson's research indicates the grave risk/intolerable situation defense has been asserted in more than 80 percent of Convention domestic violence cases, but it has been successful less than a third of the time. Edleson, *Multiple Perspectives*, *supra*.

*Amici's* own survey of published appellate decisions involving the Convention and domestic violence found that of 27 trial courts in which the abductor alleged domestic violence and grave risk/intolerable situation, 20 (74 percent) ordered return. While 10 (50 percent) of these were reversed on appeal, appellate courts also reversed 4 of the 7 no-return cases. Appellate courts thus encouraged or required return in 8 (40 percent) of the 20 cases.<sup>14</sup> Together these data indicate domestic violence and child abuse defenses are failing far more than they succeed. While appeals are sometimes successful, it is the rare litigant who can afford an appeal. Thus, even now, the abuse victim who flees to the United States faces significant

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continuing power over their partners." Australian Law Reform Commission (1994) *Equality Before the Law: Justice for Women*, Rep. No. 69 pt. I, § 9.45, Sydney.

<sup>14</sup> A complete list of the surveyed cases is attached as Appendix B.

hurdles in remaining safe and keeping her children safe under the Convention.

### **III. EXTENSION OF THE RETURN REMEDY TO HOLDERS OF *NE EXEAT* ORDERS IS INCONSISTENT WITH THE CONVENTION'S INTENT TO PROTECT CHILDREN**

Unfortunately, extension of the return remedy to non-custodial parents with a *ne exeat* order would exacerbate the problems faced by abused women and children. This outcome would contravene the core purpose and dominant value of the Convention: the protection of children.<sup>15</sup> Convention, preamble, art. 1; Explanatory Report, ¶ 24.

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<sup>15</sup> Indeed, well-established U.S. public policy shares this focus on protecting children and embodies the fundamental freedoms and human rights principles described in Article 20. *See, e.g.*, Uniform Child Custody Jurisdiction Enforcement Act (“UCCJEA”) § 208 cmt. (1997) (“Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal”); 28 U.S.C. § 1738A(c)(2)(C) (2000) (providing exception to “home state” jurisdiction if “it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse”); 18 U.S.C. § 1204(c)(2) (1994) (federal provision criminalizing child abduction provides defense for fleeing domestic violence); Sense of Congress Respecting Child Custody Determinations, H.R. Rep. No. 101-737 (1990) (“for purposes of determining child custody, credible evidence of physical abuse of one’s spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse”); Battered

(Continued on following page)

### **A. *Ne Exeat* Orders are Often a Tool for Batterers**

Batterers commonly use custody litigation and the children themselves to maintain control and restrict their ex-partner's autonomy and independence.

When a couple divorces, the legal system may become a symbolic battleground on which the male batterer continues his abuse. Custody and visitation may keep the battered woman in a relationship with the battering man; on the battleground, the children become the pawns. Studies of custody disputes indicate that fathers who battered the mother are twice as likely to seek sole physical custody of their children than are nonviolent fathers . . . .

Report of the American Psychological Association Presidential Task Force on Violence in the Family, *Violence and the Family* 40 (1996).

*Ne exeat* orders – which restrict the other parent's ability to leave the jurisdiction with the children – are an especially apt tool for batterers to achieve this end. See Weiner, *Navigating, supra*, at

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Immigrant Women Protection Act of 2000, § 1503, Pub. L. No. 106-386, 114 Stat. 1464 (amending various sections of 8 U.S.C.) (allowing battered immigrant self-petitioners to claim lawful permanent residence status in the United States with their children instead of having to go abroad, where they are at risk, to get a visa).

330 (“[t]he remedy of return is particularly unjust in the subset of cases where the sole basis for returning the child is a *ne exeat* clause . . . [such an order] may condemn the [primary caretaker] mother to a life of fear and danger”).

In the non-Convention case context, relocation restrictions in custody litigation often serve as a means for abusive parents to cement their control over the abused spouse and restrict her or his freedom to leave. Relocation cases serve as a

microcosm of the broader domestic violence dynamic. Moveaway restrictions give violent men the power to prevent their ex-partners from escaping and to continue controlling essential aspects of their lives after separation and divorce. Batterers use social isolation to maintain their power over their intimate partners. Moveaway restrictions often prevent custodial mothers from returning to their families of origin for support and protection . . . [and] prevent custodial mothers from moving to take new jobs or to continue their educations. . . . Moveaway restrictions allow batterers to use the legal system to . . . continue their domination through control of the children.

Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, 46 U. Kan. L. Rev. 433, 450-51 (1998). Thus, “abused women are likely to be overrepresented in relocation custody cases.” *Id.* at 437.

It should then come as no surprise that abusers also frequently use the Convention to intimidate their victims, maintain control over them, or gain financial advantage. Weiner, *Half-Truths, supra*, at 282; see also Bruch, *supra*, at 540-41; Interview 10 (abusive husband threatened to “use the Hague” if wife did not return with their children to his foreign home by certain date and slammed her head against wall before she left). This kind of misuse of the Convention will almost certainly increase if a return order becomes available to a parent whose claim to custody is weak on the merits, such as a non-custodial “rights of access” parent relying on a *ne exeat* order. Bruch, *supra* at 541.

### **B. Requiring Returns in More Domestic Violence/Child Abuse Cases will Increase Harm to Children**

Return orders in cases such as this threaten children’s well-being in at least three ways. First, if for her safety the mother cannot return with the children, the children will be removed from their primary caretaking mother in order to fulfill the return order. See Interview 13 (victim describes how six police officers removed her young children); Interview 14 (victim describes police removing her children from her home). The loss of their mother would be traumatic to most children, especially young ones.

Second, when the mothers return with their children, as most do, many face the risk of severe harm or even death. *See, e.g.*, Paola Totaro, *Following a court order killed her*, Sydney Morning Herald, May 4, 2009, <http://www.smh.com.au/world/following-a-court-order-killed-her-20090503-ard1.html> (describing mother who complied with Hague return order and was then murdered by her ex-husband after her pleas for police protection were rebuffed). *Cf.* Lucas, Domestic Violence Rep., *supra* (describing return order in her case as “certain death sentence”). There can be no doubt that extreme violence against or murder of one’s mother would be profoundly traumatizing and devastating for children.

Third, in many return cases, not surprisingly, when the abducting mother returns, custody is reversed and awarded to the father who abused the mother and sometimes the children.<sup>16</sup> *See, e.g.*, Interview 7 (two sons have not had contact with mother for over a year); Interview 9 (father who threatened to kill mother now has sole custody, mother has visitation with children three weeks per year but previously went two years without seeing them). The harms to such children are twofold: (i) they are devastated by the loss of their primary caretaker

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<sup>16</sup> *But cf.* Weiner, *Int’l Child Abduction*, *supra*, at 620-23 (pointing out that if abduction protects children from abuse or preserves a mother’s life, it is probably protective, and not destructive, to the children).

mother;<sup>17</sup> and (ii) they are now in the custody of a father who is at least emotionally abusive and a high risk for child abuse. *See* Interview 4 (children abused by father after return). *See also* Bancroft, *supra* (“With rare exceptions, it is not in children’s best interests to be placed in the custody of a battering father. . . . [C]ustody and visitation planning should treat security for children as a top guiding principle.”).

Finally, even if mothers retain custody and are not killed, but are “merely” subjected to ongoing abuse, the children are likely to be exposed to the physical and psychological risks associated with exposure inter-parental abuse and parenting by a highly stressed mother who is not safe. *See* Section I.A.2., *supra*. While courts sometimes assume such abuse will cease once the parties are separated or divorced, *see Tabacchi* and *Belay*, this assumption reflects a misconception that abuse ends when the

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<sup>17</sup> “All of our work shows the centrality of the well-functioning custodial parent-child relationship as the protective factor during the post-divorce years. When courts intervene in ways that disrupt the child’s relationship with the custodial parent, serious psychological harm may occur to the child as well as to the parent.” Judith S. Wallerstein and T. J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 Fam. L.Q. 305, 311 (1996). In one published decision, the court held that loss of the child’s primary bond with his mother would constitute a grave risk of harm and denied return. *Steffen v. Severina*, 966 F. Supp. 922, 928, 930 (D. Ariz. 1997). In another, the court ordered return despite such a finding. *Jaet v. Siso*, No. 08-81232-CIV, 2009 WL 35270, at \*6-8 (S.D. Fla. Jan. 5, 2009).

relationship ends – an assumption which is belied by the persistence of abusive individuals' coercive control and the prevalence and severity of separation assault. *See* Section I.B., *supra*.

These outcomes are not required by the Convention's language and are contrary to its purposes. The Convention's focus on the protection of children, especially in light of batterers' misuse of *ne exeat* orders, should inform the Court's determination of the question before it in this case.

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## CONCLUSION

For the foregoing reasons, *Amici* urge the Court to affirm the decision below.

Respectfully submitted,

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## APPENDIX A

### **Cited Interviews with Domestic Violence Victims Involved in U.S. Hague Cases<sup>1</sup>**

#### **Interview 3 – Heather and David**

Heather, a U.S. citizen, moved to northern Europe with her husband David and daughter while pregnant with her son. Once abroad, David became increasingly depressed and suicidal after moving from job to job. Two years later, his depression and the violence came to a head, and he made a major threat to kill the entire family. The violence in the relationship escalated after that, including an argument where David hit and kicked Heather in front of their daughter. David also made threats to Heather's parents when the family was visiting the U.S. a few months later. Soon thereafter, David returned to northern Europe while Heather stayed with her children in the U.S.

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<sup>1</sup> These 14 interviews were among 22 conducted in 2009 by noted domestic violence researchers Dr. Jeffrey Edleson, Dr. Taryn Lindhorst, and their research team. The interviewees provided their stories confidentially. For convenience, however, pseudonyms have been used here. The research team's interviews are included in the forthcoming report *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the U.S. for Safety: A Study of Hague Convention Cases*. See Jeffrey Edleson, Taryn Lindhorst, et al., *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the U.S. for Safety: A Study of Hague Convention Cases* (Draft Final Report to the National Institute of Justice) St. Paul, MN: University of Minnesota (2009).

David then filed a Hague petition against Heather. She was served a few months after he left, and the judge ordered the children be returned to northern Europe two months later. Heather returned with her children but did not have anywhere to go. Custody had not yet been established, and so she stayed with the children in a local shelter. Heather received public assistance as, not being a citizen, she could not work. During this time, her husband had visitation with the children. After several months, immigration served her and her children with a deportation notice to return to the U.S. They have been living in the U.S. since then. A year later, the interviewee obtained sole physical custody of the children but still has joint legal custody with her abusive ex-husband who lives in northern Europe.

#### **Interview 4 – Catherine and Jack**

Catherine, a U.S. citizen, married Jack, from a European country, and had two girls and boy with him. When her youngest child was two years old, Catherine began to work a few hours per week outside the home. Jack became jealous and verbally abusive. Catherine asked him to seek psychiatric help at which time he was diagnosed with a bipolar disorder. When Jack would take his medications, he would be okay, but when he stopped the medication, he would become depressed and begin verbally attacking her and the children. After several attempts to change his behavior, she filed for a divorce (10 years after their marriage).

The day he was served with the papers, Jack took their son (five years old at the time) and hid him in another relative's home. Catherine found her son, and in trying to take him back home, she and her son were physically assaulted by Jack. She took all three children and went to the home of a friend-of-a-friend. The local court gave her temporary custody of the children.

When she enrolled the children in a new school, Jack discovered their whereabouts and began stalking Christine and the children, threatening her and telling her he would never let her leave him. Christine contacted the police, but they said they could not stop him from following and threatening them. She had no money, and nowhere to live. She spoke with her local attorney and U.S. embassy staff, both of whom said they thought Christine should return to the U.S.

She left for the U.S. about two months later. Three months after that, Jack was granted custody of the children, saying that Christine had violated the custody agreement by leaving the country. Jack filed a Hague petition against Christine six months later. The U.S. court ruled that Christine's children had to return to Jack, and her appeal failed. After being in the U.S. for a year, Christine's children were returned to her abusive husband. They have experienced physical abuse from him since their return. Christine has returned to Europe and is continuing her efforts to win back custody. Currently, she has custody of her oldest daughter, and the two younger children are

with her abusive husband. Jack has contested the divorce, so they still remain legally married.

### **Interview 6 – Sarah and Miguel**

Sarah moved with Miguel, her Latin American husband, to a Latin American country. Miguel was from a very influential and political family in that country. Over several years, Sarah endured economic control, verbal abuse, physical abuse, and ongoing conflict in the marriage. Eight years later, Miguel left and went to India (with another woman) without telling Sarah. Soon after this, Sarah and her two sons left to go to the southern U.S., where they had arranged for a place to stay through a friend.

Sarah and her children took a boat to another Latin American country and then flew to the U.S. Several months later, Sarah's pastor from the Latin American country from which she had come told her that he had been subpoenaed and that her husband was looking for them. Sarah then went to stay in a domestic violence shelter, and soon after that filed for divorce.

A year after leaving, Sarah was served with Hague papers. The case went to trial several months later, and the children were returned to Miguel. Sarah then learned that Miguel had filed criminal kidnapping charges against her for leaving with her children. In the Hague case, the federal judge ruled that those charges should be dropped.

Sarah returned to the Latin American country to be with her children and began to have some limited, supervised visitation with her sons. A few months later, Sarah learned that the kidnapping charges had not been dropped. She began battling custody and property issues in family court and kidnapping charges in criminal court.

Six months later, Sarah was awarded custody of the boys again, but the order was reversed one month later due to a “legal technicality.” She had to return to court to turn the boys over to their father three months later. At the hearing, she brought a representative from the U.S. Embassy to court and she was able to keep her children. Miguel was awarded supervised visits.

By that point, there was also documented neglect of the children and abuse directed to the oldest son by Miguel. Sarah continued to fight for Miguel to have no visitation rights to the children because she was deeply concerned for their well-being. Two years later, Sarah got permission from the local court to take her children to the U.S. for one month. Just before leaving, the criminal court dropped the charges against Sarah, said she was a mother protecting her children from harm, and recognized she had fled because of abuse.

Sarah and her sons faced many obstacles to getting out of the country, but were finally able to leave. Sarah’s sons had contact with Miguel via email until the last six months before they left. Sarah is

now in hiding with her sons in the U.S., and Miguel has posted her children as “missing” even though he has their email addresses and has not made contact with them.

### **Interview 7 – Diane and Philippe**

Diane, U.S. citizen, married Philippe, from northern Europe, in the US, and they moved abroad together. They had three children together. When the youngest was a year old, Diane’s grandmother became ill with cancer and Philippe encouraged her to go to the U.S. to care for her grandmother. Within a week, Diane and her oldest child came to the U.S. while Philippe remained abroad with her two sons.

Being away from her husband, Diane began to realize how manipulative and controlling Philippe’s behavior was. While she was with her family in the U.S., Philippe repeatedly called Diane to check on her and her daughter’s whereabouts and sent the police to check on where they were. During this time, Diane also became increasingly aware of how isolated she and the children were in their life abroad. For example, Philippe would not let Diane go out except to go to work, and he had insisted that the family move to a very remote area of the country.

One day, Diane’s mother took her to social services where she saw a brochure entitled, “It Shouldn’t Hurt to Go Home.” Diane saw her own relationship in the description of abuse, which was the first time she really understood that she was in a

domestic violence situation. At this time, Diane was planning to return abroad, and she began to try to contact social services there for support, including a women's aid domestic violence shelter. They originally said they would help her, but then later refused and said they needed to prioritize assisting local women. During this time, Diane also learned that Philippe had not completed Diane's immigration paperwork accurately so she could no longer get back into the country.

A year later, her husband filed a Hague petition against her. She was advised by her attorney that she would have to go abroad and fight for her children in local courts. In the Hague proceeding, Diane agreed to a "voluntary return" as she wanted to demonstrate that she was not in any way trying to abduct her child. She returned and has been living there ever since. Meanwhile, Diane has not seen her two sons in three years and has not had contact with them in more than a year. Philippe is not in any kind of regular contact with Diane's daughter (who is living with Diane). She is continuing to fight for custody/visitation for her sons in local courts abroad.

### **Interview 9 – Janet and Marco**

Janet, a U.S. citizen, married Marco, a southern European-American, and they had two children. When the youngest was two, the family moved from the U.S. to another country. Marco immediately began to have a hard time mentally.

Once they were abroad, Janet was very isolated. She was not allowed to drive or do anything on her own, and Marco controlled all of the family finances. Marco would also consistently call Janet derogatory names. Two years later, Janet got a job outside the home. At this point, the jealousy, resentment, and name-calling by Marco increased.

Soon thereafter, he attacked Janet in front of the children, who were then four and six years of age. In this incident, Marco pushed her down into the bathtub, cursed at her, called her names, and threatened to kill her. Several months later, Janet's brother and sister-in-law offered to help her financially if she wanted to come back to the U.S. She returned to the U.S. with her children and filed for divorce.

A few months later, Marco filed a Hague petition against Janet. At that time, the federal court judge ordered the children be returned to the other country. During the court case, there was information presented from a school psychologist that there was possible sexual abuse of the daughter by Marco. However, the judge insisted that this was not a "grave risk" as the children were not going to a war zone. A month after filing the Hague petition, local courts in the other country gave Marco sole custody of the children and Janet had no contact with her children for six months.

Then, in the divorce proceedings, the judge ordered that the children have summer visits

(approximately two months) and Christmas visitations with Janet. Seven years later, Janet's ex-husband took her to court for custody again. Marco wanted to cut off the children's visits to the U.S. and get 10 years of back child support from her. In that court decision, the judge ordered that the children would have only three weeks per year, in August, in the U.S. with their mother, beginning that year. Janet did not see her children for two years. Janet was able to see both of the children the following year and her daughter stayed with her for three months. She still is not able to have regular phone contact with her children who are still living in the other country with her abusive ex-husband.

### **Interview 10 – Linda and Ali**

Linda married her Middle Eastern husband, Ali, and immigrated with him to another country the next year, where she became a citizen. Linda is a fluent speaker in the language of the other country, but is not a fluent writer of it. They had two boys. Ali had an unstable work history and amassed over \$100,000 in debt because he had not paid bills, but Linda did not know this.

After years of a deteriorating relationship in which Linda reports that he was very controlling, Ali became physically abusive. He hit Linda with a baseball bat, and tried to push her out of a speeding car. Linda wanted to return to the U.S. and to get a divorce. After receiving the divorce papers, Ali

obtained a restraining order so she could not leave the other country with the children.

A year later, he agreed to allow her to visit her family in the U.S. with the children, but said he would use Hague if Linda had not returned by August. Before she left, Ali physically abused Linda again by slamming her against a wall which left her with a head wound. She went to the U.S. along with her children to be with her father.

Two months after the self-imposed deadline, Ali filed the Hague petition on the same day she filed for legal custody and a temporary separation from him. The Hague petition judge said the jurisdiction was the U.S. because Linda was held against her will in the other country. Her case was reversed on appeal, and she was told she had 20 days to return the children to the other country or the children would be deported. This decision was appealed to the U.S. Supreme Court which refused to hear the case. Ali also filed kidnapping charges against Linda in the other country, so she was officially a “kidnapper” with a \$40,000 bond expected of her.

She did return and eventually the local court gave her custody after receiving a psychiatric evaluation of Ali, which said he was not fit to be a parent. Linda returned to the U.S. the next year and has remarried here with her children. Her children had weekly therapy. They are now close to their step-father.

## **Interview 11 – Courtney and Stephen**

Courtney married Stephen and had their son two years later. The abuse started within a few months of the marriage and escalated over time. Three months after their son's birth, the family went to northern Europe, but Courtney was under the assumption that they would be returning to the U.S. (they had purchased a round trip ticket). The family was struggling financially when they first were living abroad and Stephen continued to drink and be abusive toward her.

Soon thereafter, Courtney found a job as a nursing aid so that she could save some money for herself and her son. Four months later, the family returned to the U.S. and was living with Courtney's parents. One month later, Courtney returned to northern Europe with Stephen. She wanted to stay in the U.S. at the time, but she went back out of fear. Stephen was drinking heavily at the time and had blown out a light socket at her parents' house and elbowed their son on the forehead.

Six months later, Courtney contacted a local attorney and made a plan to return to the U.S. and go to her parents' house. Six months after leaving, she received full custody of her son (based on the abuse). Courtney and Stephen were divorced soon thereafter. Three months after the divorce, she was served with the Hague petition. Two years later, her divorce was finalized and she was granted full custody with no visitation for her ex-husband.

## **Interview 12 – Claudia and Raul**

Claudia is of Latin American citizenship along with her husband, Raul, a man with an alcohol problem. Claudia had two children with Raul, a daughter who was six years old at the time of the Hague petition and a son who was two years old. Raul pushed her, threw things at her, hit her, and raped her.

Claudia filed for divorce in Latin America and separated from him. At one point, her young son tried to intervene to get Raul to stop hitting her. Claudia lived in another house with the children and Raul repeatedly broke into the house and broke her things after the divorce. Claudia went to the police, who told her to go to the Red Cross, who told her to come back in two days when the bruises were visible, only to turn her away two days later, saying they couldn't help her after the fact. Claudia had no one to defend her, and Raul was well-connected, both to powerful politicians and to drug dealers.

Claudia's sister lived in the U.S. (her mother was deceased and her father was remarried), so she came to U.S. She called the police in the U.S., who referred her to a local domestic violence program. The domestic violence program helped Claudia file a petition for asylum due to domestic violence and helped her get a restraining order.

Raul found her after four or five months and located the children in their schools. Eight months after she came to the U.S., Raul filed a Hague

petition and had the police remove the children from her custody. The Hague judge ruled against Claudia, saying it was a problem to be resolved in the Latin American country. But she already had the immigration case pending, so they allowed the children to stay with Claudia until the other court made its decision.

The Hague case was appealed, and Claudia won a month later. She had documentation from threatening messages Raul had written, letters from friends in the other country, documents from attorneys in the other country explaining the divorce, and the restraining order. After he lost the Hague case, Raul filed for another custody determination. He now has visitation rights, including weekend visits when he wants to exercise them (he still lives in the other country), and a yearly vacation with the children. Raul has taken the children back to the other country and returned them at the end of the vacation.

### **Interview 13 – Rita and David**

Rita is of Latin American citizenship and lived with David in the other country. It is unclear if they were legally married. Rita had one child from a previous relationship and two children with David. It is unclear how violence developed in the relationship, but Rita reports that David was controlling, told her what to wear, whether she could have certain friends. David beat Rita and also beat her daughter (who was

not his child), but did not physically abuse his two children.

Rita had documentation consisting of a medical report about “lesions” David inflicted, which she presented to a local court in the other country, but they would not pursue the complaint. Rita also sought help from a government agency for family development, but David behaved more violently after the agency became involved, and the agency was ultimately not helpful. Twice Rita left David but returned to him.

Eventually Rita’s parents left for the U.S. and encouraged her to leave with them. Rita spoke with local attorneys, who advised her that it was a lengthy process for him to get the children if she left with them. Rita had her children taken across the border by friends who passed them off as their children. Rita then moved to the U.S. to live with all three children (who were all 10 or younger) without David’s approval.

David pursued and was granted custody of the children in the other country. A few months after arriving in the U.S., Rita was served with a Hague petition, and David’s two children were taken from the Rita’s home by six police officers. The petition required that Rita appear in court that day. She was given two continuances, but two weeks later, the judge ordered the children returned to the other country on the basis of the custody document. The

judge noted that domestic violence was not relevant to the determination.

The children returned, but Rita could not immediately return, because David had filed criminal kidnapping charges against her. Rita sought help in the U.S. and was able to find a lawyer in the other country who obtained temporary “immunity” for her. She negotiated to have the charges dropped.

For the first one and a half years Rita was in the other country, David did not allow her to see the children. The neighbors told Rita the children were alone, so she began to sneak to see them, but her children eventually told David they were meeting their mother. At that time, Rita and David made an agreement that she could see the children one day on the weekend. This is the current state of affairs.

Rita works, and earns enough to help her afford a small house and car. Her oldest daughter, now 14 years old is in the U.S. living with Rita’s parents. Rita does not have enough money to go and see her, and is uncertain if she would be able to obtain a visa for the travel. They communicate via the internet. Rita’s children in the other country are having psychological difficulties, including showing aggressive behaviors at school.

#### **Interview 14 – Carmen and Rafael**

Carmen is of Latin American citizenship. She had one daughter from a previous marriage, and had

two children with her second husband, Rafael. Rafael began abusing her within two weeks of their getting married. It started with him pushing her, pulling her hair and hitting her. It escalated to Rafael hitting Carmen and slamming her into the floor so that she lost consciousness.

Rafael threatened Carmen twice with weapons. The first time, he held an ice pick to her stomach while holding her jaw so tightly he dislocated it. Another time, he held a gun to her head and pulled the trigger. Carmen thought it was loaded and that he was going to kill her. After that, Carmen says she decided to obey everything Rafael said because she was afraid. Rafael hit all the children, sometimes with a belt and left marks. After they fled to the U.S., her oldest daughter reported that Rafael touched both girls sexually, although he did not rape them. He raped Carmen.

She sought help from family services in the other country, but they did nothing. Carmen went repeatedly to the police, but Rafael was a former police officer, and they also did nothing. After Carmen's youngest child was born, she asked for a divorce, in part because her oldest daughter had started standing up to Rafael when he hit her. Rafael refused to divorce Carmen.

The following year, Rafael moved out for a year but came back to the house frequently and was abusive. He found a therapist and asked Carmen to attend with him. The therapist told Carmen that she

needed to go back to Rafael. A year later, Rafael's behavior changed, became more erratic, guarded. He hit Carmen repeatedly with a doll in the face. She filed another police report, but the police would not pursue it. Rafael pushed her down the stairs while her son watched. He was three years old. Rafael's mother told Carmen to forget about the past and focus on being his wife.

It is unclear what finally motivated her to leave. Carmen had a brother in the U.S., so she came to be with him. Carmen and her oldest daughter had visas and came legally, but her two younger children were smuggled across the border by a *coyote*. She sought help at an immigrant women's program and was told to file for asylum. She began this process when Rafael found them and had the police remove the children from the house, pursuant to the Hague petition.

Carmen searched for an attorney that would help her keep the children in the U.S. and found one experienced in Hague cases who said it would be expensive. At the initial court hearing, Rafael was granted custody and she received two hours of visitation on Sundays and one 10-minute phone call per day.

They had the second hearing three weeks later where her attorney presented information about the domestic violence and Carmen's eldest daughter testified. Carmen was given custody of the children again. She officially won the case three years later. The children are in therapy. Carmen's second

daughter is having aggression problems and experiencing depression.

### **Interview 17 – Lindsey and Michael**

Lindsey met her husband Michael in the U.S. They married a year later and then moved to Michael's native northern Europe. Once in the other country, Michael told Lindsey that he did not want to return to the U.S. Lindsey felt she had been "tricked" and "trapped," especially after she had her first son. She had two boys in the other country and then convinced her husband to move to Canada so she could be closer to her family. In Canada, Lindsey gave birth to her third son. She tried to return in the U.S. at this point, but eventually returned with Michael to the other country.

Once back in the other country, Michael ripped up her passport and the passport of one of her sons. Michael told Lindsey she would never leave again. According to local law, both parents have to agree to get a passport for a child. Michael did not allow Lindsey to have a bank account, credit card, or money. He monitored Lindsey's phone calls to her family. She had few local contacts because she did not speak the other country's language well.

Michael drank heavily periodically. During this time, Lindsey reports that she was careful not to provoke him, and when he was upset, he would push and shove her, or break things (i.e., glass door). Lindsey's sister flew to the other country to try and

talk him into letting her and the children leave. This was followed by increasing tension between the couple, with Michael remarking to Lindsey that he was considering ways to kill her. Lindsey felt very afraid of him at this point.

Michael made a suicide gesture, overdosing on pills and had to be taken to the hospital and have his stomach pumped. His psychiatrist told Lindsey that he thought she was the cause of Michael's problems. She had been told by others in the other country that a person could be detained in a psychiatric hospital if a spouse and a psychiatrist agreed they were mentally ill. Lindsey feared that her husband was trying to have her hospitalized and trying to win the support of the psychiatrist.

After that, Michael left the house with her 18-month-old daughter. Lindsey called the U.S. Embassy and was told by them that she should return to the U.S. They put her up in a hotel for three days and loaned the money for plane tickets for her and her three sons' home.

Six months after returning to the US, Lindsey received a Hague petition in the mail from Michael. She had no proof of the abusive situation she had lived through in the other country. She says that he was rarely physically abusive to her, and never hurt the children, just neglected them or did bizarre things like taking all of their schoolbooks and burning them in a bonfire. After losing her appeal, she was ordered to return the children to the other country. As she

promised to return the children, she was not escorted back to the other country. Lindsey found the only international attorney in her area of the U.S., and this was who she hired to represent her in the Hague petition.

Lindsey had another attorney in the other country who is appointed by the state. Her mother returned with her and they resided in the home with Michael. He went to court to try and have Lindsey's mother removed but lost. Lindsey began divorce proceedings a year later, and they were finalized two years after. She was given custody of her four children.

A year later, Lindsey and Michael got back together briefly. She felt that she had a new view of him after receiving a psychiatric report that said he was mentally ill – that he has a personality disorder characterized by obsession, sadistic perversion and paranoia. They had another son, but the relationship fell apart again.

The next year, the local court authorized Lindsey to return to the U.S. with the four older children and eventually added the youngest as well. Michael received visitation in the other country or the U.S. Michael has only sporadically exercised his visitation rights in the other country.

Lindsey notified Michael that she would be returning to the U.S. Michael appealed this and forced her to stay in the other country another year. Lindsey has received a family allowance in the other

country for the children, and money from her family, but has not worked while living there, in part because the other country restricts the ability of non-residents to work.

### **Interview 20 – Jennifer and Lawrence**

Jennifer, a U.S. citizen, was living in northern Europe with her husband, Lawrence, who is a citizen of two European countries. While there, Jennifer has not been able to work because of her citizenship status and is not fluent in the language. Throughout the marriage of two years, Jennifer experienced physical and emotional abuse by Lawrence, including him hitting her while she was pregnant with their baby. On one occasion, she called the police to intervene in a violent incident. The police told Jennifer that she was crazy and they cautioned Lawrence to “guard the son’s paper since he was married to an American woman.”

A few months later, Jennifer and her son returned to the U.S. to her parents’ house. Within a few weeks, she told her husband she planned to stay in the U.S. Soon thereafter Jennifer was served with a Hague petition. The U.S. judge was not familiar with the Hague Convention. He ordered the child to go back to the other country. Jennifer was also asked to return with the child because the judge was not confident that Lawrence could care adequately for the child. Jennifer and her son are currently living in the other country on a tourist visa, which means she

cannot work to support them. They are awaiting a judgment from the local courts about custody and visitation arrangements and child support payments.

### **Interview 21 – Amy and Raymond**

Amy met her husband, Raymond, a northern European, married him, and over the next three years two sons were born. Amy had difficulties in her marriage, but would not discuss them, other than to say her second son was conceived as a result of rape. Her youngest was two years old when Raymond, the owner of a large multi-million dollar company, relocated the family to a rural area in the other country.

Raymond began to act strangely, and Amy began to find pornography at the house. Raymond hired an au pair who left after two weeks for reasons that Amy does not know. During this time, Amy's bank card was cut off, and when she tried to reach Raymond by phone, she was not able to contact him. Amy heard from other people that Raymond was saying they had separated, and she discovered later that he had filed for divorce without telling her.

After finding out about his desire to separate, Amy went to court and filed a restraining order, but when she called the police to enforce it, they would not respond. Amy said "we became prisoners," because they were isolated in the country, with no money and no help from the police. Amy found pictures taken by Raymond of the children naked

with their genitals exposed. She talked to the U.S. consulate staff who advised her that she could go home to the U.S. for a visit with the children.

Amy took her sons to the U.S., and tried to get an operation for her younger son who had a severe medical problem. Raymond filed a Hague petition a few months later. Amy received referrals for three attorneys, but she was dissatisfied with her attorneys. One month later, the judge ordered the children returned to the other country. Amy represented herself on the appeal and lost. Her children were returned to Raymond a month later, and she has not seen them since.

Amy flew back to the other country at the same time as her children and tried to get the local judge to enforce the undertakings that the U.S. judge required – namely, that criminal kidnapping charges against her be dropped, that the children receive counseling, that the father allow visitation, and that her son receive the operation for his medical problem. As far as Amy knows, none of these undertakings have been enforced in the other country.

So Amy returned to the U.S. eight months later. She stayed briefly with her parents and then has been living in various shelters in the U.S. since, she says because Raymond is continuing to harass her by tapping her parents' phone and having her followed when she lived in an apartment. She found a new attorney through an international battered women's

organization and she is continuing to pursue her legal case in the other country.

### **Interview 22 – Carolyn and Christopher**

Carolyn is a U.S. Citizen. She married Christopher and then moved with him to northern Europe. Very soon after their marriage, Christopher began to verbally abuse her. A year after their daughter was born, things came to a head and Christopher threatened to kill and kicked Carolyn. Immediately following this incident, Carolyn went to a women's shelter for a few days and started divorce proceedings.

Two years later, Carolyn and her daughter returned to the U.S. After being in the U.S. for almost a year, Carolyn was served with a Hague petition and had to appear in court one week later. In the Hague process, the judge decided that the daughter should go back to the other country with Christopher. Carolyn has been involved in a lengthy custody dispute in the other country since that time.

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**APPENDIX B**

**Survey of Published American  
Hague/Domestic Violence Cases**

Lower courts ordering return:

- *Foster v. Foster*, No. C.A. 09-093, 2009 WL 2883036 (W.D. Pa. Sept. 4, 2009), *stay denied*, 2009 WL 3064738 (W.D. Pa. Sept. 18, 2009).
- *Jaet v. Siso*, No. 08-81232-CIV, 2009 WL 35270 (S.D. Fla. Jan. 5, 2009).
- *Kufner v. Kufner*, 480 F.Supp.2d 491 (D.R.I. 2007).
- *Lieberman v. Tabachnik*, 625 F.Supp.2d 1109 (D. Colo. 2008).
- *Lopez v. Alcala*, 547 F.Supp.2d 1255 (M.D. Fla. 2008).
- *Simcox v. Simcox*, 499 F.Supp.2d 946 (N.D. Ohio 2007).
- *In re B. del C.S.B.*, 525 F.Supp.2d 1182 (C.D. Cal. 2007) (acquiescence and child's wishes defenses).
- *Adan v. Avans*, C.A. No. 04-5155 (WHW), 2007 WL 1850910 (D.N.J. June 25, 2007).
- *Mendez Lynch v. Mendez Lynch*, 220 F.Supp.2d 1347 (M.D. Fla. 2002).
- *Danaipour v. McLarey*, 183 F.Supp.2d 311 (D. Mass. 2002).
- *Gil v. Rodriguez*, 184 F.Supp.2d 1221 (M.D. Fla. 2002).
- *In re Walsh*, 31 F.Supp.2d 200 (D. Mass. 1998).

- *Krefter v. Wills*, 623 F.Supp.2d 125 (D. Mass. 2009) (not specifically mentioning abuse, but said that Petitioner desires being “in control at all times” and had “several angry outbursts” during his testimony).
- *Garcia v. Angarita*, 440 F.Supp.2d 1364 (S.D. Fla. 2006) (respondent can ameliorate the risk that exists in returning child to Colombia if she “[discontinues] the activities which . . . have resulted in a degree of parental alienation toward Petitioner, and if Respondent returns with the children”).
- *In re D.D. (Dallemagne v. Dallemagne)*, 440 F.Supp.2d 1283 (M.D. Fla. 2006).
- *Giampaolo v. Ernetta*, 390 F.Supp.2d 1269 (N.D. Ga. 2004).
- *Belay v. Getachew*, 272 F.Supp.2d 553 (D. Md. 2003).
- *Croll v. Croll*, 66 F.Supp.2d 554 (S.D.N.Y. 1999).
- *Antunez-Fernandes v. Connors-Fernandes*, 259 F.Supp.2d 800 (N.D. Iowa 2003).
- *Mendez-Lynch v. Pizzutello*, No. 2:08-CV-0008-RWS, 2008 WL 416934 (N.D. Ga. Feb. 13, 2008).

Appellate courts upholding return:

- *Kufner v. Kufner*, 519 F.3d 33 (1st Cir. 2008).
- *Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000) (affirming lower court, lower court opinion not available).

App. 27

- *Dalmasso v. Dalmasso*, 9 P.3d 551 (Kan. 2000) (affirming lower court, lower court opinion not available).
- *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999) (affirming lower court, lower court opinion not available).

Appellate courts reversing or remanding lower courts' order of return:

- *Simcox v. Simcox*, 511 F.3d 594 (6th Cir. 2007) (grave risk exists).
- *In re B. del C.S.B.*, 559 F.3d 999 (9th Cir. 2009) (child was "well settled" and father was not entitled to equitable tolling).
- *In re Adan*, 437 F.3d 381 (3d Cir. 2006) (remanding because District Court erred in determining that father satisfied his burden of proof as to custody rights under Argentine law; and abused its discretion in the manner it determined that returning the child to Argentina would not constitute grave risk) (lower court opinion not available).
- *In re Adan*, 544 F.3d 542 (3d Cir. 2008).
- *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002) (remanding with directions to dismiss Hague petition because 1) a *ne exeat* clause does not confer custody rights; and 2) *patria potestas* does not confer custody rights) (lower court opinion not available).
- *Van de Sande v. Van de Sande*, 431 F.3d 567 (7th Cir. 2005) (remanding because mother established prima facie claim of "grave risk

of harm” to children) (lower court opinion not available).

- *Danaipour v. McLarey*:
  - 286 F.3d 1 (1st Cir. 2002) (reversed and remanded because 1) District Court had erred by ruling that children be returned to Sweden without first determining if the children had been sexually abused; 2) court also erred in ruling that a forensic sexual abuse evaluation could be properly done in Sweden; and 3) undertakings issued by the District Court were invalid).
  - 386 F.3d 289 (1st Cir. 2004) (admitting and considering statements of daughter that were repeated to doctor by mother and others was not an abuse of discretion; evidence supported finding sexual abuse of youngest daughter; district court did not have to further inquire into remedies available through Swedish courts upon finding that psychological harm would be the consequence of returning daughter).
- *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000) (grave risk of harm existed, and father’s undertakings and potential for entry of Irish court orders did not mitigate the grave risk of harm).
- *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000) (*ne exeat* does not confer custody rights).

Lower courts refusing return:

- *Baran v. Beaty*, 479 F.Supp.2d 1257 (S.D. Ala. 2007) (grave risk).
- *Baxter v. Baxter*, 324 F.Supp.2d 536 (D. Del. 2004) (father consented to removal, in the alternative, grave risk would exist).
- *Elyashiv v. Elyashiv*, 353 F.Supp.2d 394 (E.D.N.Y. 2005) (grave risk).
- *Blondin v. Dubois*:
  - 19 F.Supp.2d 123 (S.D.N.Y. 1998) (grave risk).
  - 78 F.Supp.2d 283 (S.D.N.Y. 2000) (grave risk).
- *Laguna v. Avila*, No. 07-CV-5136 (ENV), 2008 WL 1986253 (E.D.N.Y. May 7, 2008) (child of sufficient age and maturity did not want to return).
- *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045 (E.D. Wash. 2001) (grave risk).

Appellate courts upholding refusal of return:

- *Baran v. Beaty*, 526 F.3d 1340 (11th Cir. 2008).
- *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001).

Appellate courts reversing or remanding refusal of return:

- *Baxter v. Baxter*, 423 F.3d 363 (3d Cir. 2005) (father did not consent and return would not place the child in grave risk).

- *Blondin v. Dubois*, 189 F.3d 240 (2d Cir. 1999) (remanded because evidence supports ‘grave risk’ determination but remand is necessary to consider range of remedies that might allow return of children to their home country and protect them from harm).
  - *In re A.V.P.G.*, 251 S.W.3d 117 (Tex. App. 2008) (reversing and remanding county court’s denial of return petition because, *inter alia*, mother did not establish that children were in grave risk if returned).
  - *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995) (reversing and remanding because 1) finding grave risk if child were returned not supported by sufficient evidence; and 2) ruling could not be supported on basis that Mexico was not habitual residence (lower court opinion not available).
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## APPENDIX C

### Interest of the *Amici Curiae*

The following organizations respectfully submit this brief as *Amici Curiae* in support of the Respondent and urge the Court to affirm the decision below.

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)** was founded in 2003 by one of the nation's leading domestic violence lawyers and scholars. DV LEAP provides a stronger voice for justice by fighting to overturn unjust trial court outcomes, advancing legal protections for victims and their children through expert appellate advocacy, training lawyers, psychologists and judges on best practices, and spearheading domestic violence litigation in the Supreme Court. DV LEAP is committed to ensuring that the Supreme Court understands the realities of domestic violence and the law when deciding cases with significant implications for domestic violence litigants. DV LEAP has previously co-authored amicus briefs to the United States Supreme Court in *Town of Castle Rock, Colo. v. Gonzalez*; *Davis v. Washington*; *Hammon v. Indiana*; *Giles v. California*; and *United States v. Hayes*. DV LEAP is a partnership of George Washington University Law School and a network of participating law firms.

The **Battered Women's Justice Project – Domestic Abuse Intervention Programs, Inc., Duluth, MN (“BWJP”)** is a national technical assistance center that provides training and

resources for advocates, battered women, legal system personnel, policymakers, and others engaged in the justice system response to domestic violence. The BWJP promotes systemic change within community organizations and governmental agencies engaged in the civil and criminal legal response to domestic violence, in order to hold these institutions accountable for the safety and security of battered women and their children. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice. In an effort to promote more safe and just results for women and their children, the BWJP works at state, national and international levels to engage court systems in methods of accurately assessing the effects of intimate partner violence on women and children and to fashion safe outcomes that hold batterers accountable. The BWJP respectfully requests the U.S. Supreme Court to support the position of Ms. Abbott, and the ultimate safety and best interests of children throughout the world, by ruling that *ne exeat* clauses alone are not equated with rights of custody under the Hague Convention on the Civil Aspects of Child Abduction.

The **National Coalition Against Domestic Violence** is a nonprofit organization dedicated to providing advocacy leadership, representation, and

support to battered women and their children throughout the United States. NCADV's work includes coalition building at the local, state, regional, and national levels; support for the provision of community-based services such as safe houses and shelter programs; public education and technical assistance; policy development and innovative legislation; and efforts to eradicate the social conditions that contribute to domestic violence. NCADV's membership is comprised of over one thousand grassroots organizations, community programs, and individuals dealing with the concerns of battered women and their families. NCADV is very concerned about the re-victimization of abused women and children who are returned to their batterers pursuant to proceedings under the Hague Convention on the Civil Aspects of Child Abduction.

**Legal Momentum** advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum is dedicated to working to end violence against women and was one of the lead advocates for the landmark Violence Against Women Act and its reauthorizations, which seek to redress the historical inadequacy of the justice system's response to domestic violence. Legal Momentum also represents victims of domestic violence who suffer housing and employment discrimination related to the violence. Legal Momentum is concerned that the Court's ruling in this case could have a devastating impact in the significant number of Hague Convention cases in which only by fleeing

can mothers protect their children from the harm of an abusive father's direct violence against them, of witnessing violence against the mother, or of living in a home suffused with the tension and fear domestic violence generates. Legal Momentum has participated in numerous briefs and *amicus curiae* briefs to the Supreme Court including as co-counsel on recent *amicus curiae* briefs concerning domestic violence: *Davis v. Washington*; *Hammon v. Indiana*; and *People v. Giles*.

**The National Network to End Domestic Violence** (NNEDV) is a non-profit membership organization devoted to remedying domestic violence through legal, legislative, and policy initiatives. The members of NNEDV are the state coalitions against domestic violence, who represent their states' local organizations that provide shelter, advocacy, and legal and counseling services to survivors of domestic violence. The member organizations of NNEDV collectively represent thousands of organizations that have hundreds of years of experience working with survivors of domestic violence, including undertaking extensive efforts to improve the justice system's response to victims of domestic violence. NNEDV is concerned that the Court's ruling in this case could make it more difficult to protect victims of abuse.

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