No. 08-645

In the Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT, *Petitioner*

v.

JACQUELYN VAYE ABBOTT, *Respondent*

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

AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a *ne exeat* order or statutory provision prohibiting a parent from removing a child from the country without the other parent's consent, confers a right of custody within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction, such that a child who was removed in violation of the *ne exeat* provision can be returned to his or her country of habitual residence.

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INTEREST OF AMICUS CURIAE

The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, seeks "to secure the prompt return of children wrongfully removed or retained in any Contracting State" and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Hague Conv., art. 1. The United States is a signatory of the Convention, and Congress has implemented the Convention in the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 *et seq*.

When the treaty was ratified in 1988, the United States Department of State, acting as the United States Central Authority, directed the Governor of California to designate a state agency to discharge the state's duties under the Convention. 42 U.S.C. § 11606(a); Exec. Order No. 12648, 53 Fed. Reg. 30,637 (Aug. 15, 1988). The Governor of California designated the California Attorney General's Office as the agency responsible for discharging the United States' treaty obligations within California.

The Attorney General, in turn, relies on local district attorneys to assist in discharging the Hague Convention obligations by helping to locate and return abducted children to their countries of habitual residence. *See* Cal. Const. art. 5, § 13; Cal. Gov't Code § 12550. In the decade from 1999 through 2008, California received an average of 75 new incoming applications per year, for a total of 749 cases, from parents abroad seeking the return of, or access to, their children. Of the 749 cases, 75, or about ten percent, involved requests only for access to a child or children. California estimates that a similar number of children are taken out of California to other signatory countries.

Given its designation in response to the State Department directive, and as part of its broader role in resolving parental-child abduction cases under state

law (Cal. Fam. Code, § 3130 *et seq.*), amicus State of California thus plays a substantial role in the implementation of the Convention. Amicus therefore has an interest in how the treaty is implemented and how the resolution of the question presented in this case will affect the success of amicus' work in this area. Amicus' view—that the return remedy should be available in cases involving an international violation of a *ne exeat* order—derives from its state statutory responsibility for resolving parental child abduction cases through civil and criminal means (the latter of which includes responsibility to prosecute violations of criminal law based on breaches of custody and visitation rights in domestic and international cases), its long history of involvement in Hague Convention cases, and its interest in seeing that state court orders are enforced and the principles of comity and reciprocity apply to ensure that the Convention works effectively to resolve international parental child abduction cases.

In handling Hague Convention cases, amicus' prosecutors take no position on the merits of any custody or visitation dispute between parents. They act on behalf of the court, and represent neither party in the proceeding. Cal. Fam. Code § 3455. Amicus' interest lies in securing the enforceability of its state court orders and in seeing that the treaty is properly implemented within California, i.e., that the Convention is properly applied to return wrongfully removed or retained children to their countries of habitual residence.

STATEMENT OF THE CASE

The Hague Convention is designed to protect children from the harmful effects of international parental child abduction by establishing procedures to secure their prompt return to their country of habitual residence. *Whallon* v. *Lynn*, 230 F.3d 450, 454 (1st Cir. 2000); Hague Conv., preamble, 51 Fed. Reg. at 10498 (March 26, 1986). The Convention provides for the

mandatory return of a child wrongfully removed from, or retained outside of, the child's country of habitual residence. Hague Conv., Arts. 3, 12. It defines a wrongful removal or retention as one that violates the custody rights attributed to a person under the law of the country where the child was habitually resident immediately before the child's removal or retention, Hague Conv., Art. 3, 51 Fed. Reg. at 10,498; *Whallon* v. *Lynn*, 230 F.3d at 454; and it expressly states that rights of custody include the right to determine the child's "place of residence," Hague Conv., art. 5(a); 51 Fed. Reg. at 10,498. The Convention distinguishes rights of custody from rights of access, and reserves the return remedy for breaches of the former. Hague Conv., arts. 1, 3, 21; 51 Fed. Reg. at 10,498, 10,500.

Petitioner, a British subject, married respondent, a United States citizen, in England in 1992. While living in Hawaii in 1995, the couple had a child, A.J.A. The family moved to Chile, where the couple separated in 2003. They litigated custody and visitation issues in the Chilean courts, which granted petitioner "direct and regular" visitation rights, including a full month of summer vacation. Both parents were prohibited, under a *ne exeat* order, from removing their child from Chile without written authorization from the court In addition, petitioner held a *ne exeat* right under Chilean law, which requires authorization from a parent holding visitation rights before the other parent can take a child out of Chile.

In 2005, petitioner asked the Chilean court to expand his rights with respect to A.J.A. In turn, respondent removed A.J.A. from Chile without petitioner's knowledge or consent. As respondent concedes, she violated Chilean law and the *ne exeat* order by removing the child from Chile. *Abbott* v. *Abbott*, 542 F.3d 1081, 1083 (5th Cir. 2008). Petitioner located A.J.A. in Texas. Petitioner then initiated proceedings in the federal court in Texas seeking the return of his child to Chile under the Convention.

The District Court denied petitioner's request for

return of the child to Chile, and the Fifth Circuit Court affirmed the decision. Agreeing with *Croll* v. *Croll*, 229 F.3d 133 (2d Cir. 2000), the Fifth Circuit ruled that, although the child's removal violated the Chilean court order and statutory *ne exeat* provision, it was not "wrongful" because "*ne exeat* rights, even when coupled with 'rights of access,' do not constitute 'rights of custody' within the meaning of the Hague Convention." *Abbott*, 542 F.3d at 1087.

SUMMARY OF ARGUMENT

A *ne exeat* right constitutes a right of custody under the Hague Convention, and therefore the Convention's return remedy applies to a breach of that right. This conclusion follows from a correct understanding of the text and context of the treaty and the intent of the Hague Convention's drafters, reflected in their documented discussions and writings, that the breach of a *ne exeat* right is encompassed in the Convention's "right of custody." It also follows from the shared expectations of the other Contracting States, which are reflected both in the reports of their meetings to review the operation of the Convention and in the weight of foreign case law holding that a *ne exeat* right is a right of custody. Convention.

The Fifth Circuit opinion—that a *ne exeat* right is not a right of custody—conflicts with the views of the United States' treaty partners and thus undermines the comity and reciprocity necessary for the effective implementation of the Convention. Lack of reciprocity impairs the ability of State and local prosecutors to fulfill their statutory responsibilities in parental child abduction cases, including their use of the Convention to recover internationally abducted children. Moreover, without a return remedy under the Convention, public prosecutors will be left with few options other than to seek criminal sanctions to address the violation of a *ne exeat* right. That would contravene public policy favoring the use of civil remedies in such

cases and the reservation of criminal remedies as a last resort.

Recognizing a *ne exeat* right as a right of custody enforceable under the Convention, further, aligns with the central importance of the parent-child relationship. That importance is confirmed by the facts that violations of custody and visitation orders, including *ne exeat* orders, are punishable under state and federal criminal law; that a custodial parent's frustration of the other parent's access rights may trigger a transfer of custody to the non-custodial parent; and that the relationship between a parent and child enjoys basic constitutional protection.

ARGUMENT

I. A *NE EXEAT* RIGHT CONFERS A RIGHT OF CUSTODY UNDER THE HAGUE CONVENTION

Amicus supports the arguments made by then-Judge Sotomayor in her dissent in *Croll* v. *Croll*, 229 F.3d 133, by the Eleventh Circuit in *Furnes* v. *Reeves*, 362 F.3d 702 (11th Cir. 2004), and by petitioner in his merits brief, that a *ne exeat* clause confers a "right of custody" within the meaning of the Hague Convention. The factors that guide the interpretation of international treaties weigh heavily in favor of the view that a *ne exeat* right is a right of custody and that the Convention's return remedy may be invoked to remedy a breach of that right. Support for this view is found in the text of the treaty, the context in which the words in question are used, the history of the treaty, the negotiations, the practical construction of the treaty adopted by the parties, and the shared expectations of the contracting parties. See *Air France* v. *Saks*, 470 U.S. 392, 396-97, 399 (1985). Petitioner's merits brief thoroughly demonstrates this. Before addressing some unique policy considerations bearing on the State's interests, amicus highlights its agreement with petitioner on the following major points.

First, the text of the treaty and the context in which the words are used support the view that a *ne exeat* right is a right of custody. The Convention explicitly states that "rights of custody" include "rights relating to the care of the person of the child and, in particular, the right to determine the child's *place of residence*." (Hague Conv., art. 5(a) (emphasis added).) As the Eleventh Circuit explained, the Convention does not concern itself with where a child will live *within* a particular country, but rather with the *international* relocation of the child. *Furnes* v. *Reeves*, 362 F.3d at 715; see also *Croll*, 229 F.3d at 146-48 (Sotomayor, J., dissenting). In the context of the Convention, then, the right to determine a child's "place of residence" clearly embraces the right to participate in deciding in which *country* the child will live. A parent in possession of a *ne exeat* right is empowered to participate in determining the country in which the child will live, and is thus endowed "with significant decision-making authority over the child's care," *Furnes*, at 716, because the parent can help choose the language, nationality, cultural identity, and educational system in which the child will be raised. *Id.* A *ne exeat* right is, therefore, both a right to determine the child's place of residence and "a right 'relating to the care of the person of the child' within the meaning of the Convention," and it fits the treaty's definition of "rights of custody." *Id.*

Further, the history of the Convention reveals that its drafters intended the Convention's terms to be interpreted broadly to include a *ne exeat* right as a right of custody, as evidenced by the Explanatory Report by Elisa Perez-Vera, the official Hague Conference reporter. Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, in 3 Acts and Documents of the Fourteenth Session (1980) (the Perez-Vera Report). In their view, applying the Convention to the greatest number of cases would best effectuate the Convention's objective of restoring the status quo and deterring international forum shopping. *Whallon* v. *Lynn*, 230

F.3d at 455 ("the Convention favors 'a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration.'") (quoting Perez-Vera Report, par. 67, at 446 & n.5); see *Shalit* v. *Coppe*, 182 F.3d 1124, 1130 (9th Cir. 1999).

In line with this liberal interpretation, "the proceedings at the diplomatic conference in October 1980 that adopted the final text of the Child Abduction Convention reflect the delegates' understanding that a move by the custodial parents in violation of a restriction on removal of the child would constitute a wrongful removal." See Linda Silberman, *Symposium Issue Celebrating Twenty Years: The Past and Promise of the Hague Convention on the Civil Aspects of International Child Abduction: Articles and Remarks: Gender Politics and Other Issues*, 33 N.Y.U. J. Int'l L. & Pol. 221, 229 n. 29 (Fall 2000) (citing 3 Hague Conference on Private International Law: Actes et documents de la Quatorzieme Session 266-67 (1980)). Accordingly, the Convention's drafters intended that the return remedy would apply to the breach of a *ne exeat* right. *See* Petitioner's Brief at 42-46; Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA,* 38 Tex. Int'l L.J. 41, 46 (2003); Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 75-78, 80 (1999).

The Contracting States' support for this view continued in subsequent years, as reflected in the reports of five Special Commission meetings held since the Convention's adoption to review its operation. Amicus California's representatives have attended three of these meetings; its understanding of the Contracting States' views has thus been formed by its presence and participation in the meetings at which these discussions took place. (See http://www.hcch.net/index_en.php?act=text.display&tid=21 for reports reflecting the

conclusions of those meetings.) These reports reiterate the need to accord the term "rights of custody" an autonomous meaning—one that does not depend on any single legal system or coincide "with any particular concept of custody in a domestic law, but that instead draws its meaning from the definitions, structure and purposes of the Convention."[1] These reports make it clear that one must not look only to whether a habitual-residence country *denominates* a particular parental right as a "right of custody" under the Hague Convention, but to whether the applicant-parent possessed rights granted under a law or court order of the habitual-residence country which *in substance* conform to "rights of custody" as contemplated by the treaty.

Like the Special Commission reports, foreign case law also reflects the Contracting States' shared understanding that a *ne exeat* order constitutes a right of custody and that a violation of such an order would be considered a wrongful removal under the Convention. As petitioner's thorough discussion

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[1] *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction Held 18-21 January 1993*, Part Two, Conclusion 2, see http://hcch.e-vision.nl/upload/abdrpt93e.pdf; see also *Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, see par. 8-10 (1990), available at http://hcch.e-vision.nl/upload/abdrpt89e.pdf ("rights of custody . . . in the Convention . . . constitute an autonomous concept, and . . . are not necessarily coterminous with rights referred to as "custody rights" created by the law of any particular country or jurisdiction thereof"); *Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22-28 March 2001), par. 4.1, see http://hcch.e-vision.nl /upload/concl28sc4_e.pdf ("[t]he Convention should be interpreted having regard to its autonomous nature and in the light of its objects").

demonstrates (Pet's Br. at 32-42), the weight of international case law favors the view that a restraint on the removal of the child from the child's country of habitual residence constitutes a right of custody within the meaning of the Hague Convention.[2]

Finally, a liberal view of the Convention's "rights of custody" serves a basic goal of the Convention: to ensure that rights of custody and access in one signatory country are recognized and respected in the other Contracting States. See Hague Conv., art. 1(b). Because "rights of custody" encompass *ne exeat* orders or rights, the treaty may be implemented in a way that more fully ensures that rights of custody and access in

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[2] The Permanent Bureau of the Hague Conference on Private International Law, responsible for monitoring and reviewing the practical operation of the Convention and promoting its effective implementation by the parties, has reached the same conclusion. See *Report on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. During a discussion of "[t]he dividing line between custody and access rights," "[t]he Permanent Bureau noted that a clear preponderance of case law supported the view that [the combination of access rights and a veto on the removal of a child] constituted a custody right for the purposes of the 1980 Convention." (Report, par. 211, at 52, available at http://www.hcch.net/upload/wop/abd_2006_rpt-e.pdf.)

Notably, Judge Sotomayor reached the same conclusion at the time the Second Circuit was deciding *Croll*. 229 F. 3d at 150-53 (Sotomayor, J. dissenting). So have other scholars. *E.g.*, Silberman, 33 N.Y.U.J. Int'l L. & Pol. at 230-32; Christopher B. Whitman, *Croll v. Croll: The Second Circuit Limits "Custody Rights" Under the Hague Convention on the Civil Aspects of International Child Abduction*, 9 Tul. J. Int'l & Comp. L. 605, 624 (Spring 2001); *see* William Duncan, *Symposium Issue Celebrating Twenty Years: The Past and Promise of the Hague Convention on the Civil Aspects of International Child Abduction: Articles and Remarks: A View From the Permanent Bureau*, 33 N.Y.U.J. Int'l L. & Pol. 103, 105 (Fall 2000).

one country are respected in the other. *See Croll*, 229 F.3d at 147 (Sotomayor, J., dissenting). Viewing the breach of a *ne exeat* right as a breach of custody rights remediable by the Convention's return remedy promotes the recognized principle that the habitual-residence country should decide the merits of custody and visitation. *Croll* v. *Croll*, 229 F.3d at 137; see also Perez-Vera Report at par. 34. As Beaumont and McEleavy note in their scholarly monograph on the Convention, a *ne exeat* clause protects a parent with access rights, ensures that the court retains continuing jurisdiction over the case, and preserves a child's right to a meaningful relationship with both parents. Requiring that the custodial parent obtain permission from either the other parent or the court if he or she wishes to relocate necessitates a high level of judicial oversight, but

> this is the only means of ensuring that the rights of all those concerned are given due consideration in a forum with which all should be familiar. Therefore the underlying principle should be that a veto over the removal of a child from its habitual residence should ordinarily amount to a right of custody, and its breach should be sufficient to successfully base a return.

Beaumont & McEleavy, at 79-80.

II. A RESTRICTIVE INTERPRETATION OF THE TERM "RIGHTS OF CUSTODY" WOULD IMPAIR THE STATE'S ABILITY TO RECOVER INTERNATIONALLY- ABDUCTED CHILDREN AND WOULD UNDERMINE THE RECIPROCITY ON WHICH THE CONVENTION'S IMPLEMENTATION DEPENDS

The sound reasons summarized above demonstrate that a *ne exeat* right constitutes a right of custody under the Convention, and therefore the return remedy applies when such a right is breached. Amicus' experience with a state system in which prosecutors

are involved in handling Hague Convention cases reveals additional practical and policy considerations that support this interpretation of the treaty.

The Hague Convention's return remedy provides prosecutors seeking to fulfill their statutory responsibilities in parental child-abduction cases with an effective, practical, and appropriate mechanism for resolving such cases, and one that fulfills the treaty's objectives. When a custodial parent violates a *ne exeat* order and takes the child to another country, he or she

> nullifies that country's custody law as effectively as does the parent who kidnaps a child in violation of the rights of the parent with physical custody of that child. Moreover, where, as here, the parent seeks a custody order in the new country, she seeks to legitimize the very action – removal of the child – that the home country, through its custody order, sought to prevent. To read the Convention so narrowly as to exclude the return remedy in such a situation would allow such parents to undermine the very purpose of the Convention.

Croll, 229 F.3d at 147 (Sotomayor, J., dissenting); see also Silberman, *supra,* 33 N.Y.U. J. Int'l L. & Pol. at 229. The return remedy reverses the effect of a violation of the *ne exeat* right by returning the abducted child to the habitual-residence country, which is usually the country whose court issued the order and has jurisdiction over matters of custody and visitation. It ensures that rights of custody and access in one signatory country are respected in the others. It provides a means of enforcing a court's *ne exeat* order, which as a practical matter would otherwise prove unenforceable in most instances. (See Arg. III, below.) And, as in California, it gives local prosecutors a specific remedy they can seek in order to secure a judicial resolution of the case.

Since amicus California accepted its first Hague Convention case in 1989, its has steadfastly advocated

the position that a parent whose child is abducted by the other parent in violation of an express court order prohibiting such conduct has the right to seek return of the child under the Convention. California's long-held view—that a *ne exeat* order confers a right of custody under the Convention—is consistent with the guidance the State Attorney General's Office has provided to local prosecutors throughout the state, and with the guidance provided to state court judges in Hague cases. Hoff, Volenik and Girdner, *Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA, and the Hague Child Abduction Convention*, American Bar Association Center on Children and the Law, Juvenile and Family Court Journal (Spring 1997/Vol. 48, No. 2), p. 10-9. Although a *ne exeat* right is itself a right of custody, not merely something which transforms access rights into custody rights (*Croll*, 229 F.3d at 145 et seq. (Sotomayor, J. dissenting)), amicus' experience is that a *ne exeat* order is typically included in a court order granting custody and access rights in contemplation of the parents' continued residence within the same country. *See, e.g., Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002), *Nadarajan M. v. Sandra W.*, No. B155305, 2002 Cal. App. Unpub. LEXIS 10737(Cal. Ct. App. Nov. 20, 2002).

Accordingly, when a child is brought into California in violation of the *ne exeat* rights of a parent in another Contracting State, state and local prosecutors may initiate a Hague Convention proceeding in which a state court determines whether the child in question was wrongfully removed or retained away from the habitual-residence country, and whether the Convention requires the child's return, so that the underlying custody and visitation dispute can be addressed in the appropriate country. Alternatively, when a child is removed from the State in violation of a California court order prohibiting such removal, state prosecutors can help the left-behind parent apply to the haven country for relief under the Convention.

However, if state courts were required to deny a return remedy where a parent has only *ne exeat* rights, the essential reciprocity between Contracting States would be impaired, and California will be less likely to obtain the return of children to the United States.

A. Failure To Enforce Ne Exeat Rights As Custody Rights Under The Convention, As They Are Enforced By Other Contracting States, Would Result In A Lack Of Reciprocity That Will Threaten Prosecutors' Ability To Resolve Parental Child-Abduction Cases

Because California's prosecutors handle both incoming and outgoing international-abduction cases, it has become clear to amicus that principles of comity and reciprocity must be vindicated in order to ensure that the Convention works effectively in cases of children wrongfully removed from California or to California.[3] "[C]omity is at the heart of the Convention." *Miller* v. *Miller*, 240 F.3d 392, 400 (4th Cir. 2001) (quoting *Diorinou* v. *Mezitis*, 237 F.3d 133, 143 (2d Cir. 2001) (internal citations and quotations omitted in original).

> In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of

[3] For this reason, California has actively worked to foster such reciprocity. For instance, recognizing that the majority of California cases involve children either taken to or taken from Mexico, the State Attorney General's office has helped organize several Binational Conferences with its counterparts in Mexico, aimed at improving the handling of Hague Convention cases and achieving their expedited resolution on both sides of the border.

> treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.

Factor v. *Laubenheimer*, 290 U.S. 276, 293-294 (1933) (citations omitted).

The argument that a *ne exeat* right confers no custody right under the Convention fails to construe the Convention's "rights of custody" liberally and undervalues the importance of reciprocity in the Convention's implementation. Adopting that argument would undermine the efforts of California prosecutors to obtain the return of children to California under the Convention.

For example, when the California Attorney General receives a Hague application from a mother in Germany claiming that her children have been brought to California by the father in violation of her right of custody, the Attorney General asks the local prosecutor to locate the child and begin a Hague Convention proceeding. See, e.g., *In re Witherspoon*, 155 Cal. App. 4th 963, 969-970 (2007);[4] see also *In re Marriage of Forrest and Eaddy*, 144 Cal. App. 4th 1202, 1208, 51 Cal. Rptr. 3d 172 (2006) (reflecting local prosecutor's involvement). Under the Fifth Circuit's view in this case, if the mother's only claim of custody is based on a *ne exeat* clause, the trial court would be required to find

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[4] In *Witherspoon*, the Hague application was initially directed to the Attorney General. Although the case did not involve a *ne exeat* order, the court did find that the father's removal of the children from Germany was wrongful because it interfered with the mother's jointly held custodial rights, by operation of German law, including the right to determine the childrens' residence. *Id.* at 972.

that such a clause does not confer a right of custody and would be constrained to refuse to order the child returned to Germany—even though Germany itself considers a *ne exeat* clause to constitute a right of custody. *See Bundesverfassungsgericht* [9BverfG] [Federal Constitutional Court] July 18, 1997, 2 BvR 1126/97(F.R.G.); http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&lng=1&conde=338 (INCADAT summary). Thereafter, a California prosecutor assisting a California resident parent with a *ne exeat*-based custody right runs the risk that a German court will be unwilling to return a child because of California's failure to accord reciprocity to Germany when the German parent sought to recover the similarly-situated German child.

Interpreting the term "rights of custody" under the Convention in a manner that is consistent with the views of the United States' treaty partners, as documented in the reports of the Special Commission meetings referenced above and as reflected in the foreign case law, promotes the principles of comity and reciprocity that are crucial to the successful operation of the treaty. In so doing, it furthers the ability of State prosecutors to use the Convention both to recover children wrongfully removed from the State and to return to other Contracting States children wrongfully brought into California.

B. A Restrictive Interpretation Of "Rights Of Custody" And The Resulting Lack Of Reciprocity Would Undermine The State's Significant Interest In The Enforceability Of Its Orders And Judgments

The availability of the return remedy when a child has been removed from the habitual residence country in violation of a parent's court-ordered access and *ne exeat* rights is justified by another good reason: it gives force to court *ne exeat* orders, whereas respondent's

more restrictive approach would often make them ineffective.

In recognition of their importance, state courts often include *ne exeat* provisions in custody and visitation orders. See Cal. Fam. Code, § 3048(b)(2)(C), 3063, 7501; see *Brown* v. *Yana,* 37 Cal. 4th 947, 957, 38 Cal. Rptr. 3d 610 (2006) ("section 7501, fairly read, contemplates that even a parent with sole legal and sole physical custody may be restrained from changing a child's residence, if a court determines the change would be detrimental to the child's rights or welfare").[5] State courts, naturally, expect that these orders will be obeyed and enforced. This expectation is reflected in the fact that parents subject to custody and visitation orders are expressly warned that, if they violate those orders, they may be subject to civil or even criminal sanctions. Cal. Fam. Code § 3048(a)(4); see Family Law forms, n.5. California law, further, provides both civil and criminal contempt proceedings to remedy the willful disobedience of such court orders. See, *e.g.*, Cal. Fam. Law, §§ 290, 1209 *et seq.*; *People* v. *Lindemann*, 8 Cal. App. 4th Supp. 7, 12, 11 Cal. Rptr. 2d 886 (1992). But a court can do little to give effect to these remedies when a parent has left the country in violation of its orders. The parent residing abroad may simply be beyond the court's reach if extradition is unavailable.

The Hague Convention's return remedy, however, provides an appropriate and effective remedy for the

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[5] Standard forms used in custody cases in California contain *ne exeat* provisions that Family Law judges can check to restrict parents' travel with their children. See, e.g., Family Law form 341, Child Custody and Visitation Order Attachment, page 2, par. 6 & 7, http://www.courtinfo.ca.gov/forms/documents/fl341.pdf; Family Law form 341(B), Child Abduction Prevention Order Attachment, http://www.courtinfo.ca.gov/forms/documents/fl341b.pdf Family Law form 355, Stipulation and Order for Custody and/or Visitation of Children, http://www.courtinfo.ca.gov/forms/documents/fl355.pdf (hereinafter "Family Law forms").

breach of a state court's access and *ne exeat* orders. As discussed above, the shared expectations of the Contracting States, reflected in the Special Commission meeting reports and in foreign case law addressing this issue, show that the return remedy was meant to apply to violations of *ne exeat* orders. This expansive interpretation of rights of custody, shared by the Contracting Parties, serves the State's significant interest in enforcement of its orders and judgments. *See Brittain* v. *Hansen*, 451 F.3d 982, 1001-02, quoting *Duranceau* v *Wallace*, 743 F2d 709, 711-12 (9th Cir. 1984) ("California's interest in enforcing its court judgments is significant."). When children removed from the State in violation of its *ne exeat* orders are returned pursuant to the Convention, the State benefits from other countries' recognition and enforcement of those orders: its court's order is enforced, the child is returned so the court can continue to exercise jurisdiction over custody, and the taking-parent's effort to evade the court's jurisdiction and gain some advantage in regard to the child's custody is thwarted. From the State's perspective, it is hard to expect other Contracting States to respect and enforce California's *ne exeat* orders without reciprocally recognizing and enforcing, in the United States, similar orders from other Contracting States.

If a *ne exeat* order does not confer a right of custody, so that a breach of it cannot be remedied by returning a child removed in violation of that order, then a parent may violate that order and take his or her child abroad with impunity. For, as a practical matter, no other established legal mechanism can effectively remedy the situation. By contrast, accepting a *ne exeat* right as a right of custody, the violation of which can be remedied by the return of the child, encourages and promotes the rule of law and gives effect to the Convention's mechanism for enforcing such court orders.

III. IT WOULD CONTRAVENE SOUND PUBLIC POLICY TO TREAT VIOLATIONS OF ACCESS AND *NE EXEAT* RIGHTS SERIOUSLY UNDER CRIMINAL AND DOMESTIC FAMILY LAW, BUT LESS SERIOUSLY IN INTERNATIONAL CASES, ESPECIALLY GIVEN THE CONSTITUTIONAL DIMENSION OF THE PROTECTIONS AFFORDED THE PARENT-CHILD RELATIONSHIP

The violation by one parent of the other parent's rights of visitation can constitute a criminal offense under both state and federal law. In addition, under State family law, a custodial parent's frustration of the other parent's visitation rights can provide a basis for transferring custody of the child to the non-custodial parent. Where the violation of those rights is effected by transporting a child across an international border, perhaps to a haven country many thousands of miles away, it would be inconsistent with the seriousness with which violations of such rights are viewed in other contexts to preclude application of the Convention's return remedy by defining a *ne exeat* right as less than a right of custody.

A. To Allow Violations Of Access Rights To Be Punished Criminally While Disallowing The Convention's More Effective Remedy Of Return Would Undermine The Preference For Resolving Parental Child Abduction Cases Through Civil Means

In California, state and local prosecutors are required to help resolve parental-child abduction cases using both civil and criminal remedies. See Cal. Fam. Code, §§ 3130, et seq., 3455; Cal. Penal Code, §§ 278, 278.5. Criminal prosecution punishes the abducting parent, but does not provide any direct means for recovering a child. Moreover, in parental child abduction cases, the parents and children will continue to have a lifelong relationship with one another and will be profoundly impacted by the prosecution—and even more so by incarceration — of one of the parents.

The family will also be profoundly affected by the impairment of the parent-child relationship that results when one parent, even a custodial one, unilaterally impedes the other parent's access to the child by relocating the child to another country in violation of a court order. Although criminal prosecution appropriately might result in punishing an abducting parent, there is a strong preference for resolving these cases with civil remedies that result in the return of a child. With the power to enforce *ne exeat* orders, the Hague Convention, through its return remedy, provides an effective civil alternative mechanism prosecutors can use to resolve international parental-child abduction cases and thus to fulfill their statutory responsibilities in this area of law.

Absent a return remedy under the Convention, however, state and local prosecutors would have only limited options. As noted, a California prosecutor might charge the taking parent under state law. California Penal Code section 278.5 makes it a crime when a person "takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody, *or a person of a right to visitation* . . . ." (Italics added).

Or, the prosecutor might refer the left-behind parent to federal prosecutors for potential prosecution under federal law. The International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. § 1204(a), provides:

> Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned for not more than 3 years, or both.

The act defines "parental rights" as "rights to physical custody of the child [¶](A) whether joint or sole (*and includes visiting rights*) . . ." 18 U.S.C. §

1204(b)(2) (italics added). Thus, under IPKCA, a parent who moves out of the country in violation of the other parent's visitation rights can be criminally prosecuted. See *United States* v. *Alahmad*, 211 F.3d 538, 541 (10th Cir. 2000).

Despite the availability of criminal sanctions, prosecutors are advised to initiate criminal prosecutions in cases of abductions involving United States treaty partners under the Hague Convention only as a last resort. "Indeed, IPKCA itself specifies that procedures under the Convention 'should be the *option of first choice*'" because they have "'resulted in the return of many children.' Pub. L. 103-173, § 2(b), 107 Stat. 1998 (1999) (emphasis added)." *United States v. Cummings*, 281 F.3d 1046, 1052 (9th Cir. 2002). This policy makes sense because the primary goal in child abduction cases is to reunite the child and both parents and foster a continuing relationship between them, not to punish the taking parent. See Second Special Commission Report, reprinted in 33 Int'l. Legal Materials 225, 249-250 (1994) ("In cases where the main intention was to use a civil action to ensure the return of the abducted child, as envisaged under the Convention, the experts agreed that recourse to criminal procedures ought not to be encouraged. The object was not to punish the abducting parent").

Moreover, "[c]riminal charges under IPKCA (or any other State or Federal statute) may adversely affect return proceedings under the Hague Convention. . . . In Hague proceedings, some foreign judges have been reluctant and others have refused to order a child's return to the United States if the parent's return would result in his or her arrest and attendant inability to participate in civil custody proceedings." *A Report to the Attorney General on International Parental Kidnapping*, April 1999, at 35 (http://www.ncjrs.gov/pdffiles1/ojjdp/189382.pdf).

Even criminal prosecution, whether in the United States or another country, does not always result in the return of the children or reunification with the left-

behind parent. See *United States* v. *Amer*, 110 F.3d 873, 877 (2d Cir. 1997) (despite criminal court order to return children, "[a]t the time of this appeal, the children remain in Egypt"); *People* v. *Lazarevich*, 95 Cal. App. 4th 416, 420 (2001) (despite criminal prosecution in Serbia, the children remained concealed until "Serbian authorities, acting under the direction of President Milosevic, recovered the children in Yugoslavia"). Likewise, a parent such as respondent, who has abducted a child to the United States, could similarly defy a court order to return the child despite being criminally prosecuted. Courts might have the power to order the return of the children as a condition of sentencing, *id.* at pp. 883-885, but the "imposition of such conditions has proven ineffective." *Report to the Attorney General*, at 35.

If California courts are precluded from ordering a child returned under the Hague Convention where the left-behind parent enjoys only a *ne exeat* right, prosecutors may be more likely to use the less desirable avenue of criminal prosecution as a means both to punish the taking parent and to indirectly seek the return of the child. It is illogical, if not contrary to sound public policy, to encourage criminal prosecution and punishment for conduct that is considered, in a different context, too insignificant to mandate a return of the child through the preferable civil remedy.

Clearly, violations of custody and visitation rights may be serious enough offenses to warrant criminal prosecution in both state and federal court. But it makes little sense as a matter of logic or policy to allow a parent to be criminally prosecuted for violating the other parent's *ne exeat* right to determine the country where the child will live, while simultaneously construing that right as so insignificant that it does not constitute a right of custody sufficient to make the Hague Convention's return remedy available in civil proceedings.

B. Disallowing The Convention's Return Remedy For Violations Of *Ne Exeat* Rights Would Be Inconsistent With The Serious Consequences Attendant To Such Violations Under State Family Law

Similarly, in the realm of family law, violations of a parent's visitation rights are viewed as sufficiently serious that "[c]onduct by a custodial parent designed to frustrate visitation and communication may be grounds for changing custody. (*Speelman* v. *Superior Court*, [152 Cal.App.3d 124, 132, 199 Cal Rptr. 784 (1983)].)" *Burchard v. Garay*, 42 Cal. 3d 531, 541 n.11 (1986); see Cal. Fam. Code, 3040(a)(1) ("In making an order granting custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent"). Thus, a custodial parent who frustrates the other parent's rights of access to a child by taking their child abroad in violation of a court order might, under state family law, face the loss of custody of the child and the transfer of custody to the other parent. If access rights are deemed sufficiently important that their breach can give rise to the transfer of a child's custody from the custodial parent to the parent with access rights, then it should be equally possible to secure the return of a child under the Hague Convention when the violation of those rights is accomplished across international borders. Construing the *ne exeat* right as a right of custody gives full effect to the level of importance placed upon a parent's right of access and is consistent with the serious consequences that can follow a violation of that right.

C. Petitioner's Interpretation Of "Rights Of Custody" Is Consistent With The View That The Importance Of The Parent-Child Relationship Warrants Constitutional Protection

The notion that a *ne exeat* right is so insignificant that it does not constitute a right of custody or warrant invocation of the Convention's return remedy is similarly inconsistent with the value placed on the parent-child relationship reflected in attendant constitutional protections. Parents have a fundamental liberty interest in making decisions concerning the care, custody, and control of their children. *Troxel* v. *Granville*, 530 U.S. 57, 66 (2000). This is "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.,* at 56 (citing *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923)). "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' [citation] rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 116 (1996).

Parents with visitation rights have been held to possess a liberty interest in their court-ordered visitation rights, albeit "lesser in magnitude than that of a parent with full legal custody." *Brittain* v. *Hansen*, 451 F.3d at 992; see *Swipies* v. *Kofka*, 419 F.3d 709, 714 (8th Cir. 2005) (non-custodial parent had protected liberty interest in care, custody and management of child); see also *Terry* v. *Richardson*, 346 F.3d 781, 784 (7th Cir. 2003). Moreover, such rights are reciprocal and belong to the children as well as to the parents. *E.g., Suboh* v. *Dist. Attorney's Office*, 298 F.3d 81, 91-92 (1st Cir. 2002); *Bennett* v. *Town of Riverhead*, 940 F. Supp. 481 (D.N.Y. 1996); *Wooley* v. *City of Baton Rouge,* 211 F.3d 913 (5th Cir. 2000); *F.K.* v. *Iowa District Court,* 630 N.W.2d 801 (Iowa Sup. 2001); see also *Troxel* v. *Granville*, 530 U.S. 57, 89-91 (O'Connor, J. dis. opn.).

This is not to say that the constitutional rights of petitioner and his child have been violated in this case. Amicus is mindful of "the Supreme Court's directive to 'avoid constitutional issues when resolution of such issues is not necessary for disposition of a case.'" *Brittain* v. *Hansen*, 451F.3d at 996 (quoting *In re Snyder*, 472 U.S. 634, 642 (1985)). Rather, amicus points out, in connection with the *ne exeat* right and the meaning of the right to custody under the Convention, that "there is a constitutional dimension to the right of parents to direct the upbringing of their children." *Troxel*, 530 U.S. at 56.

This Court has explained that "[t]reaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." *Asakura* v. *City of Seattle*, 265 U.S. 332, 341 (1924). Moreover,"[t]reaties are construed in the same manner as statutes," *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210, 215 (2d Cir. 1999); and, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' [citation]," this Court is "obligated to construe the statute to avoid such problems." *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001).[6] As discussed above, it is at the very least "fairly possible"—in looking at the intent of the drafters, the case law of other signatory countries, the persuasive arguments of the federal courts in *Furnes* and the *Croll* dissent, and the

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[6] While the Supremacy Clause of the United States Constitution declares that treaties "shall be the supreme Law of the Land[,]" this Court has observed that "[t]here is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution." *Reid* v. *Covert*, 354 U.S. 1, 16 (1957).

concerns raised in amicus' experience—to interpret the Hague Convention's "right of custody" as encompassing the right or rights conferred by *ne exeat* orders. Such an interpretation also would enhance the goal of reciprocity in the treaty's implementation, increase the likelihood of recovering abducted children, and comport with the public policy favoring civil remedies over criminal prosecutions.

It would be anomalous to recognize the constitutionally protected right of a parent to make decisions concerning the care, custody and control of their children, which extends to some degree to parents with visitation rights, yet interpret the terms of the Convention in a way that places out of reach the only effective remedy for violations of those constitutionally protected rights. Interpreting a *ne exeat* right as a right of custody under the Convention is consistent with this Court's directive that a treaty must be construed in a broad and liberal spirit, and best serves not only a parent's liberty interests in court-ordered visitation rights, but the reciprocal rights of a child in the parent-child relationship.

* * * * *

The State's consistent and long-held position has been that *ne exeat* orders confer a right of custody under the Hague Convention and therefore, the Convention's return remedy is available to applicant parents in such cases. This view is consistent with a proper interpretation of the term "rights of custody" in Hague cases, the interpretation adopted and understood by the other Contracting States, and the principles of comity and reciprocity essential to the successful implementation of the treaty. It satisfies the State's interest in the enforceability of State court orders and it promotes the ability of State and local prosecutors to fulfill their statutory responsibilities in international parental child abduction cases.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted

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