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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

BRIEF OF *AMICI CURIAE* THE S&W INTERNATIONAL CHILDFIND PROGRAM, THE MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, JUSTICE FOR CHILDREN, PATHWAYS FOR CHILDREN, CHILDREN'S LAW CENTER OF LOS ANGELES, AND EMERGE, IN SUPPORT OF REVERSAL

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INTERESTS OF THE *AMICI CURIAE*[1]

The S&W International ChildFind Program of Sullivan & Worcester LLP in Boston, MA, New York, NY, and Washington, DC provides legal assistance to parents of limited financial means, whose children have been abducted across sovereign borders. Through this program, with the help of Sullivan & Worcester LLP attorneys, left-behind parents can pursue remedies under international law, including the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention"). The S&W International ChildFind Program and the lawyers at Sullivan & Worcester LLP who have volunteered for the program have helped reunite numerous abducted children with left-behind parents from a variety of foreign countries. Lawyers affiliated with the S&W International ChildFind Program have advised dozens of parents and children involved in international child abductions, appeared in a majority of the Hague Convention appeals to the First Circuit, and participated in many evidentiary

[1] Counsel for all parties received notice at least ten days prior to the due date of the *Amici Curiae*'s intention to file this brief, which is submitted with the consent of both the Petitioner and the Respondent. The Respondent's consent letter has been filed with the Clerk of Court; the Petitioner's consent letter is filed herewith. No counsel for any party authored this brief in whole or in part, and neither any such counsel nor any party nor any person or entity other than *Amici Curiae* or their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

hearings to resolve international custody disputes. The S&W International ChildFind Program has been a member of the International Child Abduction Attorney Network formed by the National Center for Missing and Exploited Children, receiving referrals through that network, as well as through the United States Department of State and other sources.

The Massachusetts Society for the Prevention of Cruelty to Children (the "MSPCC"), based in Boston, Massachusetts, is a 131-year old private non-profit 501(c)(3) society dedicated to leadership in protecting and promoting the rights and well-being of children and families. On April 23, 1878, the MSPCC was incorporated "for the purpose of awakening interest in the abuses to which children are exposed by . . . parents and guardians, and to help the enforcement of existing laws on the subject, procure needed legislation and for kindred work. . . ." Since its inception, MSPCC has contributed to the advancement of child welfare. The MSPCC provides direct services, such as counseling, support and other social services, to more than 30,000 children, adults and families each year. In addition to direct services, the MSPCC has been instrumental in putting dozens of laws on the books regarding everything from abandonment to custody to support. In international child abduction cases, MSPCC has made available qualified professionals for abuse evaluations, provided expert witnesses, and/or joined in *amicus* briefs submitted to the First Circuit, including in *Walsh v.*

Walsh, 221 F.3d 204 (1st Cir. 2000), and *Danaipour v. McLarey*, 286 F.3d 1 (1st Cir. 2002).

Justice For Children ("JFC") is a national child advocacy organization headquartered in Houston, Texas. Formed in 1987, JFC works to protect abused children when the system of governmental agencies responsible for their safety (CPS, family courts, and the criminal justice system) fails to do so. Unlike other child advocacy organizations which work to prevent child abuse through education and social programs, JFC focuses on protecting the abused child after the initial report has been made to the authorities. JFC has offices in Houston and Washington, DC.

Pathways for Children ("Pathways"), based in Gloucester, Massachusetts, was founded in 1967 to provide early education and child care programs. Pathways provides high quality, affordable and comprehensive care, education, recreation and support for children and their families. Some of Pathways' services include infant and toddler day care, head start classrooms, and after school activities. In each program, Pathways focuses on creating a supportive environment where children can learn community values, respect, and education in a nurturing environment. Pathways also provides support to families and offers programs for family involvement. Throughout the past 32 years, Pathways has worked on the local, state, and national levels to create programs for children and families.

Children's Law Center of Los Angeles ("CLC") is a nonprofit, public interest law corporation created 18 years ago and funded by the courts to serve as appointed counsel for the abused and neglected youth of Los Angeles. CLC strives to achieve better standards of care and protection for children in the foster care system, with the belief that troubled foster youth can become troubled adults. CLC attorneys represent children who are at risk of abuse or neglect in juvenile dependency proceedings. In addition, CLC advocates for the critical services and support that these children need. CLC attorneys seek to ensure the children's well being and future success. CLC also works with advocacy groups to identify and implement reform where it is needed.

Emerge was founded in 1977 as the first abuser education and prevention program in the United States. Emerge's mission is to eliminate abuse in intimate relationships by providing intervention and education to abusers and to prevent young people from learning to accept violence in their relationships. The services provided by Emerge include educational and anger management programs, parenting classes, and support groups. Emerge is seeking to ensure that children are not put in abusive situations and to improve institutional responses to domestic abuse.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Labels concerning parental rights can be deceptive or at least less than adequately informative, particularly when used in different countries and by different legislatures, courts, cultures and families. As a practical matter, these labels can lose their case-specific significance in translation. The Fifth Circuit and the District Court ruled, as a matter of law, that the label "*ne exeat*" cannot, as an international travel limitation, when combined only with parental rights labeled "visitation," comprise "rights of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction. The lower courts failed to appreciate that a case-specific rather than categorical approach is necessary, consistent with domestic and international laws, including the United Nations Convention on the Rights of the Child, which support consideration of the best interests of each child whose welfare can be affected by judicial proceedings. A universally recognized tenet of child welfare is reflected in Article 3 of the Convention on the Rights of the Child: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Trial courts have inappropriately deemed the best interests of children irrelevant merely because Hague Convention cases should not consist of

full-blown custody battles regarding which parent is better for the child. In this case, as a left-behind parent, the Petitioner introduced sufficient evidence to require the District Court to request the analysis and opinion of the Central Authority of the child's country of habitual residence, here Chile. The Petitioner introduced evidence that he was the child's father, that he had exercised natural parental rights, that a court in Chile had provided him with an express right to prevent the mother from leaving the country with the child, and that Chilean domestic relations law gave rise to additional rights of the father to care for the child. The record did not establish conclusively why the foreign court and parents did not more specifically either remove the father's rights to participate in decision-making regarding where the child resided, or define his rights in the event of an abduction. Parents and family courts can leave gaps in these areas for a variety of good or poor reasons, ranging from efforts to avoid more contentious litigation to inadequate counsel to well-reasoned judicial acts based on the best interests of a child. Without explanation, here the lower courts treated the custody orders as the triggering source from which parental rights sprung, rather than analyzing what inherent or natural parental rights the custody-type orders stripped, if any, and whether the Chilean orders adequately considered the best interests of the child.

In addition, the District Court had at its disposal an internationally-contemplated mechanism for

gathering additional information from the foreign Central Authority, under Article 15 of the Hague Convention, but did not utilize it. The record reflects that the District Court did not even recognize the existence of its discretion to trigger an Article 15 inquiry before rejecting the Petitioner's claim of custody rights. Accordingly, this Court should answer the question presented that the benefits of a *ne exeat* clause *may* constitute rights of custody and should require an Article 15 inquiry before determining otherwise. This Court should therefore reverse or vacate the opinion of the Fifth Circuit and remand this matter to allow the completion of an Article 15 inquiry by the District Court as part of further proceedings consistent with the best interests of the child whose lifelong welfare will be directly affected by this case.

ARGUMENT

I. THE FIFTH CIRCUIT ERRED BY TREATING THE ISSUE OF WHETHER *NE EXEAT* RIGHTS CONSTITUTE "RIGHTS OF CUSTODY," WITHIN THE MEANING OF THE HAGUE CONVENTION, AS A PURE CATEGORICAL ISSUE OF LAW, RATHER THAN AS A CASE-SPECIFIC MIXED QUESTION OF FACT AND LAW.

The Fifth Circuit framed the issue before it as "whether *ne exeat* rights constitute 'rights of custody' " within the meaning of the Hague Convention and

held "that they do not." *Abbott v. Abbott*, 542 F.3d 1081 (5th Cir. 2008). In so doing, the Fifth Circuit reasoned that "[t]he *ne exeat* order thus gave the father a veto right over his son's departure from Chile, but it did not give him any rights to determine where in Chile his child would live." *Id.* at 1087. The District Court noted, in a conclusory manner, that a "careful review of the record reveals that the Chilean family court granted all care and custody rights to Ms. Abbott, despite Mr. Abbott's petitions to the courts for custody of his son." *Abbott v. Abbott*, 495 F. Supp. 2d 635, 637 (W.D. Tex. 2007). Neither the Fifth Circuit nor the District Court identified the source of a gap in the Chilean orders concerning where in Chile the child would reside, such as whether the gap arose from efforts by the parties to avoid more contentious litigation over an issue seemingly not in dispute, whether it arose from inadequate representation, or whether it was the product of well-reasoned judicial action based on the best interests of the child.[2] Neither the Fifth Circuit nor the District Court requested a determination from the foreign Central Authority regarding its views of the father's rights under Chilean law.

[2] The Fifth Circuit mentioned that, in one order, the Chilean trial court refused to award the father a grant of full custody, but the record is bare on what that exactly meant, let alone why the Chilean court prohibited international but not domestic changes in the child's residence.

A. While Hague Convention Cases Should Not Entail Full-Blown Custody Battles Regarding Who is the Best Parent, Court Decisions Affecting the Welfare of a Child or Children Require Individual Consideration of the Best Interests of the Particular Child or Children.

Hague Convention cases trigger not only consideration of the treaty itself and its implementing statute, the International Child Abduction Remedies Act, 42 U.S.C. § 11601, *et seq.*, but also consideration of traditional principles of comity and the fundamental safeguards throughout the courts of the United States and elsewhere that protect the best interests of children.

1. A Determination of Whether to Defer to Foreign Law Requires Consideration of Whether it Adheres to Fundamental Principles and Mores Embodied in Domestic Law, Such as Protection of the Best Interests of Children.

The policies underlying the Hague Convention are complemented by traditional principles of comity as they relate to the judgments of foreign nations. Under that longstanding concept, valid judgments rendered by the courts of foreign nations, although not as conclusively entitled to full faith and credit as the judgments of sister states, are accorded similar

recognition when rendered in a manner consistent with fundamental principles and mores embodied in domestic law. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§102(2), 102 cmt. b., 415 (1987); *see also Medellin v. Dretke*, 544 U.S. 660, 670 (2005) (Ginsburg, J., concurring), *citing* ALI, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute § 2, Comment *d*, p. 38 (2005); *Hoyt v. Sprague*, 103 U.S. 613, 631 (1881) ("in the due exercise of comity," preference would ordinarily be given to "the authority of guardian in the minor's own country"). Comity, as traditionally applied, provides recognition of foreign judgments, but not if they were rendered in a manner inconsistent with fundamental laws and procedures, or public policy, of the United States. *See Dennick v. Cent. R. Co. of New Jersey*, 103 U.S. 11, 11 (1880) (principles of comity favor honoring foreign law or orders "if not contrary to the public policy of the country where the suit is brought, nor to abstract justice or pure morals"); *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 106 (1969). This principle is limited by concerns over fundamental rights, due process and public policy; where it is apparent that the foreign judgment violates any of these, it is undeserving of recognition. *See, e.g., Griffin v. Griffin*, 327 U.S. 220, 228-29 (1946), *citing Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 401 (1917); *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 23 (1907); *Nat'l Exch. Bank v. Wiley*, 195 U.S. 257 (1904).

Under the guidance of the Uniform Child Custody Jurisdiction and Enforcement Act (the "UCCJEA"), which is now in force in all but two states in the country,[3] domestic family courts provide recognition to foreign child custody orders but only if

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[3] *See* ALA. CODE § 30-3B-105 (2009); ALASKA STAT. § 25.30.810 (2009); ARIZ. REV. STAT. § 25-1005 (2009); ARK. CODE ANN. § 9-19-105 (2009); CAL. FAM. CODE § 3405 (West 2009); COLO. REV. STAT. § 14-13-105 (2005); CONN. GEN. STAT. § 46B-115D (2009); DEL. CODE tit. 13, § 1905 (2009); D.C. CODE § 16-4601.04 (2009); FLA. STAT. § 61.506 (2009); GA. CODE ANN. § 19-9-44 (2009); HAW. REV. STAT. § 583A-105 (2009); IDAHO CODE ANN. § 32-11-105 (2009); 750 ILL. COMP. STAT. § 36/105 (2009); IND. CODE. § 31-21-1-3 (2009); IOWA CODE § 598B.105 (2009); KAN. STAT. ANN. § 38-1340 (2008); KY. REV. STAT. ANN. § 403.806 (West 2009); LA. REV. STAT. ANN. § 13:1805 (2008); ME. REV. STAT. ANN. tit. 19-A, § 1735 (2009); MD. CODE ANN., FAM. LAW § 9.5-104 (West 2009); MICH. COMP. LAWS § 722.1105 (2009); MINN. STAT. § 518D.105 (2009); MISS. CODE ANN. § 93-27-105 (2008); MO. REV. STAT. § 452.720 (2009); MONT. CODE ANN. § 40-7-136 (2007); NEB. REV. STAT. § 43-1230 (2009); NEV. REV. STAT. § 125A.225 (2008); N.H. REV. STAT. ANN. § 458-A:4 (2009) (effective December 1, 2010); N.J. REV. STAT. § 2A:34-57 (2009); N.M. STAT. § 40-10A-105 (2009); N.Y. DOM. REL. LAW § 75-d (2009); N.C. GEN. STAT. § 50A-105 (2009); N.D. CENT. CODE § 14-14.1-04 (2008); OHIO REV. CODE ANN. § 3127.04 (West 2009); OKLA. STAT. tit. 43, § 551-105 (2009); OR. REV. STAT. § 109.714 (2003); 23 PA. CONS. STAT. § 5405 (2009); R.I. GEN. LAWS § 15-14.1-5 (2008); S.C. CODE ANN. § 20-7-6008 (2007); S.D. CODIFIED LAWS § 26-5B-105 (2009); TENN. CODE ANN. § 36-6-208 (2009); TEX. FAM. CODE ANN. § 152.105 (Vernon 2009); UTAH CODE ANN. § 78B-13-105 (2009); VA. CODE ANN. § 20-146.4 (2009); WASH. REV. CODE § 26.27.061 (2005); W. VA. CODE § 48-20-105 (2009); WIS. STAT. § 822.05 (2009); WYO. STAT. ANN. § 20-5-205 (2009).

they do not run contrary to fundamental human rights:

> (a) A court of [the relevant] State shall treat a foreign country as if it were a State of the United States for the purpose of applying [Articles] 1 and 2.
>
> (b) Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this [Act] must be recognized and enforced under [Article] 3.
>
> ***(c) A court of this State need not apply this [Act] if the child custody law of a foreign country violates fundamental principles of human rights.***

UCCJEA § 105 (emphasis added).[4] As discussed further below, the need to consider the best interests of children is a "fundamental principle of human rights."

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[4] The only two states not to have enacted the UCCJEA are Massachusetts and Vermont. Both of those states have adopted the Uniform Child Custody Jurisdiction Act, which also applies principles of comity to foreign custody determinations so long as fundamental principles of those states' laws are satisfied. *See* MASS. GEN. LAWS ch. 209B, § 14 (2007); VT. STAT. ANN. tit. 15, § 1051 (2002).

2. The Convention on the Rights of the Child Requires Consideration of the Best Interests of the Child in All Proceedings Concerning Children.

The established law of the international community requires consideration of the "best interests of the child" in all cases involving children. This law is reflected in a central theme of the United Nations Convention on the Rights of the Child (the "CRC"), which provides, in relevant part, that:

> *In all actions concerning children*, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration*.

CRC Article 3 § 1 (emphases added). The CRC is the most widely accepted human rights treaty in the world and has been ratified by 193 countries.[5] The United States signed the CRC in February 1995, but stands virtually alone as one of only two members of the United Nations that have not yet ratified it (the other being Somalia, which lacks an internationally recognized government).

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[5] The United Nations Treaty Collection provides an official list of nations that have signed and/or ratified the CRC, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

As a signatory to the CRC, the United States is obliged under Article 18(a) of the Vienna Convention on the Law of Treaties (the "Vienna Convention")[6] not to act in a manner that would defeat the "object and purpose" of the CRC. The Vienna Convention, while not yet formally ratified by the United States, is relied on by courts and the United States Department of State as the authoritative guide to existing treaty law and procedure. *See* The Vienna Convention on the Law of Treaties, S. Exec. Doc. No. 92-1, 92d Cong., 1st Sess. 1 (1974); *see also Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting) (citing to the Vienna Convention when interpreting the United Nations Convention Relating to the Status of Refugees); *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001) ("We apply the rules of customary international law enunciated in the Vienna Convention on the Law of Treaties"); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1296 n.40 (11th Cir. 1999) ("Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention as codifying the

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[6] Article 18(a) of the Vienna Convention provides:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty[.]

international law of treaties." (citation and quotation omitted)).

Because customary international law[7] requires that each child's best interests be considered in cases involving children, so too in the United States should the child's best interests be considered in all such cases. Customary international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900); *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.").

This Court should here, as it has done previously, give due weight to persuasive, customary international law. In *Roper v. Simmons*, 543 U.S. 551, 575-76 (2005), for example, this Court discussed the weight to be given to international law with regard to the imposition of the death penalty on juvenile

[7] The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES provides that customary international law results from "a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). The American Law Institute commented that "[a] practice can be general even if it is not universally followed; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity." *Id.* § 102 cmt. b.

offenders, and recognized the "stark reality" that the United States was the only country in the world that "continue[d] to give official sanction to the juvenile death penalty[,]" and referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments. *Id.* at 575 (citations omitted). The Court specifically referred to the CRC as instructive, not just on international law, but also on domestic constitutional law, noting that "every country in the world has ratified [the CRC] save for the United States and Somalia." *Id*. at 576-78. Here, as in *Simmons*, this Court should give due weight to the "overwhelming weight of international opinion" adopting the CRC and requiring consideration of the best interests of the child. To do otherwise would defeat one of the primary objectives of the CRC (and, in turn, violate Article 18(a) of the Vienna Convention), which is to make the best interests of the child a "primary consideration" in all actions concerning children. CRC Art. 3 § 1.

Several courts in Hague Convention cases have recognized that the best interests of children, including for example concerns over the child's safety, must be considered. The First Circuit has persuasively explained that "the protection of the child must remain paramount," *Danaipour v. McLarey*, 286 F.3d 1, 26 (1st Cir. 2002), making decisions regarding whether to return children in complex circumstances "[a]mong the federal courts' most

difficult and heart-rending tasks," *id.* at 4.[8] While Hague Convention cases should not turn into

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[8] The official commentary to the Hague Convention provides that, "the Convention does not seek to regulate the problem of the award of custody rights[,]" and that "any debate on the merits of [custody rights] . . . should take place [in the country of habitual residence]." *See* Elisa Perez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention: Hague Conference on Private International Law P 84, in 3 Acts and Documents of the Fourteenth Session 426, at 430 ¶ 19 (1980), http://hcch.e-vision.nl/upload/expl28.pdf. While proceedings under the Hague Convention should not become full-blown custody battles, courts have improperly conflated the merits of custody concerns with the relevance of the best interests of the child. *See*, *e.g.*, *Kufner v. Kufner*, 519 F.3d 33, 40 (1st Cir. 2008) (explaining that the "best interests of the child standard" applies in custody matters and custody is not the issue in a Hague Convention case); *Diorinou v. Mezitis*, 237 F.3d 133, 145 (2d Cir. 2001) (Article 13 was not intended to be used by defendants as a vehicle to litigate or re-litigate the child's best interests); *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001) (The Hague Convention is not designed to resolve underlying custody disputes); *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005) (custody litigation in state court revolves around findings regarding the best interest of the child, relying on the domestic relations law of the state court, which is distinct from an adjudication of a Hague Convention petition that focuses on findings of where the child was habitually located and whether one parent wrongfully removed or retained the child); *Cantor v. Cohen*, 442 F.3d 196, 207 (4th Cir. 2006) ("The Hague Convention aims to have judicial authorities decide whether a child has been wrongfully removed or retained in violation of existing custody rights, or whether existing access rights are being violated, not whether the petitioning parent is better suited to serve as custodian."); *Simcox v. Simcox*, 511 F.3d 594, 607 (6th Cir. 2007) ("child's best interests" analysis is not the proper standard under the Convention); *In re B. Del C.S.B.*, 559 F.3d 999, 1013 (9th Cir. 2009) (the Convention is concerned with

(Continued on following page)

full-blown custody battles, nothing in the Hague Convention is inconsistent with the requirement under international law that courts *must* consider the best interests of children whose welfare is at stake in proceedings.[9] After all, a primary purpose for the powers granted to courts under the Hague Convention is to promote the best interests of the child by preventing parents from abducting children to different countries in search of more favorable custody laws. *See Baxter v. Baxter*, 423 F.3d 363, 367 (3d Cir. 2005) ("Convention's procedures are designed to restore the status quo prior to any wrongful removal or retention, and to deter parents from engaging in international forum shopping in custody cases."), citing *Feder v. Evans-Feder*, 63 F.3d 217, 221

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the present, and not with determining the best interests of the child in the long term); *Ohlander v. Larson*, 114 F.3d 1531, 1541 (10th Cir. 1997) ("Under the Convention, a child is to be expediently returned to his or her state of habitual residence so that a court there can examine the merits of the custody dispute and award custody in the child's best interests.") (internal quotation omitted).

[9] Recognizing the potential harm caused by wrongfully abducting children to another country, Article 3 of the Hague Convention provides courts with power to return the abducted child to his country of habitual residence where the custody issues will be resolved. But this power is not unlimited; under Article 13, for example, a court is not required to return the child to his country of habitual residence if it is not in the best interest of the child (*i.e.* the return poses a grave risk of harm or an otherwise intolerable situation, or if the petitioning parent never had a right to determine the residence of the child, or if the child has been in the new country for more than a year and is settled into his new environment).

(3d Cir. 1995); *Yang*, 416 F.3d at 201 ("The Hague Convention's goal is to 'protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.'" (quoting the Hague Convention Preamble, 19 I.L.M. 1501, 1501 (1980))).

3. The Fifth Circuit and District Court Failed to Consider the Best Interests of the Child and Whether Chilean Law Adequately Considered the Best Interests of the Child.

When treating an order containing a *ne exeat* clause as if it were the triggering and dispositive source of rights subject to the Hague Convention, the Fifth Circuit and the District Court failed to consider whether the foreign orders stripped parental rights or, if so, whether they took adequately into account the best interests of the child. When failing to address the preexisting parental rights under Chilean law and any specific basis for stripping them down to a *ne exeat* clause, the lower courts here failed even to refer at all to the best interests of the child, let alone to determine whether Chilean courts had adequately addressed those interests or to consider how the denial of the Hague Convention petition would affect those interests. The fundamental need to protect children can be frustrated by any determination that views the existence *vel non* of a *ne exeat*

clause as dispositive, without further consideration of whether each child's best interests have been adequately taken into account.

The lower courts here failed to consider adequately: (1) whether the Chilean court intended the order containing the *ne exeat* clause to strip the father of preexisting parental rights that arose by operation of law[10]; (2) whether the Chilean court adequately considered the best interests of the child when making its rulings; (3) whether the father's rights to care for the child for a full month in the summer along with frequent visits throughout the year amounted to the father's right to determine the residence of the child during those periods thereby giving rise to custodial rights; and, (4) whether the Chilean Central Authority considered the removal of the child to be in breach of rights of custody under Chilean law and therefore "wrongful" under Article 3 of the Hague Convention.

B. In the Absence of Justification, Child Abductions Pose Serious Risks to the Development of the Victimized Children.

An important objective served by a broad interpretation of "rights of custody" is that the best

[10] Under Article 3 of the Hague Convention, international law expressly honors "rights of custody" not only as set forth in custody orders, but also that arise by operation of law or from an agreement between the parents.

interests of children often, though not always, will be served by returning them to the status quo in their country of habitual residence. By ignoring the best interests of the child and failing to assess whether Chilean courts had adequately considered those interests, the lower courts undervalued the adverse consequences to an abducted child. International child abductions impose serious psychological and developmental effects on children. Multiple studies have shown that children who are abducted by a parent, thereby separated from the other parent and their support systems, can suffer from a wide range of psychological issues ranging from depression and acute stress disorder to post traumatic stress disorder and identity formation issues. *See* Nancy Faulkner, *Parental Child Abduction is Child Abuse* (1999-2006), presented to the United Nations Convention on Child Rights in Special Session June 9, 1999, http://www.prevent-abuse-now.com/unreport.htm; Dorothy S. Huntington, *Parental Kidnapping: A New Form of Child Abuse* (1982), http://207.58.181.246/pdf_files/library/Huntington_1982.pdf. These far reaching and serious psychological effects can last long after the child is returned. Geoffrey L. Greif, *A Parental Report on the Long-Term Consequences for Children of Abduction by the Other Parent*, 31 Child Psychology and Human Development 59, 70 (Fall 2000).

In a peer-reviewed study by Nancy Faulkner presented to the United Nations Convention on Child Rights, it was found that there are many potential

psychological and developmental ramifications to unjustified parental abductions. The conclusions of this study found that

> Children who have been psychologically violated and maltreated through the act of abduction are more likely to exhibit a variety of psychological and social handicaps. These handicaps make them vulnerable to detrimental outside influences.

Faulkner, *Parental Child Abduction is Child Abuse*, *supra*, at 2 (citing D.C. Rand, *The Spectrum of the Parental Alienation Syndrome*, Am. Journal of Forensic Psychology, 15-3 (1997)). Specifically, abducted children can suffer from depression; loss of community; loss of stability, security, and trust; excessive fearfulness, even of ordinary occurrences; loneliness; anger; helplessness; disruption in identity formation; and fear of abandonment. Huntington, *Parental Kidnapping: A New Form of Child Abuse*, *supra*. These disorders emerge from the anxiety produced by the abductions as well as the displacement of the children from their entire support systems, including their relationships with the left-behind parents. Faulkner, *Parental Child Abduction is Child Abuse*, *supra*, at 4-5. "[F]or a child 'it is not possible to develop true self-esteem and find peace without resolving differences and emotional pain due to stressed or damaged emotional ties to parents and family.'" *Id*. at 5. Children may suffer physical

manifestations of stress such as problems with their immune systems, sleep disorders, stomach aches, headaches, and trouble academically. Faulkner, *Parental Child Abduction is Child Abuse, supra*, at 8; Huntington, *Parental Kidnapping: A New Form of Child Abuse*, *supra*, at 12-13. It is also common that the abducting parent and child are on the run from authorities, making the abducting parent unable or unwilling to put the child's needs first, including food, education, and emotional support. "The needs of the troubled parent override the developmental needs of the child, with the result that the child becomes psychologically depleted and their own emotional and social progress is crippled." Faulkner, *Parental Child Abduction is Child Abuse*, *supra*, at 3. All of these scenarios and stresses place an abducted child at risk of severe psychological harm, which may last indefinitely, particularly if courts sanction and validate the abduction by not returning the child.

In addition, courts have recognized the serious psychological impact of abductions on children, in particular the impact of being separated from one parent. *E.g.*, *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996) ("Under the logic of the Convention, it is the *abduction* that causes the pangs of subsequent return."). In 2005, a state trial court upheld an eight-figure jury verdict based on the emotional distress that resulted from an international child abduction. *See Streeter v. Executive*

Jet Mgmt., Inc., No. X01-02-0179481-S, 2005 WL 4442352, at *8 (Conn. Super. Nov. 10, 2005). The court there explained that the abducting parent had informed the children that the left-behind mother no longer wanted to see them and, should anyone ask about her, they should say she had died. *Id.* at *4. Further, the court found that, after they were returned to their mother, as a result of the abduction, the children exhibited fear of being left alone, fear of going upstairs alone, anger toward their father, academic problems due to memory loss, and fear of their mother leaving them. *Id.* These psychological symptoms appeared consistent with those found in the Faulkner study and other literature.

Each victim can experience any of a wide range of resulting maladies, leading experts to conclude:

> As adults, many victims of bitter custody battles who had been permanently removed from a target parent, whisked away to a new town and given a new identity, still long to be reunited with the lost parent. The loss cannot be undone. Childhood cannot be recaptured. Gone forever is that sense of history, intimacy, lost input of values and morals, self-awareness through knowing one's beginnings, love, contact with extended family, and much more. Virtually no child possesses the ability to protect him- or herself against such an undignified and total loss.

Faulkner, *Parental Child Abduction is Child Abuse*, *supra*, at Conclusion (citing S.S. Clawar & B.V. Rivlin,

Children Held Hostage: Dealing with Programmed and Brainwashed Children, ABA Section of Family Law, ISBN No. 0-89707-628-1, p. 105). The psychological and developmental effects of an abduction are considerable, and should play a role in the adjudication of Hague Convention cases. Indeed, such inherent harm to children flowing from abductions presents yet another reason for broadly interpreting the parental rights that constitute rights of custody under the Hague Convention.

C. The Meaning of Labels Regarding Parental Rights Can Vary Among Countries, Courts, Cultures, and Families, Thereby Presenting Mixed Questions of Law and Fact.

The meaning of custodial terms, or default custody rights can vary among countries, cultures, courts and families. For example, in certain Islamic nations, gender and religion generally dictate custody and travel rights and obligations between parents. Jamal J. Nasir, *The Islamic Law of Personal Status* 187 (Graham & Trotman, 2d ed. 1990). While fathers are automatically given legal decisionmaking rights over children, in many cases under Shari'a law, a form of physical custody of the child is given automatically to the mother until that child reaches a certain age. *Id.* This form of custody does not entitle mothers to travel with children outside of the country. When a boy reaches the age of seven or a girl reaches

the age of nine, that child is considered to be past the "years of dependency" and is then placed in the custody of the father or a full-blooded male relative of the father. *Id.* While most if not all Islamic nations are not presently signatories to the Hague Convention, their systems pose an extreme example of how custody-type labels vary from country to country, or from culture to culture.

Countries utilize a variety of default mechanisms when there is not a formal custody arrangement in place. These too can be misconstrued by the courts. Questions abound that can serve as simple exercises that illustrate the different meanings that can be ascribed to labels by different countries, cultures, courts, and families. What if the pertinent Chilean court order had expressly stated that "the *ne exeat* clause was intended to constitute rights of custody under the Hague Convention"? Or what if it specifically stated that "no right of custody is intended to be created by the *ne exeat* clause, but rather only a local remedy"? Would the calculus change if the *ne exeat* provision were part of an agreement by the parties instead of a court order? What if, only in a laudable effort to avoid contentious litigation, the parents chose not to seek a court order regarding who decides where the child lives inside of Chile? Would it matter whether the child had always lived in one residence and no reason existed to predict a move? Or what if the foreign court delineated rights based purely on gender or racial discrimination? Obviously various circumstances that serve as a

backdrop to a *ne exeat* clause can inform its meaning. The determination of whether, in particular circumstances, a *ne exeat* clause gives rise to rights of custody poses not just a legal question, but rather a mixed question of law and fact.

II. AS A MATTER OF LAW, THE PETITIONER MET HIS BURDEN OF TRIGGERING AN INQUIRY BY THE DISTRICT COURT OF THE CENTRAL AUTHORITY OF CHILE FOR ITS OPINION ON THE ISSUE OF RIGHTS OF CUSTODY IN THIS MATTER, UNDER ARTICLE 15 OF THE HAGUE CONVENTION.

It is noncontroversial, if not axiomatic, that the determination of whether a child has been wrongfully removed from his country of habitual residence should be analyzed under the substantive law of that foreign country, not of the removed-to country. Courts adjudicating Hague Convention matters have routinely engaged in careful analyses of foreign law. *See*, *e.g.*, *Whallon v. Lynn*, 230 F.3d 450, 456-59 (1st Cir. 2000) (affirming a rigorous analysis by the trial court of parental rights under the pertinent foreign law). To ensure that the correct interpretation of the legal concepts is employed, including (but not limited to) *ne exeat* clauses such as the one at issue, courts should request a determination from the Central Authority of the foreign country when there is at least a *prima facie* showing of parental status and a legitimate dispute over the meaning of foreign legal labels.

The Convention specifically provides a mechanism for this undertaking through Article 15, which states:

> The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

http://www.hcch.net/index_en.php?act=conventions.text&cid=24. The express language of Article 15 vests in the District Court the responsibility for initiating such an inquiry when necessary.[11]

Courts routinely obtain a determination from the foreign Central Authority pursuant to Article 15 by directing the applicant to obtain the determination or by making the request itself. *See*, *e.g.*, *Silverman v.*

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[11] Because the Convention expressly contemplates that the District Court will trigger an Article 15 inquiry, a petitioner's failure to request such an inquiry should not amount to a waiver, and should not result in plain error review of a lower court's failure to direct the inquiry.

Silverman, 338 F.3d 886, 892 (8th Cir. 2003); *Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634, 639 (E.D.N.Y. 2000). In *Bader v. Kramer*, 445 F.3d 346 (4th Cir. 2006), German law appeared to provide, as a default matter, that joint custody existed between parents until a court ordered otherwise. The German family court in *Kramer* entered a visitation schedule before the child was taken to the United States. *Id.* at 350. While the trial court concluded that the visitation order altered the joint custody arrangement, the appellate court concluded otherwise. *Id.* When reversing the trial court, the Fourth Circuit relied on a letter from the German Central Authority explaining that, under German law, both parents still possessed custody rights. *Id.* at 351.

Here, the Petitioner introduced sufficient evidence to require the District Court to obtain a similar determination under Article 15 of the Hague Convention, from the Chilean Central Authority, before it could have properly found custody rights lacking. The Chilean Central Authority could then have offered an opinion concerning whether the Respondent had "wrongfully removed" the child from Chile based on the existence of the *ne exeat* clause and any other parental rights within the meaning of Article 3 of the Convention. Obtaining the foreign country's determination is particularly important when there is a significant range of reasonable interpretations among courts as to the meaning of a particular type of parental right such as that embodied in a *ne exeat* order. The majority of foreign

countries have decided that *ne exeat* orders coupled with a right of access gave rise to custodial rights as defined under the Hague Convention. *See* Sara E. Reynolds, *International Parental Child Abduction: Why We Need To Expand Custody Rights Protected Under The Child Abduction Convention,* 44 Fam. Ct. Rev. 464, 472 (July 2006). Courts in the United States have split on the significance of such provisions. One of the objectives of the Hague Convention is uniformity of interpretation of foreign laws such that the "rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States." Article 1(b); *Furnes v. Reeves*, 362 F.3d 702, 716 (11th Cir. 2004). The proper consistency can be achieved only by the courts obtaining a determination from the foreign country as to the meaning of its own orders and laws. Given the questions below, the District Court should have exercised its discretion to obtain an Article 15 determination.

A. When a District Court Possesses Discretion, It Cannot Simply Ignore that Discretion.

Because courts possess discretion to obtain an Article 15 determination, that discretion must be considered by the Court and acted upon appropriately. *See Gall v. United States*, 552 U.S. 38, 53 (2007) (explaining that lower courts abuse their discretion when they have "ignored or slighted" the existence of their discretion or a relevant factor).

Here, the Fifth Circuit and District Court erred by not even recognizing the District Court's discretion to seek an Article 15 determination, let alone appropriately exercising that discretion when assessing the existence of custodial rights as required by Article 3 of the Hague Convention. *Ne exeat* orders are known to have different meanings in different countries, which the lower courts here specifically acknowledged. *See Abbott v. Abbott*, 542 F.3d 1081, 1084 (5th Cir. 2008) (recognizing that "courts in the United Kingdom, Australia, South Africa, and Israel have held that *ne exeat* rights do constitute 'rights of custody' under the Hague Convention," while Canadian and French courts have reached the contrary conclusion). Here, the District Court ignored and therefore abused its discretion to seek the official Chilean view of the meaning of the custody orders without seeking a determination from Chile. *Cf. Gall*, 552 U.S. at 53; *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997) (in Hague Convention case, explaining that "[a] clear example of an abuse of discretion exists where the trial court fails to consider the applicable legal standard or the facts upon which the exercise of its discretionary judgment is based").

Lower courts in other cases have engaged in much more rigorous reviews of foreign law to find that a petitioner possessed rights of custody. Courts have thoughtfully applied Article 3's express statement that custody rights may arise from a country's common law or from agreements between the parents, even in the absence of custody orders.

E.g., *Whallon*, 230 F.3d at 456, 457 n.7. Here, the lower courts failed to determine whether the father had custody rights under Chilean common law or other source, such as the doctrine of *patria potestas*, which has been interpreted to signify “a meaningful, decisionmaking role in the life and care of the child, and not the mere access to the child associated with visitation rights.” *Id.* at 457. Even the doctrine of *patria potestas* has different meanings in different countries and “highlights the difficulties in imposing Anglo-American definitions of custody on legal systems, . . . that have different origins and traditions.” *Id.* at 458. The most effective way to overcome these difficulties and to understand the custodial rights of parents in another country is to obtain the determination from the Central Authority of the country of habitual residence. Here, given the Petitioner’s demonstration of paternity, his past exercise of parental rights, the *ne exeat* clause, and citations to Chilean common law, the Fifth Circuit and District Court simply did not have sufficient information about Chilean law to find custody rights lacking, and the District Court abused its discretion by not obtaining an Article 15 determination.

B. Because of the Interests of Abducted Children, the Article 15 Duty Should Be Self-Executing.

Article 15 expressly contemplates a court triggering an inquiry of a foreign Central Authority

for its opinion on whether a removal of a child violates rights of custody under the laws of the foreign country of habitual residence. *Cf. Sorenson v. Sorenson*, No. 07-4720 (MJD/AJB), 2008 U.S. Dist. LEXIS 21778, at *3 (D. Minn. Mar. 19, 2008); *Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1148 (E.D. Wash. 2007). Courts can improve the quality of Article 15 determinations by seeking them directly, rather than leaving or passing them to or through litigants, who could present biased versions of underlying facts to foreign Central Authorities. In addition, often indigent or of limited means, left-behind parents face enormous difficulties litigating Hague Convention cases in what to them are foreign countries. Children often remain unrepresented. By controlling the Article 15 process, the court can ensure not only the accuracy of the content and scope of the inquiry, but also can ensure the completion of an inquiry consistent with the interests of the children who may have the most at stake in these proceedings. *Cf. Norden-Powers*, 125 F. Supp. 2d at 639. And because the courts expressly possess the authority to trigger the Article 15 inquiry, and because such inquiries can be crucial to the protection of children from abductions, it is an error by a trial court itself to fail to commence such an inquiry when one would be appropriate.

Here, the Petitioner introduced sufficient evidence to require either a finding in his favor on the issue of whether he possessed "rights of custody," or to require an Article 15 inquiry before the lower

courts could reject his claim of "rights of custody." Even though the record suggests that the Petitioner did not request an Article 15 inquiry, the error still rests with the courts below, thereby negating any waiver or need for "plain error" review. To hold otherwise would penalize a victimized child and sanction a kidnapping that separates him indefinitely from one of his parents.

CONCLUSION

Based on the foregoing, the *Amici Curiae* respectfully submit that this Court should reverse or vacate the decision of the Fifth Circuit and remand the matter for further proceedings. The existence of *ne exeat* clauses like the present one *may* constitute rights of custody and should require Article 15 inquiries before a court finds custody rights lacking. When facing such issues, courts adjudicating Hague Convention matters must consider the best interests of the pertinent children, including whether foreign orders affecting them and Article 15 determinations have adequately considered such interests. In addition, once a parent has introduced sufficient evidence of parental status and legal rights that could lead reasonable minds to differ regarding whether they amount to rights of custody, the trial court should commence an Article 15 inquiry before

rejecting a petition based on a failure to demonstrate rights of custody.

Respectfully submitted,

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