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 DELEGATES LAWRENCE H. STOTTER AND MATTI SAVOLAINEN, ON THE DRAFTING AND NEGOTIATING OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

E. JOSHUA ROSENKRANZ
Counsel of Record
LISA T. SIMPSON
ORRICK, HERRINGTON
& SUTCLIFFE LLP
666 Fifth Avenue
New York, New York 10103-0001
(212) 506-5000

QUESTION PRESENTED

Whether the drafters of the Hague Convention on the Civil Aspects of International Child Abduction intended *ne exeat* orders, which prevent one parent from removing a child from the jurisdiction without the consent of the other parent, to be a "right of custody" such that violation of a *ne exeat* order gives rise to the drastic "right of return" of the child under the Hague Convention.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES

Pages

U.S. CASES

Cited Authorities

Pages

U.S. STATUTES

TREATIES

OTHER AUTHORITIES

Cited Authorities

Pages

Cited Authorities

Pages

Cited Authorities

Pages

INTERESTS OF AMICI CURIAE*

The Amici Curiae, Messrs. Lawrence H. Stotter and Matti Savolainen, served as delegates from the United States and Finland, respectively, to the Fourteenth Session of the Hague Conference on Private International Law, which drafted the Hague Convention on the Civil Aspects of International Child Abduction. As delegates, they participated in the negotiation and drafting of the terms of the Hague Convention. They have clear memories of the intent of the delegates, and the result that the drafters were looking to obtain when they crafted the Hague Convention's provisions. They are interested to see that the integrity of the Hague Convention, as written and as intended by the drafters, is preserved and that the true intent of the drafters is presented to the Court to aid the Court in its interpretation of this important international agreement.

SUMMARY OF ARGUMENT

Typically, when charged with determining the intent of the drafters of an agreement, a court is forced to wade through what amounts to

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* The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae,* their members, or their counsel made a monetary contribution to its preparation or submission.

circumstantial evidence, collecting the available pieces of the puzzle and ultimately making the best guess as to what other individuals, operating at another point in history, were thinking and attempting to accomplish. That guesswork is not necessary here. Mr. Lawrence H. Stotter was one of only five delegates chosen to represent the United States at the Hague and one of only two with true expertise in the area of child custody issues. His impressive background as a leading family law practitioner led the then-president of the American Bar Association to suggest to the U.S. Secretary of State that Mr. Stotter be appointed to represent the United States' interests in the negotiation and drafting of the Hague Convention. Similarly, Mr. Matti Savolainen, who has negotiated and drafted numerous international conventions and treaties, served as the Finnish delegate to the Hague Conference. He was also one of only five members of the Drafting Committee, which was charged with memorializing in final written form the conclusions reached during the Convention negotiations.

Both of these delegates have strong and clear recollections of the intent of the drafters at the time that the Hague Convention was negotiated and finalized. They share their memories of the process here, and provide a rare firsthand account of their intent during the negotiations, thus eliminating the need for much of the circumstantial puzzle-working that would otherwise be required. Both Mr. Stotter and Mr. Savolainen (the "Drafters") are clear that the drastic "right of return," which mandates immediate return of a child to the country of habitual residence in the case of abduction, was

expressly reserved for violations of "rights of custody." By contrast, "rights of access," *i.e.*, visitation rights, were not granted that drastic remedy after much debate. The delegates were fully aware of *ne exeat* orders, and their absence from mention in the text of the Convention is no mistake. The Drafters did not intend that a *ne exeat* order would confer a right of custody. The Drafters' recollection is summarized as follows:

1. The distinction between rights of custody and rights of access was much debated, heavily negotiated, and intended to be a critical difference within the framework of the Convention.

2. The right of return was exclusively reserved for remedying breaches of rights of custody.

3. Breaches of rights of access were granted less drastic and non-mandatory remedies, which did not include a right of return.

4. The delegates were fully aware of *ne exeat* orders, but did not include them in the discussions and negotiations when defining rights of custody, or when determining what the remedy would be for violation of such custody rights.

5. The drafters did not intend for *ne exeat* orders to convert rights of access, *i.e.*, visitation rights, into rights of custody.

6. The drafters did not intend for a *ne exeat* order to be construed as a right of custody.

7. The drafters did not intend for a violation of a *ne exeat* order to give rise to the drastic remedy of a right of return.

8. The only time rights similar to the rights granted under a *ne exeat* order were raised in the negotiations, they were referenced as an example of an access right. After considering that example, the drafters soundly defeated a proposal that such access rights be given the remedy of a right of return.

9. The United States delegation, in particular, would have strongly opposed any attempt to qualify a *ne exeat* order as granting a right of custody that would give rise to a right of return.[1]

[1] Ms. Jamison Selby Borek, who served as a U.S. delegate along with Mr. Stotter, has reviewed this submission. Ms. Borek represented the U.S. State Department at the Conference, and, as described below, assumed the role of lead U.S. spokesperson at the plenary session of the Conference where the final drafting and negotiations of the Convention took place. Ms. Borek reports that the recollections of the Drafters set forth herein are consistent with her own recollection of the intent and purpose of the terms of the Convention.

ARGUMENT

I. THE INTENT OF THE DRAFTERS IS PROPERLY CONSIDERED BY THE COURT.

A. Negotiating History and Intent Are Relevant When Interpreting a Convention.

The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10494 (1986) [hereinafter Hague Convention or Convention], implemented by the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 *et seq.* (1995), is an international treaty to which the United States and approximately 80 other countries are signatories. The Convention was convened to address the "necessity to find a solution to a problem which caused harm to children and suffering to parents … to ensure the return of abducted children as quickly as possible and with as few legal formalities as possible." ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, *Procès-verbal No 2*, TOME III [hereinafter TOME III], 257-61 at 257.

When interpreting an international treaty, such as the Hague Convention, the Court may look beyond purely textual definitions to the broader meaning of the Convention, and assess the "ordinary meaning to be given to the terms of the treaty in their context and in the light of [the Convention's] object and purpose." Vienna Convention on the Law

of Treaties, May 23, 1969, art. 31.1, 1155 U.N.T.S. 331, 340 (stating general rule on the interpretation of treaties).

The Court's inquiry "begin[s] 'with the text of the treaty and the context in which the written words are used.'" *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988), quoting *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 534 (1987). *Accord Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989). However, "treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Air France v. Saks*, 470 U.S. 392, 396 (1985) (citing *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943)); *see also Eastern Airlines, Inc v. Floyd*, 499 U.S. 530, 534-35 (1991) (same). "In interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiation." *Air France*, 470 U.S. at 400. The Court has also considered it appropriate to consult external sources that establish the purposes of the treaty, its drafting history, and its post-ratification understanding. *See El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167-76 (1999).

Accordingly, the Court may properly consider the recollections of the Drafters that are presented here. *See Air France*, 470 U.S. at 402-03 (considering statements of delegates and members of drafting committee to determine meaning of Warsaw Convention). "Because a treaty ratified by the

United States is not only the law of this land … but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux preparatoires)* … of the contracting parties." *See id.* at 400. Indeed, overlooking the intentions of the drafters and amending judicially the Convention text is impermissible, for it "would be to make and not construe a treaty." *See Chan*, 490 U.S. at 135 (internal quotation marks omitted).

B. Mr. Stotter and Mr. Savolainen Are Credentialed Participants in the Drafting of the Hague Convention.

The Hague Convention on the Civil Aspects of International Child Abduction was initially drafted over the course of two meetings of the Special Commission on international child abduction in 1979, at the Peace Palace in The Hague. The first meeting took place from March 12-22, 1979. *See* Elisa Pérez-Vera, *Report of the Special Commission*, TOME III, 172-214, 176 at ¶ 14 (1980). The delegates at the first meeting were not able to reach a consensus on the necessary provisional conclusions, nor did they produce a draft. *Id.* The second meeting was held from November 5-16, 1979, over the course of sixteen sessions, along with additional meetings of the drafting committee and two *ad hoc* committees. *See id.* at 176. The second Special Commission meeting adopted the text of a Preliminary Draft that was subsequently presented to the full Convention. *Id.*

The Plenary Session of the Fourteenth Session of the Hague Conference met from October 6-25, 1980. *See* Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, TOME III, 426-76, 426 at ¶ 3 (1982) [hereinafter Pérez-Vera Report].[2] The following countries participated in those sessions: Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, the United States, Venezuela and Yugoslavia. During the sessions, a Drafting Committee prepared the text concurrently as the main proceedings progressed. Pérez-Vera Report, 426-27 at ¶ 4. The Drafting Committee was chaired by Allan Leal of Canada. The members of that committee included Louis Chatin of France, R.L. Jones of the United Kingdom, Reporter Elisa Pérez-Vera of Spain and amicus curiae Matti Savolainen of Finland.

Matti Savolainen, who attests to his recollection of the Hague Convention negotiations and drafting through this submission, served as Counselor of Legislation at the Finnish Ministry of Justice from 1971-2000 and was a member of the Finnish delegation at the Diplomatic Conferences of the Hague Conference on Private International Law in

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[2] *See* Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10494, 10503 (1986) ("[Professor Pérez-Vera's] explanatory report is recognized by the [Hague] Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it.").

1976, 1980, 1984 (as Chairman of Commission I (General Affairs)) and 1988. Mr. Savolainen participated in both meetings of the Special Commission that immediately preceded the full Conference in 1980 and, thus, was involved with the drafting process from the beginning, including the development of the draft treaty that emerged from the second meeting of the Special Commission. As noted above, Mr. Savolainen was one of five members of the Drafting Committee that prepared the Convention in its final form in 1980, and indeed is considered one of the "fathers" of the Hague Convention. *See* Adair Dyer, *To Celebrate a Score of Years!*, 33 N.Y.U. J. Int'l L. & Pol. 1, 2-3 (2000). He is also the author of an article that has been distributed as part of an "accession kit" by the Permanent Bureau secretariat to states interested in acceding to the Convention. *See* Matti Savolainen, *The Hague Convention on Child Abduction of 1980 and Its Implementation in Finland*," 66 Nordic Journal of Int'l Law (*Acta scandinavica juris gentium*) 101-166 (1997) (noting that the remedies for violation of an access order are very limited; the Convention does not provide for the removal of a child based upon such an order).

The United States sent three delegates to the Special Commission meetings and five delegates to the full Hague Conference. Those delegates were Peter H. Pfund (Assistant Legal Adviser for Private International Law, U.S. Department of State); James Hergen (Trial Attorney, Office of Foreign Litigation, U.S. Department of Justice); Patricia Hoff (Congressional Adviser, U.S. Senate); Professor Brigitte M. Bodenheimer (Professor, University of

California Law School, Davis), who, due to illness, was replaced for the full Conference Sessions by Jamison Selby Borek (Legal Adviser's Office, U.S. Department of State) [3]; and amicus curiae Lawrence H. Stotter. *See Membres de la Première Commission,* TOME III, 253-55 at 254.

Lawrence H. Stotter, who also attests to his recollection of the Hague Convention negotiations and drafting through this submission, joined the delegates as a leading family law practitioner. Mr. Stotter is the former National Chairman of the American Bar Association's ("ABA") Family Law Section. He served as State Chairman of the California Bar Family Law Division, where he, along with delegate Professor Bodenheimer, successfully advocated for the enactment of the Uniform Child Custody Jurisdiction Act ("UCCJA") by the California Legislature, and additionally encouraged its enactment in states throughout the United States. Mr. Stotter also served as Editor-in-Chief of the ABA magazine "Family Advocate" and authored

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[3] As noted above, Ms. Jamison Selby Borek, who joined the U.S. State Department in 1979 after having worked for a number of years in children's services (and retired just this year), assumed Professor Bodenheimer's role as lead U.S. spokesperson at the Hague Conference proceedings. *See, e.g.*, *Procès-verbal No 3*, TOME III, 263-67 at 263, 265 [hereinafter *Procès-verbal No 3*]; *Procès-verbal No 4*, TOME III, 268-73 at 269-71 [hereinafter *Procès-verbal No 4*]. In addition to finding that this *amici* submission is consistent with her recollection of the intent of the drafters of the Convention, Ms. Borek also particularly recalls that, since this was a family law, and not a conflicts of law, convention, the overriding principle among the drafters was the best interests of the child, not conflict of laws or preserving judicial jurisdiction.

an oft-cited article on the Hague Convention. *See* Lawrence H. Stotter, *The Light at the End of the Tunnel: The Hague Convention on International Child Abduction Has Reached Capitol Hill*, 9 HASTINGS INT'L & COMP. L. REV. 285-328. Although the United States delegation to the Hague Convention consisted of several other representatives from the State Department, specializing in other areas of the law, it was readily acknowledged and recognized that Mr. Stotter and Professor Bodenheimer were the experts on U.S. custody problems and solutions. As such, Mr. Stotter played an influential role in the drafting negotiations.

After nearly a month of meetings, which included both Mr. Savolainen and Mr. Stotter, the Hague Convention was adopted by unanimous vote of representatives from the twenty-three states that were present at the Fourteenth Session of the Hague Conference on Private International Law in Plenary Session, and signed on October 25, 2009. Pérez-Vera Report, 426 at ¶ 1. Thereafter, Mr. Stotter testified in hearings before U.S. congressional committees, explaining the Convention and the U.S. delegation's position, and advocating for its adoption and implementation in the United States.

Given their level of participation and expertise in the area, Mr. Savolainen and Mr. Stotter's recollections of the intent of the drafters at the time of the Conference should be given considerable weight in interpreting the meaning of the Hague Convention.

II. IT WAS NOT THE INTENT OF THE DRAFTERS THAT *NE EXEAT* ORDERS WOULD QUALIFY AS CUSTODY RIGHTS

A. The Setting in Which the Delegates Met.

The Hague Convention was ultimately adopted as an effort "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." Hague Convention, Preamble, TOME III at 413.

Many countries were represented at the Hague Conference, with varying legal systems and approaches to child custody issues. Accordingly, delegates did not always agree, as captured by the *Procès-verbal*, as well as by the voting results. *See, e.g.*, *Procès-verbal No 5*, TOME III, 275-70 at 277 (*Working Document No 11*) (rejecting Working Document No 11 by a vote of 13 against, 11 in favor, with 1 abstention); *Procès-verbal No 6*, TOME III, 283-89 at 285-86 (disagreeing about how possible presumption concerning the exercise of custody rights might be expressed); *Procès-verbal No 9*, TOME III, 303-08 at 303-06 (discussing differing countries' views of public policy exception).

The sharp debate stemmed, in part, from the diverse ways in which the participating countries addressed custody issues. *See, e.g.*, *Replies of the Governments to the Questionnair*e, TOME III, 61-129

at 73-82 [hereinafter Government Responses] (comparing country-specific responses); *see also Procès-verbal No 8*, TOME III, 297-303 at 298 (delegates note that "not exercising [custody rights] in good faith" would have different implications in Germany, the United States, the Netherlands and Finland). For example, joint custody was a relatively novel concept in 1980, and some countries either had very little experience with it, or had not yet recognized it at all. *See Procès-verbal No 3* at 267 (Delegate Leal stated that "[j]oint custody was an unusual concept in Canada"). Similarly, not all countries had implemented the concept of visitation rights, and, as a result, that type of right was not uniformly used. *See* Government Responses at 82 (Denmark notes distinction in its treatment of visitation rights for child born in versus out of wedlock); *id.* at 125 (Czechoslovakia's general rule is that parents determine contact with child in their divorce agreement). It was against this backdrop that the delegates came together.

The Drafters here recall that the main goal and focus of the Convention was the protection of children from abduction by the non-custodial parent. Issues surrounding rights of custody and remedies for breach of a given parent's rights were hotly debated. The Drafters comment on the civility of the debate, however, noting that diverse and opposing positions were expressed respectfully, often followed by a compliment for the previous speaker, even if the message delivered was in complete and utter disagreement. *See, e.g., Procès-verbal No 4* at 270.

B. A Major Distinction Was Made Between Custody Rights and Access Rights.

The Drafters report that from the very beginning of the preparatory work of the Special Commission, it became clear that there were significant differences of opinion as to what types of parental rights should be protected in what way. Discussions were held that revolved around differing attitudes and beliefs held by trial judges around the world as to the "best interests of the child." Judges in some countries felt that those interests were broad and included all contacts and visits with both parents. At the same time, it became clear that a considerable number of delegates were not prepared to give visitation rights the same strong protection that they felt rights of custody deserved. The Drafters struggled with framing legislation that would take into account all of these diverse views. Thus, the concept of separating "custody rights" from "access rights" evolved. The delegates made sure to define these terms to emphasize the sharp distinction that they wished to draw between those two rights. *Compare* Article 5(a) "rights of custody" with Article 5(b) "rights of access." This strong distinction between rights of custody and rights of access cannot, according to the Drafters, be emphasized enough.

"Rights of custody" were defined as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence," while "rights of access" were defined as "the right to take a child for a limited period of time

to a place other than the child's habitual residence." Articles 5(a) and (b). The Drafters recall that it was easier to develop the definition of "rights of access" than "rights of custody," since custody rights were intertwined with what each delegate individually viewed as being in the best interests of the child. Although traditionally, the definition of "custody rights" would include the right to make decisions relating to the child's "health, education and welfare," the consensus was that "rights of custody" would not take on this broad and unmanageable definition.

After distinguishing these two types of parental rights, the delegates concluded that only a breach of "rights of custody" would warrant the drastic remedy of the "right of return." Specifically, Article 3 was drafted with this intent:

> The removal or the retention of a child is to be considered wrongful [thus qualifying for a right of return] where –
>
> *a* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone . . . and
>
> *b* at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Convention Article 3.

"Access rights" were given a lesser remedy intentionally. And that remedy applies even where access rights are very extensive. That remedy is found in Article 21, which allows a parent to seek through the Central Authorities, "arrangements for organizing or securing the effective exercise of rights of access" if those rights are violated. Convention Article 21. Thus, although Article 1(b) of the Convention states that one of the objects of the Convention is to ensure that rights of access are effectively respected in other Contracting States, the implementation of that object of the Convention does not impose upon the Contracting States any obligation to recognize and enforce access orders issued by other Contracting States.

The Drafters point specifically to Article 3 to emphasize that the delegates were fully aware of and accounted for joint custody rights. The language of Article 3 itself so contemplates. Reviewing the facts as presented in the merits briefs on this appeal, the Drafters note that the Chilean trial court seemed to appreciate the stark difference between custody and access rights. On two separate occasions it awarded all custody rights to the mother, while granting only access rights to the father. While it could have made those rights joint, particularly the right to choose where the child lived, it did not. Moreover, the second custody order, in February 2005, issued when the father once again sought, but was denied, any custody rights, was made following the *ne exeat* order of January 2004. Yet the court did not provide the father with *any* custody rights, nor did it tie its *ne exeat* order to any custody rights granted to the mother. In fact, the court made no

order limiting the mother's custody rights at all. On those facts, under the provisions of the Convention, only the mother holds the ability to seek a "right of return." The Drafters strongly disagree with any suggestion that the father's access rights were instead intended by the Chilean court to be part of a bundle of "custody rights." It is the Drafters' view that the Court of Appeals correctly appreciated the intent of the Convention by recognizing the difference between these two types of rights.

C. *Ne Exeat* Orders Were Not Considered Rights of Custody, and It Was Not Intended That They Would Give Rise to the Right of Return.

The Drafters were, at the time of the Convention, quite experienced with *ne exeat* orders, their impact, and their consequences. They were strongly critical of their use as a basis for altering well-considered custody orders. In fact, they did not (and do not) view them as custody rights or even rights of access at all. Instead, it is the Drafters' opinion that *ne exeat* orders are instead an expression of judicial control and/or a retention of jurisdiction (or, more bluntly, a provision to prevent forum shopping in a non-signatory country). Perhaps the most common form of this type of order in the United States is the requirement that a child's and/or a parent's passport(s) be turned over to the court. These types of orders vest control with the court, not rights in either parent; they are thus enforced by contempt, fine or jail, but not by revising custody or access provisions. For example, a trial court could make a

number of negative orders to a custodial parent under a *ne exeat* type order, such as denying the right to live in a dangerous part of town or denying the right to live with a particular person. These are negative orders that shape the custody right, but vest no rights whatsoever in the non-custodial parent, except the right to bring any violation of those orders to the attention of the court and seek appropriate penalties. That scenario does not convert the right into one of custody.

Given that, it was not surprising to the Drafters that *ne exeat* rights were not part of the discussion of what constitutes a custody right, and that *ne exeat* rights similarly did not surface during the debates regarding the definition of rights of access. It is Mr. Stotter's distinct recollection that *ne exeat* orders were never on the convention agenda with regard to defining either custody or access rights, and consistent with that recollection, no such substantive discussions took place.

Indeed, the only time that something akin to a *ne exeat* right was discussed, the concept of granting a right of return for such a violation was put to vote and soundly defeated. The Petitioners, in their brief, note that the "*travaux préparatoires*" raise the idea of *ne exeat* rights as something that the Convention could address. *See* Brief of Petitioner at 42; Brief of United States at 28. As Petitioner notes, the "*travaux préparatoires*" consisted of a series of questions prepared by the Permanent Bureau's First Secretary, Adair Dyer, Petitioner's counsel, which were put to each country in advance of the commencement of the Fourteenth Session in an

attempt to shape the Convention's discussion. The fifth situation listed as a type of child abduction, for purposes of the questionnaire only, was where "[t]he child was removed by a parent from one country to another in violation of a court order which expressly prohibited such removal." Adair Dyer, *Questionnaire and Report on international child abduction by one parent* (Preliminary Document No 1 of August 1978), TOME III, 9-51 at 9. There was no indication in the questionnaire of whether custody rights were also violated in the removal; indeed, the term "rights of custody" had not yet been defined. Brief of Respondent at 41.

Despite the inclusion in the questionnaire, it is the Drafters' recollection that a *ne exeat* scenario was not discussed in any detail again, either in conjunction with the definitions of rights of custody or rights of access or any of the ensuing remedies, until the session on October 8, 1980. *See Documents de travail Nos 4 à 13*, TOME III, 261-63 at 262 (Proposal No 5). At that session, the Canadian delegate, Mr. Allan Leal, addressed Canada's proposal that the right of return be granted for violation of access rights. *See Procès-Verbal No 3* at 266. As an initial matter, Mr. Leal noted that access rights could at times be very substantial and admitted that in Canada joint custody was very rare, as the Canadian courts generally granted custody to one parent and visitation to the other. Mr. Leal then cited two examples of "wrongful removal" in support of his proposal, one of which was a situation where one parent is given custody, but cannot leave the jurisdiction without the other parent's consent. *Id.* at 267. Leal suggested that such a removal should

be subject to the right of return. Debate about this proposal and the specific *ne exeat* example ensued. After several delegates spoke, the proposal was put to a vote. It was soundly defeated by a vote of 19-3.[4] *Id.*

The Drafters find it contrary to reason to suggest that a proposal that was considered and then specifically and expressly rejected was actually impliedly intended to be read into the Convention. For this reason, the State Department's suggestion, in its *Amicus Curiae* brief in support of the Petitioner, that the delegates "understood," following this debate, that *ne exeat* rights were "rights of custody" is simply incorrect. *See* Brief of United States at 20-21. This is a mischaracterization of the delegates' intent on this issue, and the Drafters specifically attest that they had no such "understanding." *Id.*

Indeed, the Drafters had decided that even the most extensive of access rights, such as having the physical care of the child during the summer holiday, would not confer a custody right or a right of return on that parent. It is thus self-evident that lesser rights, such as those arguably afforded by a *ne exeat* order, cannot possibly confer greater

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[4] Working Document No 5 was rejected by the following countries: Australia, Austria, Belgium, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the United States. The three countries in favor of the proposal were Canada, Ireland and Israel. Italy abstained from voting.

substantive rights for a non-custodial parent than access rights of much more significance.

In sum, the Drafters did not intend for a *ne exeat* order to confer a right of custody upon the non-custodial parent. Furthermore, and in keeping with that purpose, the Drafters did not intend that *ne exeat* orders would give rise to a right of return under the Convention.

D. The United States Would Have Strongly Objected to Any Suggestion That *Ne Exeat* Orders Create a Right of Return.

Because of the experience of Mr. Stotter and the other United States delegates (including Professor Bodenheimer) with domestic custody issues,[5] the United States delegation had a strong, overtly expressed position against the use of visitation abuses as a basis for making orders of return or changes in custody. Mr. Stotter's co-expert on custody issues, Professor Bodenheimer, was particularly adamant that these two types of rights be treated separately. Given that position, the United States similarly would have objected strenuously to the idea that *ne exeat* orders are included within "custody rights." Indeed, in the United States' response to the Dyer questionnaire distributed immediately prior to the Hague

[5] Professor Bodenheimer and Mr. Stotter's experience was pivotal to the universal acceptance of the UCCJA throughout the United States as a workable solution to the child-snatching and forum-hunting that was prevalent prior to the UCCJA's enactment.

Conference, the United States characterized *ne exeat* orders simply as having "the purpose of preserving the jurisdiction of the state in the custody matter and of safeguarding the visitation rights of the other parent." Government Responses at 88 (Question 16). The suggestion that *ne exeat* orders were silently understood or implied to fall within custody rights is simply not tenable—the U.S. delegation was firmly against such an interpretation and would never have let such an issue simply pass by without debate. Indeed, the U.S. delegation's opposition on this issue was so firm that it might have led to the United States' opposition to the entire Convention's adoption. Such an issue certainly would have been evident in the delegates' notes and likely in the minutes as well. Moreover, from Mr. Stotter's own notes, it does not appear that this issue received any debate at the Convention. Any attempt by the Court to impose such a term into the Convention would be to enforce a provision that this signatory country's own delegates would have objected to at the time of drafting.

Furthermore, Mr. Stotter notes that the United States, in its amicus brief submitted in support of Petitioner, fails to take into account the position of the U.S. delegation at the time of drafting. *See generally* Brief of United States. Surely, the intent of the United States delegation should bear on the position of the United States on this issue.

E. The Drafters' Intent Was Correctly Captured by the Appellate Court and Others to Consider the Issue.

Those who have reported on the Hague Convention have agreed with the intent of the Drafters, as expressed here. Specifically, the Reporter for the Permanent Bureau, Elisa Pérez-Vera, who attended all sessions of the Conference and reported on the debate, wrote in the 1980 Explanatory Report, in reference to the Canadian proposal that *ne exeat* rights give rise to a right of return, that "[a]lthough the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised during the Fourteenth Session, the majority view was that such situations could not be put in the same category as the wrongful removals which it is sought to prevent." Pérez-Vera Report at 444-45.

Similarly, A.E. Anton's comments, which were written shortly after the conclusion of the Hague Convention, and before any courts attempted to interpret the treaty's language, were, in the Drafters' opinions, too easily disregarded by the United States in its brief. *See* Brief of United States at 20-21 n.12. Mr. Anton was a highly respected

member of the Convention,[6] and took his role and responsibility as Chairman seriously, with careful and considerate weighing of the different attitudes and goals of the varied delegates. Interpretation of specific words and their meaning and consequences, was a special concern of his. His express recollection, quite consistent with that of the Drafters here, that the Commission rejected the view that *ne exeat* rights fell under "rights of custody" is much more than a personal view, but rather a significant indication of the intent of the delegates. A.E. Anton, *The Hague Convention on International Child Abduction*, 30 Int'l & Comp. L. Q. 537, 546 (1981) ("A suggestion that the definition of "abduction" should be widened to cover this case was not pursued.").

The Second, Fourth, Fifth and Ninth Circuits have also reached results that are consistent with the Drafters' recollection of intent. *See Abbott v. Abbott*, 542 F.3d 1081, 1087 (5th Cir. 2008) ("[*N*]*e exeat* rights, even when coupled with 'rights of access,' do not constitute 'rights of custody' within the meaning of the Hague Convention."); *Fawcett v. McRoberts*, 326 F.3d 491, 499-500 (4th Cir. 2003) (prohibiting removal from country without non-

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[6] Dyer, *To Celebrate a Score of Years!*, 33 N.Y.U. J. Int'l L. & Pol. at 3 ("Professor A.E. "Sandy" Anton, the leading Scottish expert on private international law, served as Chairman of the Commission that negotiated and drafted the treaty. A superb draftsman himself, he undoubtedly lent great assistance to the delegations in reaching a clean text, distinguished by its simplicity of style and straightforward treatment of a complex problem. He was one of the outstanding fathers of this Convention…").

custodial parent's consent "does not confer 'rights of custody'"); *Gonzalez v. Gutierrez*, 311 F.3d 942, 952 (9th Cir. 2002) ("[I]t is clear that the 'majority view' of the Convention drafters was that the mandatory remedy of return ought not be available to the left-behind non-custodial parent."); *Croll v. Croll*, 229 F.3d 133, 142 (2d Cir. 2000) (refusing to "overlook[] the stated intentions of the drafters" in holding that a *ne exeat* provision does not provide a return remedy). Only the Eleventh Circuit has reached a contrary result, but that conclusion, too, comports in substance with the Drafters' intent. In *Furness v. Reeves*, 362 F.3d 702 (11th Cir. 2004), although the court found that a *ne exeat* right is sufficient to constitute a right of custody, the parents in that case possessed *joint rights* of custody under Norwegian law, *i.e.*, "joint parental responsibility," which triggered the right of return. There are no such joint rights of custody presented in this situation.

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For these reasons, the Drafters request that the Court honor the original intent of the delegates who authored the Hague Convention and find that a *ne exeat* order does not qualify as a right of custody and, therefore, does not give rise to an automatic right of return.

CONCLUSION

The judgment of the Court of Appeals comports with the intent of the drafters of the Hague Convention and should therefore be affirmed.

Respectfully submitted,

E. Joshua Rosenkranz
Counsel of Record
Lisa T. Simpson
ORRICK, HERRINGTON &
SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103-0001
(212) 506-5000

Counsel for Amici Curiae

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