No. __-____

In the Supreme Court of the United States

ALAN CRITTENDEN,

Petitioner,

v.

MARIKO CRITTENDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Georgia dismissed Petitioner's complaint for divorce for lack of subject matter jurisdiction, where Petitioner's last domestic residence in the United States before his active-duty military service was the State of Georgia. At the time of filing for divorce, Petitioner had established no other permanent or temporary residence in any other state. The mother of the minor children of the marriage is a Citizen of Japan, does not reside in the United States, remains in Japan with the children, and has refused to accede to the jurisdiction of the state courts of Georgia.

Petitioner could not file for divorce in any other forum and therefore could not resolve important constitutional rights he has as a citizen of the United States, nor those of his minor children.

The questions presented in this petition are as follows:

For purposes of the disposition of Petitioner's constitutional rights (including those with respect to custody of and visitation with his minor children), did the State of Georgia deny Petitioner equal protection and/or due process of law by dismissing his complaint for divorce for lack of subject matter jurisdiction, where there was no other forum in which Petitioner could seek a divorce?

Does Congress' Military and Treaty Powers under the Supremacy Clause, both of which authorize the applicable Status of Forces Agreement (SOFA)

between the nation of Japan and the United States govern and control, and therefore supersede, the decision of the state of Georgia to deprive Petitioner of a forum to adjudicate his constitutional rights and those of his minor children?

PARTIES TO THE PROCEEDING

Petitioner, Alan Crittenden, was the Plaintiff-Appellant below. Respondent, Mariko Crittenden was Defendant-Appellee.

There are no corporate parties and no other parties to the proceedings.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Alan Crittenden, respectfully petitions for a Writ of Certiorari to the Supreme Court of the State of Georgia, which denied Petitioner's writ of certiorari on November 16, 2020. (App. 1a - 2a).[1]

OPINIONS BELOW

The Court of Appeals of the State of Georgia issued an opinion on March 6, 2020 in Case Number A19A1866 (App. 3a - 7a), which affirmed the decision of the Cherokee County Superior Court in Case Number 18CVE0936JH. (App. 8a - 9a).

These decisions comprise the substantive rulings for which Petitioner seeks a writ of certiorari.

JURISDICTION

The highest court of the State of Georgia entered its order denying Petitioner's writ on November 16, 2020. (App. 1a-2a). On March 19, 2020, this Court issued a Miscellaneous Order increasing the time to file Petitions for Certiorari from 90 days to 150 days from the date of the lower court's final judgment or order. This Petition for Certiorari is being filed on or before April 15, 2021.

The Court has jurisdiction over this Petition under 28 U.S.C. § 1257.

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[1] The appendix is presented with the select documents from the record numbered in seriatum at the bottom center, 1a, etc.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV, § 1, cl. 2

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No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUS OF FORCES AGREEMENT (JAPAN), UNITED STATES TREATIES, 11 U.S.T. 1652, T.I.A.S. 4510, Art. IX, cl. 2

***

2. Members of the United States armed forces shall be exempt from Japanese passport and visa laws and regulations. Members of the United States armed forces, the civilian component, and their dependents shall be exempt from Japanese laws and regulations on the registration and control of aliens, but shall not be considered as acquiring any right to permanent residence or domicile in the territories of Japan.

OFFICIAL CODE OF GEORGIA ANNOTATED (OCGA) § 9-10-91

A court of this state may exercise personal jurisdiction over any nonresident or his or her executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in

the same manner as if he or she were a resident of this state, if in person or through an agent, he or she:

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(5) With respect to proceedings for divorce, separate maintenance, annulment, or other domestic relations action or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce….

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OFFICIAL CODE OF GEORGIA ANNOTATED (OCGA) § 19-9-61

(a) Except as otherwise provided in Code Section 19-9-64, a court of this state has jurisdiction to make an initial child custody determination only if:

(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(2) A court of another state does not have jurisdiction under paragraph (1) of this subsection, or a court of

the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Code Section 19-9-67 or 19-9-68 and:

(A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(B) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under paragraph (1) or (2) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Code Section 19-9-67 or 19-9-68; or

(4) No court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3) of this subsection.

(b) Subsection (a) of this Code section is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

OFFICIAL CODE OF GEORGIA ANNOTATED (OCGA)
§ 19-9-67

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(b) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction.

STATEMENT

A. Introduction

Can the State of Georgia deprive overseas military personnel due process of law and equal protection of the law by refusing to exercise subject matter jurisdiction and grant a divorce in the state of their domicile and residence (official home of record (HOR)) before they were deployed? In refusing to exercise jurisdiction over Petitioner's lawsuit, the State of Georgia leaves military servicemembers who are for all intents and purposes domiciled in that state, but temporarily serving their country, without a forum in which to claim residency and file for divorce. In doing so, Georgia also leaves the children of such military servicemembers without a home state pursuant to the Uniform Child Custody Jurisdiction Enforcement Act, O.C.G.A. § 19-9-40 through § 19-9-64. This, even though children are considered to be domiciles of the domicile of their parents, and the UCCJEA in Georgia ostensibly *requires* the state court to take jurisdiction over a potential custody matter where there has been no other custody proceeding "commenced in a court of a state having jurisdiction" as defined in the statute. See O.C.G.A. § 19-9-64(b).

According to Petitioner's military file, his HOR was the State of Georgia. Until the filing of the underlying action, Petitioner only ever lived outside of Georgia due to his military orders and duties. At the time he filed for divorce, he had never owned property, held a driver's license, filed taxes, voted, or taken any other steps to establish a domicile in any state other than Georgia. (App. 39a-77a). He was never domiciled

anywhere in the United States other than the State of Georgia and his presence in the United States since joining the military was always in an active-duty military status. Prior to the divorce, his military orders placed him and his family on a base in Japan, where he had no rights as a resident or domiciliary. He and his family's status was governed by the Status of Forces Agreement (SOFA) in effect on military bases in the nation of Japan, which is pursuant to the Agreement Under Article VI of the Treaty of Mutual Cooperation and Security between Japan and the United States of America (Regarding Facilities and Areas and the Status of United States Armed Forces in Japan), 11 U.S.T. 1652, T.I.A.S. 4510. (App. 78a-96a). Under Article IX(2) of the SOFA members of the United States armed forces and their dependents, which included Respondent and the minor children at the time of the underlying action, "shall not be considered as acquiring any right to permanent residence or domicile in the territories of Japan."[2] (App. 81a). The parties' children, 6 and 4 years of age at the time of the filing of the underlying action, as U.S. citizens living on a military installation in Japan, also had no rights as Japanese residents and no home state.

The residence of a person in the military service of his country is in no way affected by his service; he does not abandon or lose the residence he had when he entered such service by being required to live at certain posts in other states or countries. The

[2] Respondent's mother is Japanese and her father is American. Respondent is a United States citizen (App. 97a; 99a) and only after the divorce action was filed did she seek to register and become a legal resident in Japan under the guise of her dual status.

domicile of a soldier or sailor in the military or naval services generally remains unchanged, domicile being neither gained nor lost by temporary station in the line of duty at a particular place, even for a number of years. *Commonwealth ex rel. Hoffman v. Hoffman*, 162 Pa. Super. 22, 26; 56 A.2d 362, 364 (1948); *Wamsley v. Wamsley*, 333 Md. 454, 461, 635 A.2d 1322, 1325 (1994).

Indeed, it has long been the view of this Court that "[t]he place where a person lives is taken to be his domicil until facts adduced establish the contrary, and a domicil when acquired is presumed to continue until it is shown to have been changed. *Anderson v. Watt*, 138 U.S. 694, 706; 11 S. Ct. 449, 452 (1891), citing *Mitchell v. United States*, 21 Wall. 350, 352 (1874); *Desmare v. United States*, 93 U.S. 605, 609 (1876); *Shelton v. Tiffin*, 6 How. 163 (1848); *Ennis v. Smith*, 14 How. 400 (1853). See also *District of Columbia v. Murphy*, 314 U.S. 441, 455; 62 S. Ct. 303, 309-10 (1941) (same). In fact, this Court has ruled as to the issue before the Court that "although the wife may be residing in another place, the domicil of the husband is her domicil." *Anderson*, *supra*, citing Story, Conflict of Laws, § 46 (1834); Wharton, Conflict of Laws, § 43 (2d ed. 1881). "Even where a wife is living apart from her husband, without sufficient cause, his domicil is in law her domicil" and the husband has a right to and may obtain a divorce in that state's courts. *Cheely v. Clayton*, 110 U.S. 701, 705 (1884).

Here, Respondent's refusal to return to the United States and to remain in Japan did nothing to affect Petitioner's domicile and the State of Georgia could not refuse to recognize it where there was no other

domicile or residence ever established by the family, or by any of the parties. *Anderson*, *supra*; *Murphy*, *supra*; *Cheely*, *supra*.

By denying Petitioner the right to file for divorce in Georgia, the state court created a rule that will leave countless overseas military servicemembers and their children, as well as other United States citizens, without a forum in which to exercise important constitutional rights to due process and equal protection of the law, such as the right to file for divorce to protect their own property and economic interests, as well as the constitutional right to protect their interest in custody and visitation with their children, and to protect the constitutional rights of their minor children.

Georgia's law does not address Petitioner's status. The lower court's interpretation of Georgia's long-arm statute to adjudicate domicile and residency requirements, which are jurisdictional facts, without accounting for the Petitioner's unique status leaves a critical omission in the integrity of the constitutional legal protections that should be afforded citizens of the United States. Indeed, it goes against what this Court has stated the states must do – recognize the domicile and rights of a citizen to file for divorce where no other facts exist that the he or she has any other domicile.

As a consequence of its refusal to accept jurisdiction over Petitioner's action, Georgia's disposition of the jurisdictional question deprived Petitioner of due process and equal protection. Petitioner was unable to access a forum to adjudicate

his constitutional rights and those of his minor children, including his rights to custody, especially as Respondent has illegally detained the children in the nation of Japan.

B. Factual Background

In 2000, at the age of 18, Petitioner left his family home in Georgia and enlisted in the United States Marine Corps. (App. 252a-253a). At the time of his enlistment until the time he filed an action for divorce in this case, he maintained only one domicile in the United States. *Id.* He served on active duty in the Marines until his honorable discharge and retirement in March 2020. (App. 31a-32a; App 302a).

Prior to joining the military, Petitioner resided in Cherokee County, Georgia with his parents and maintained that HOR as his address for all purposes of state citizenship. (Petitioner's Emergency Motion and Affidavit and Federal and State Tax Returns, App. 34a-77a). Petitioner listed the Cherokee County, Georgia address where he lived with his parents as his home of record (HOR) with the United States Marine Corps. This address was Petitioner's HOR the entire time he was in the military up to the filing of this action. (App. 34a-77a; App. 132a).

The Marines sent Petitioner to Japan. As an active-duty member of the United States Military in Japan, Petitioner was subject to "The Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between Japan and the United States of America Regarding Facilities and Areas" and the Status of United States Armed Forces in Japan, 11

U.S.T. 1652, T.I.A.S. 4510, hereinafter referred to as "The Status of Forces Agreement" or "SOFA." (App. 78a-96a). Article IX, clause 2 of the SOFA provides:

> Members of the United States armed forces shall be exempt from Japanese passport and visa laws and regulations. Members of the United States armed forces, the civilian component, and their dependents shall be exempt from Japanese laws and regulations on the registration and control of aliens, but shall not be considered as acquiring any right to permanent residence or domicile in the territories of Japan**.**

(App. 81a, SOFA, 11 U.S.T. 1652, T.I.A.S. 4510, Art. IX(2))

Petitioner met Respondent in Japan. (App. 235a; App. 260a; App. 304a-307a). Respondent father is a United States servicemember and her mother is a Japanese citizen. As the daughter of a United States servicemember, Respondent was also present in Japan pursuant to SOFA when she married Petitioner. (App. 248a). Both parties were United States citizens at the time of their marriage. *Id*.

And although Respondent's mother is a citizen of Japan, Respondent has always maintained a United States passport and lived in Japan under SOFA status. (App. 256a-260a). In 2011, the parties' eldest son was born in California while Petitioner and Respondent were there on a temporary assignment. In January 2012, Petitioner received military orders

to transfer back to Okinawa, Japan (App. 254a-255a). During the transfer, Respondent returned to Japan under her United States passport, and her passport was stamped with notice that she, like Petitioner and their child, was present in Japan under SOFA status. (App. 256a-260a). In 2014, the parties' youngest son was born in a United States hospital on the military installation in Japan. (App. 305a). Both minor children are United States citizens and, up until the time Petitioner filed this action, both children had only ever lived in Japan under SOFA status. (App. 36a; App. 250a-251a).

In April of 2018, Petitioner received orders for a Permanent Change of Station to Maryland. (App. 31a-33a). Petitioner and his family were to depart Japan on or about June 24, 2018. (App. 97a-98). As a result of the transfer, the family's SOFA status was due to expire on July 1, 2018. (App. 35a-37a; App. 231a).

Petitioner departed Japan pursuant to his orders; however, Respondent refused to leave and refused to allow the children to leave with Petitioner. (App. 97a-98a; App. 304a-306a).

Since Petitioner's departure, Respondent has denied Petitioner visitation and contact of any substance with the minor children. (App. 97a-98a). During the marriage and up to the date of the filing of this divorce, the parties and their children had always been citizens of the United States and had only held United States passports. (App. 36a; App. 248a-260a). And, up until Petitioner filed this action, the parties had only been present in Japan under SOFA. *Id.* See also App. 304a-308a. Under the SOFA, maintaining

custody of the children in Japan was illegal and in fact Petitioner filed an affidavit in the state court to that effect. (App. 97a – 98a).

After Petitioner filed for divorce in Georgia, Respondent allegedly took steps to register herself and the children in Japan and to request permission for them to stay there. (App. 119a-125a; 128a-131a; App. 306a).

The parties do not own real property together or individually in the United States or Japan. (App. 236a). The parties filed taxes together and voted in Georgia during the prior relevant years of their marriage (2014-2017) (App. 39a-77a; App. 305a). Petitioner always paid taxes and voted in Georgia since his emancipation. Petitioner also holds a Georgia driver's license and his home of record with the military has always been Cherokee County, Georgia. (App. 34a-37a).

Respondent has never, up to the filing of this action, voted in or registered to vote in Japan nor has she ever held employment in Japan. (App. 34a-37a; App. 232a-234a; App. 304a-306a). And up until the time that Petitioner filed this divorce action, Respondent had never held a Japanese driver's license. (App. 34a-37a; App. 232a-234a). Rather, she maintained a driver's license in the United States, which allowed her to drive while in Japan pursuant to SOFA. (App. 34a; App. 304a-305a). Up until the filing of this action, Respondent never identified herself on any document or took any legal steps to identify herself as a citizen of Japan or Japanese National. (App. 132a-136a; App. 235a-260a).

Throughout the litigation, Respondent pointed to the fact that she is listed on her mother's "koseki" or family registration card as proof of her Japanese citizenship. But Japanese nationality law does not recognize automatic birthright citizenship. The Nationality Law of Japan, (Law No. 147 of 1950, as amended by Law No. 268 pf 1952, Law No. 45 of 1984, Law No. 89 of 1993 and Law No. 147 of 2004, Law No. 88 of 2008). Under Japanese law, persons, such as Respondent, who are born as a Japanese national and are also a foreign national must make an affirmative declaration of their choice to be a Japanese National on or before attaining the age of twenty-two. *Id*. at Article 14. Respondent made no such declaration. Rather, Respondent continued to hold a United States Passport, as a citizen of the United States. (App. 235a-260a).

It should also be pointed out that after Petitioner was deprived of his right to file for divorce in his home state of record, he was forced to file for divorce in the state of Maryland, where he had been transferred.[3] However, by that time, Respondent had made efforts to nationalize and otherwise register and claim that she and the minor children were Japanese citizens. Once the trial court denied Respondent's motion to dismiss, again filed on the basis that the state of Maryland lacked jurisdiction, she filed a separate child support action in July of 2020.[4]

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[3] *Alan Crittenden v. Mariko Crittenden*, Case No. C-02-FM—19-000823 (Anne Arundel County Circuit Court, State of Maryland) (currently pending).

[4] *Mariko Crittenden v. Alan Crittenden*, Case No. C-02-FM-20-001938 (Anne Arundel County Circuit Court, State of Maryland) (currently pending).

The proceedings in Maryland would not have been necessary had the State of Georgia properly applied the rule that Petitioner, Respondent, and the minor children were, by law, domiciled in and residents of the State of Georgia when Petitioner sought a divorce in June of 2018 in the state of his official HOR after Respondent absconded with the children into Japan.

C. Procedural History

The parties were married on January 7, 2004 and lived together as husband and wife until December 25, 2017. (App. 24a-25a, ¶ 3). Two minor children were born, the first, in 2011, and the second in 2014. (App. 25a, ¶ 4). Petitioner filed for divorce in the Superior Court of Cherokee County Georgia on May 30, 2018. (App. 14a-20a). Petitioner effectuated personal service of the summons and complaint upon Respondent at her address in Japan on June 6, 2018. (App. 22a).

In his complaint, Petitioner alleged he was a resident of the State of Georgia and that it was his "military home of record." (App. 15a, ¶ 1). Petitioner further alleged that Respondent was an American citizen residing in Japan and was subject to the jurisdiction of courts of the State of Georgia through Georgia's Domestic Long Arm Statute. *Id*., ¶ 2. Petitioner alleged that the antecedent for the divorce was the adultery and cruelty of Respondent. (App. 17a, ¶ 5). Petitioner requested in his prayer for relief that that the state court grant a divorce, equitable division of the parties' property, and to determine *all issues* regarding child custody, support and visitation. (App. 17a-18a).

Petitioner was scheduled to leave Japan for a change of duty station to Maryland in June of 2018. (App. 31a-32a, ¶ 4). On June 6, 2018, Petitioner filed a motion for an emergency hearing to have the children returned to him in the United States until further proceedings were held. (App. 32a-33a). The basis of the motion was Petitioner's fear that Respondent would abscond with the parties' children into the nation of Japan "making it exceedingly difficult if not impossible for the Plaintiff to exercise custodial rights over his children." (App. 33a, ¶ 11).

Respondent had already left with the children before the complaint was filed and Petitioner explained in his brief in support of the emergency motion that they were required by law to bring the children back to the United States in accordance with the Status of Force Agreement (SOFA) that governed the parties' status as American citizens on a military base in the nation of Japan. (App. 35a, ¶ 4). Neither party had any rights to be present in Japan other than by reason of the Petitioner's military service and the protection of the SOFA. *Id*. See also App. 77a-96a, SOFA).

Petitioner alleged that Respondent "vacated the parties' residence in Okinawa, Japan, taking the children and most of the parties' personal property." (App. 32a, ¶ 6). Petitioner further alleged that Respondent "refuse[d] to provide information regarding her whereabout and has ceased communicating with [Petitioner]…[and] told [Petitioner] that he will never see the children again." *Id*. Petitioner alleged that the Respondent "and the children remain in the nation of Japan." *Id*.

Petitioner alleged he did not consent to the children remaining with Respondent in Japan. *Id*., ¶ 8. Petitioner further stated that he was the "proper parent to have primary physical custody of the children" and that he "intend[ed] for the children to reside with him in the United States."

Respondent filed an untimely Answer entitled "Special Appearance for Defendant's Affirmative Defenses and Answer to Plaintiff's Complaint for Divorce" and a Motion to Dismiss on July 6, 2018, more than thirty days after service of the Complaint. (App. 107a-111a; 99a-104a). She argued that she was not subject to the jurisdiction of the state of Georgia and that the state of Georgia lacked subject-matter jurisdiction over Petitioner's action.

On July 6, 2018, the same day she filed her answer and motion to dismiss, Respondent filed a response to Petitioner's emergency motion. (App. 112a–116a). In it, she continued to claim she was not subject to the jurisdiction of the state courts of Georgia. (App. 112a). In part, Respondent claimed that she was not a citizen of any state, even though she admitted she was a United States citizen because she was born in Japan to a United States Citizen father and a Japanese Citizen Mother. *Id*. She attempted to introduce a "koseki," a Japanese family registry as proof of citizenship showing that she had been born in Japan, but she omitted that she was in Japan under the same SOFA as Petitioner. (App. 113a).

The substance of Respondent's argument throughout was based on its "analysis" and proposed "interpretation" of the Georgia "long-arm statute" and

personal jurisdiction over her rather than the Court's subject-matter jurisdiction over the divorce proceedings. O.C.G.A. § 9-10-91. Because she did not maintain a "matrimonial domicile" in the state of Georgia, Respondent argued that the state court could not acquire personal jurisdiction over her. (App. 114a). Respondent further argued that the SOFA did not apply because the minor children "were born in Japan, to a mother, born in Japan, with Japanese Citizenship." *Id.*[5]

Petitioner filed his Response on August 6, 2018. A rule nisi was issued and a hearing was on August 14, 2018. (App. 299a-317a). Trial counsel for Respondent was not prepared to present evidence and Respondent did not appear. The trial court continued the hearing. In lieu of resetting the hearing, the parties consented to submit the matter to the trial court on briefs.

Both parties submitted additional argument and evidence for the Court's consideration. Additionally, Respondent filed an amendment to her Motion to Dismiss. For the first time, Respondent argued that Petitioner's Complaint should be dismissed due to improper service.

On September 28, 2018, the Cherokee County Superior Court granted Respondent's Motion to

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[5] One child was born in California. The other child, while born in Japan, was only in the country because of Petitioner's active-duty military orders requiring him to be in Japan. The entire family remained subject to the SOFA, which gives no rights of domicile or residency to dependents. Respondent only ever had a United States passport and she did not apply for citizenship or residency in Japan until *after* Petitioner filed for divorce. (App. 232a - 233a, ¶¶ 2-5; App. 236a-239a).

Dismiss finding that service of process was improper pursuant to O.C.G.A. § 9-11-4(c), that it lacked personal jurisdiction over Respondent pursuant to O.C.G.A. § 9-10-91(5), and that it lacked subject matter jurisdiction over the parties' divorce pursuant to O.C.G.A. § 19-5-2. Petitioner appealed.

The Court of Appeals affirmed, holding that the Cherokee County Superior Court did not err by dismissing Petitioner's Complaint for lack of subject matter jurisdiction because Petitioner failed to show that he was a bona fide resident of Georgia for the time required by O.C.G.A. § 19-5-2. (App. 4a).[6] The Court of Appeals reasoned that to meet the residency requirement, Petitioner was required to provide evidence of a "single fixed place of abode" in Georgia, where he intended to return after residing elsewhere. *Id*. at 6a. The Court of Appeals acknowledged that Petitioner testified that "he lived in his parents' home in Cherokee County, Georgia; that he has since lived where he was stationed; and that he has never established any other residence" and that Petitioner provided copies of his Georgia tax returns for the last several years. *Id.* Nevertheless, because Petitioner could not point to a Cherokee County, Georgia address, the Court of Appeals determined that Petitioner has no right to file for divorce in the State of Georgia. *Id*. (noting that Petitioner's Georgia tax returns did not list a Georgia address and that there was no evidence in the record that Petitioner's parents' home "or any other place" in Georgia was a

[6] Because the Court of Appeals affirmed the Cherokee County Superior Court based on its conclusion that the court lacked subject matter jurisdiction, the Court of Appeals declined to address any of the other enumerations of error raised in Petitioner's appeal. *Id*. at 7a.

"single fixed place of abode" where Petitioner intended to return).

Petitioner filed a Motion for Reconsideration, which the Court of Appeals denied on March 20, 2020. Petitioner filed a petition for a writ of certiorari to the Supreme Court of Georgia. On November 16, 2020, that court denied the petition. Petitioner now seeks a Writ of Certiorari to the State of Georgia in this Court.

REASONS FOR GRANTING THE PETITION

1. The United States Supreme Court has never addressed a case in which an American citizen, resident of and domiciled in a state of the United States, cannot obtain a divorce because the opposing party refuses to return to the state of domicile, and the divorce cannot be obtained in the country in which the latter party resides. It is one that is particularly important for Petitioner and other military servicemembers who are deployed and on active duty at home and abroad and not in their state of residence or domicile – but who, like Petitioner maintain their original domicile and state of residence at the time that they attempt to exercise their constitutional rights. If the state is not compelled to assume jurisdiction over a petition for divorce filed by a military servicemember in the state that is his or her HOR, then these citizens will be fundamentally deprived of their ability to assert their constitutional rights and avail themselves and their families of all the protections afforded by the Constitution.

2. "[D]omicil is the foundation of probate jurisdiction as it is that of divorce." *Williams v. North*

Carolina, 325 U.S. 226, 231; 65 S. Ct. 1092, 1096 (1945). While between states the issue might be particular to the state's own rules, where the citizen is effectively deprived of a forum altogether, as here, then the issue of full faith and credit ceases to exist, but preserving the constitutional rights of every citizen as against the arbitrariness of state action remains. *Id*. at 231.

While, "[a]ll the world is not party to a divorce proceeding…[w]hat is true is that all the world need not be present before a court granting the decree and yet it must be respected by the other forty-seven States provided – and it is a big proviso – the conditions for the exercise of power by the divorce-decreeing court are validly established whenever that judgment is *elsewhere* called into question." *Id*. at 232 (emphasis added).

Domicile is a jurisdictional fact. *Williams*, *supra* at 232. This Court has noted that "[t]o permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable." *Id*. Likewise, it is equally intolerable to allow a state to effectively punt on this foundational jurisdictional fact where *all states* are required to consider that primary question and by ignoring the question to effectively foreclose a citizen from realizing and immediately protecting his and his family's constitutional rights. *Id*.

"Domicile" is, of course, a concept widely used in both federal and state courts for jurisdiction and conflict-of-laws purposes, and its meaning is generally uncontroverted. See generally Restatement, Conflicts

§§ 11-23 (1935); Leflar, McDougal & Felix, American Conflicts Law 17-38 (4th ed. 1986); Weintraub, Commentary on the Conflict of Laws 12-24 (2d ed. 1980).

A fundamental mistake made by the Georgia state courts in this case was to equate the simple statute defining legal residence with the full scope of the meaning of "domicile". As noted below, not only was this not authorized under the Georgia version of the UCCJEA, but courts have long held that "'[d]omicile' is not necessarily synonymous with 'residence.'" *Perri v. Kisselbach*, 34 N.J. 84, 87, 167 A. 2d 377, 379 (1961). "[O]ne can reside in one place but be domiciled in another." *District of Columbia v. Murphy*, 314 U.S. 441, 454-455; 62 S. Ct. 303; 86 L. Ed. 329 (1941).

For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there. *Texas v. Florida*, 306 U.S. 398, 424; 59 S. Ct. 563; 83 L. Ed. 817 (1939). One acquires a "domicile of origin" at birth, and that domicile continues until a new one (a "domicile of choice") is acquired. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S. Ct. 1597, 1608; 104 L. Ed. 2d 29 (1989). Likewise, since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is automatically determined by that of their parents. *Yarborough v. Yarborough*, 290 U.S. 202, 211; 54 S. Ct. 181; 78 L. Ed. 269 (1933).

There are different kinds of domiciles recognized by the law: (1) domicile of origin; (2) domicile of choice; and (3) domicile by operation of law. *Smith v. Croom*,

7 Fla. 81, 151 (1857); *Louisville & N. R. R. Co. v. Kimbrough*, 115 Ky. 512, 516; 74 S.W. 229, 229 (1903).

The domicile of origin of every person is the domicile of his parents at the time of his birth. *Prentiss v. Barton,* 19 F. Cas. 1276, 1277 (1819). There, Chief Justice Marshall said: "By the general laws of the civilized world, the domicile of the parents at the time of birth, or what is termed the 'domicile of origin,' constitutes the domicile of an infant, and continues, until abandoned, or until the acquisition of a new domicile in a different place." Domicile of choice is the place which a person has elected and chosen for himself, to displace his previous domicile. *Warren v. Warren*, 73 Fla. 764, 784-86, 75 So. 35 (1917) (internal citations omitted). Domicile by operation of law is that domicile which the law attributes to a person, independent of his own intention or action of residence. This results generally from the domestic relations of husband and wife, or parent and child. *In re Estate of Jones*, 192 Iowa 78, 80-81; 182 N.W. 227, 228-29 (1921).

Generally, it is an established rule that a person can have but one domicile *at the same time for the same purpose*. *Id*. It also understood that an original domicile is retained until a new domicile has been actually acquired.

This Court's treatment of the subject is voluminous. The Court has established that the place where a man lives is properly taken to be his domicile until facts adduced establish the contrary. *District of Columbia v. Murphy*, 314 U.S. 441, 455, 62 S. Ct. 303, 309-10 (1941), citing *Ennis v. Smith*, 14 How. 400

(1853). See also *Anderson* v. *Watt*, 138 U.S. 694, 706 (1852).

In the instant case, under any of the tests, Petitioner was only ever domiciled in Georgia. It was his home of record at origin; it was the location of his choice to maintain a driver's license, vote, and pay federal and state income taxes; and it was his place of domicile by operation of law, because whether under the UCCJEA and common law respecting military servicemembers on active duty provide that the HOR is the domicile. (App. 39a-77a; App. 305a). Petitioner always paid taxes and voted in Georgia since his emancipation. Petitioner also holds a Georgia driver's license and his home of record with the military has always been Cherokee County, Georgia. (App. 34a-37a).

Indeed, had Georgia delved into the legal principles further, it would have discovered that most states follow the rule that the HOR of a military servicemember is his or her domicile for purposes of exercising jurisdiction over a divorce proceeding. See, e.g., *Wamsley v. Wamsley*, 333 Md. 454, 461, 635 A.2d 1322, 1325 (1994) (member of the military who originally established domicile in Maryland, but lived elsewhere during his or her service was domiciled in Maryland for purposes of state court jurisdiction over divorce proceedings and stating "fact that members of the military are frequently moved about under military orders…more than explain why an individual occupies a place of abode beyond the state's borders."); *Nora v. Nora*, 494 So.2d 16, 18 (Ala. 1986) (person inducted into military service retains residence in state from which he is inducted until initial residence

abandoned); *Hilburn v. Hilburn*, 287 Ark. 50, 51; 696 S.W.2d 718, 719 (1985) (temporary military assignment to other state and foreign country did not affect domicile); *In re Marriage of Thornton*, 135 Cal.App.3d 500, 509, 185 Cal.Rptr. 388, 393 (1982) (merely purchasing home near military base is not sufficient to demonstrate intent to acquire domicile if contradicted by other substantial evidence of intent); *Weintraub v. Murphy*, 244 S.W.2d 454, 455 (Ky.1951) (serviceman cannot be said to have any home other than that which he has left, since he has no choice as to where he goes, the time he can remain, or when he shall return); *Gowins v. Gowins*, 466 So.2d 32, 35 (La. 1985) (military members presumed to retain domicile of home state); *Blackwell v. Blackwell*, 606 So.2d 1355, 1358 (La. App. 2d Cir. 1992) (serviceman's domicile does not change merely because of move of physical residence while in service of his country); *Blessley v. Blessley*, 91 N.M. 513, 514; 577 P.2d 62, 63 (1978) (domicile of soldier not, in absence of intention to effect a change of domicile, affected by reason of his entering the military); *Zinn v. Zinn*, 327 Pa. Super. 128, 131, 475 A.2d 132, 133 (1984) (serviceman's domicile is presumed not to change from domicile at time of enlistment, but may change if circumstances show intent to abandon old domicile and establish new one); *Carroll v. Jones*, 654 S.W.2d 54, 55 (Tex. App. 1983) (member of armed forces does not acquire new domicile merely by virtue of being stationed in a particular place in line of duty).

In addition, significant legal commentary and annotation has uniformly concluded that "home of record" for purposes of domicile and jurisdiction is the home state from which the military member leaves to

join the service and subject himself or herself to the geographical duty assignments of the government. George H. Fischer, Annotation, *Residence or Domicile, for Purpose of Divorce Action, of One in Armed Forces*, 21 A.L.R.2d 1163, § 13, at 1180 (1952) (practically all authorities agree that military personnel retain a domicile in the state from which they entered the military service and may institute an action for divorce there until the domicile is effectively abandoned and a new domicile established). See also 25 Am.Jur.2d, *Domicil*, § 39, at 30 (1966) ("where the facts are insufficient to justify *a different conclusion*, it will be presumed that the 'usual place of abode' is not changed by entry into military service").

Further, as explained below, by the application of the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), if there is no other jurisdiction, as here, then the state must exercise jurisdiction over the action.[7] In fact, the UCCJEA incorporates this well-established, unrefuted, common-law understanding of domicile. To do otherwise would deprive the citizen of a forum. That is what happened here.

3. Every parent has a constitutional right to the custody and protection of his or her minor children. *Troxel v. Granville*, 530 U.S. 57, 72; 120 S. Ct. 2054; 147 L. Ed. 2d 49 (2000). This Court has consistently held that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. *Quilloin v. Walcott*,

[7] Georgia has adopted the UCCJEA and it is required, by its own statute, to consider the factors when assessing the question of jurisdiction over an action in divorce necessarily involving custody. See O.C.G.A. § 19-9-67(b).

434 U.S. 246, 255; 98 S. Ct. 549; 54 L. Ed. 2d 511 (1978); *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 845; 97 S. Ct. 2094; 53 L. Ed. 2d 14, 35 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 500; 97 S. Ct. 1932; 52 L. Ed. 2d 531, 538 (1977); *Cleveland Bd. of Ed. V. LaFleur*, 414 U.S. 632, 639-40; 94 S. Ct. 791; 39 L. Ed. 2d 52, 60 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-52; 92 S. Ct. 1208; 31 L. Ed. 2d 551, 559 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166; 64 S. Ct. 438; 88 L. Ed. 645, 652 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35; 45 S. Ct. 571; 69 L. Ed. 1070, 1078 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400; 43 S. Ct. 625; 67 L. Ed. 1042, 1045 (1923). Even where blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. *Santosky v. Kramer*, 455 U.S. 745, 753-54; 102 S. Ct. 1388; 71 L. Ed 2d 599, 606 (1982).

It follows that a natural parent is entitled to a hearing regarding his or her rights to custody. *Stanley v. Illinois*, 405 U.S. 645, 649; 92 S. Ct. 1208, 1211 (1972). A denial of this right is a violation of the equal protection clause of the Fourteenth Amendment. *Id*.

In ignoring the domicile and home of record of members of the United States military, the State of Georgia automatically deprived Petitioner of his rights to adjudication of his constitutionally protected right to custody of his minor children.

In refusing to exercise jurisdiction over Petitioner's lawsuit, the State of Georgia leaves military servicemembers who are for all intents and purposes

domiciled in that state, but temporarily serving their country, without a forum in which to claim residency and file for divorce. In doing so, Georgia also leaves the children of such military servicemembers without a home state pursuant to the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), O.C.G.A. § 19-9-40 through § 19-9-64. This, even though children are considered to be domiciles of the domicile of their parents, see *Yarborough*, 290 U.S. at 211, and the UCCJEA in Georgia adopts this well-established and unremarkable proposition, see O.C.G.A. § 19-9-61(a)(1), and indeed *requires* the state court to take jurisdiction over a potential custody matter where there has been no other custody proceeding "commenced in a court of a state having jurisdiction" as defined in the statute. See O.C.G.A. § 19-9-64(b).

When Petitioner filed for divorce in the county of his HOR, *no other state* had or would have had jurisdiction over a custody dispute, and none of the other competing criteria in the UCCJEA were present. See O.C.G.A. § 19-9-61(a)(4) (no court of any other state would have jurisdiction if the criteria in subsections (1) through (3) are not present – which was satisfied because there simply was *no other state* in which any custody dispute could ever be determined at the time Petitioner filed his action; (b) (UCCJEA provides the *exclusive* jurisdictional basis for making a child custody determination), and (c) (physical presence in Georgia not necessary).

As explained in Petitioner's affidavit and per the SOFA, the children were only allowed to be in Japan under the SOFA because Petitioner's active-duty station was Japan. SOFA, 11 U.S.T. 1652, T.I.A.S.

4510. (App. 78a-96a). Under Article IX(2) of the SOFA members of the United States armed forces and their dependents, which included Respondent and the minor children at the time of the underlying action, "shall not be considered as acquiring any right to permanent residence or domicile in the territories of Japan."[8] (App. 81a). As Petitioner pointed out in his petition and brief for an emergency hearing, because Respondent absconded into the nation of Japan with the children and refused to allow them to return with him, they were in the nation of Japan illegally under the SOFA. (App. 35a-36a, ¶¶ 4-7).

In fact, at that time, Petitioner explained that Respondent stopped communicating with him, told him he would never see his children again, and did in fact abscond into Japan and make it "difficult if not impossible" to exercise *any* custodial rights over his children.

In its opinion, the Court of Appeals simply affirmed the state court's superficial and simplistic "residency analysis" from the general provision, O.C.G.A. § 19-5-2, without regard for the unique circumstance that there was no other gaining jurisdiction, and indeed with no mention whatsoever of the UCCJEA's required jurisdictional analysis as identified in O.C.G.A. § 19-9-61 and § 19-9-64. See also O.C.G.A. § 19-9-67(b) (*requiring* this analysis be undertaken).

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[8] Respondent's mother is Japanese and her father is American. Respondent is a United States citizen (App. 97a; 99a) and only after the divorce action was filed did she seek to register and become a legal resident in Japan under the guise of her dual status.

If it had engaged in this required analysis, the Georgia Court of Appeals would have at least had to consider the very specific rules regarding domicile of military servicemembers who are on active duty and away from their home of record – rules which obviated the need for any other analysis in this case because Petitioner was on active duty from the time of his emancipation until the time he filed for divorce, returning to his original, selected, and legal domicile to do so. See, e.g. *Wamsley*, 333 Md. at 461; substantial evidence of intent); *Weintraub*, 244 S.W.2d at 455 (serviceman cannot be said to have any home other than that which he has left, since he has no choice as to where he goes, the time he can remain, or when he shall return). Indeed, had it delved further, it would have discovered the long-standing tradition of military domicile as being the home of record *regardless* of location and length of service. *Id*.

What other option did Petitioner have to exercise his constitutional privilege as a citizen to seek adjudication of his legal rights and responsibilities? His duty station changed from one place to the next, but he remained in the service of the military. His HOR was always the state of Georgia in the county of the residence of his parents; the county where he sought a divorce from Respondent. He could not seek a legal determination of his rights in any other state; certainly no more than he could do in Georgia, which was his only HOR. No other state had jurisdiction, or could have even considered the question as there was no other home of record for either Petitioner or Respondent in the United States.

Nor can Respondent rely on her status as the daughter of a Japanese mother because Respondent herself was always in Japan as the daughter of a United States servicemember, and therefore, was herself subject to the SOFA even before her marriage to Petitioner.[9]

Finally, under the SOFA, neither Petitioner nor his dependents acquired any rights to "residence or domicile" in Japan. (SOFA, § IX(2), App. 81a). Furthermore, the nation of Japan cannot diminish Petitioner's and the minor children's constitutional rights by harboring Respondent indefinitely. No agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution itself. *Bond v. United States*, 572 U.S. 844, 880, 134 S. Ct. 2077, 2101 (2014), citing *Reid v. Covert*, 354 U.S. 1, 15 n.29, 77 S. Ct. 1222, 1229 (1957). The Constitutional guarantees to citizens are preserved when they are under a SOFA. *Munaf v. Geren*, 553 U.S. 674, 701 n.5, 128 S. Ct. 2207, 2225 (2008). This would, of course, include the fundamental right to custody, care and protection of Petitioner's minor children. *Troxel v. Granville*, 530 U.S. 57, 72; 120 S. Ct. 2054; 147 L. Ed. 2d 49 (2000). This Court has stated that the right to an adjudication of custody is guaranteed by the Fourteenth Amendment, and a deprivation thereof is a violation of that amendment's guarantee of equal protection of the law. *Stanley v. Illinois*, 405 U.S. 645, 649; 92 S. Ct. 1208, 1211 (1972).

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[9] All efforts Respondent made to become recognized as a Japanese national and/or citizen occurred *after* Petitioner filed for divorce in Georgia. (App. 119a-125a; 128a-131a; App. 306a).

CONCLUSION

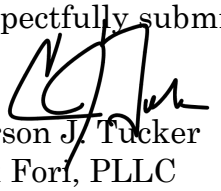
By refusing to accept jurisdiction of this case, the State of Georgia deprived Petitioner and his minor children of their rights under the Fourteenth Amendment to equal protection of the law by depriving them of a forum in which to adjudicate their privileges and responsibilities regarding financial obligations, property and custody. Not only is the consequences of the state court's decision deleterious to Petitioner's constitutional rights as a parent, but this ruling will affect all military servicemembers and their families who seek to avail themselves of the jurisdiction of the courts of their HOR when they have not established another domicile.

The state's decision also runs contrary to the common-law principles governing domicile, which, as established herein, have been incorporated into the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Given the large number of military servicemembers, this outcome will cause significant disruption among the states in the application of their statutes adopting the UCCJEA.

RELIEF REQUESTED

For all the reasons stated above, Petitioner respectfully requests the Court grant his petition or summarily reverse the decision of the Georgia Supreme Court and Georgia Court of Appeals and remand to the state courts for recognition of jurisdiction and Petitioner's rights to file suit and have his and his minor children's rights adjudicated in that state.

Respectfully submitted,



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Dated: April 15, 2021