No.

IN THE
SUPREME COURT OF THE UNITED STATES

HITOMI ARIMITSU,
Petitioner,

v.

JAMES EDWARD COOK, II,
Respondent.

On Petition For A Writ Of Certiorari To The Minnesota Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

AMY M. KEATING*
ANDREW A. ZASHIN
CHRISTOPHER R. REYNOLDS
ZASHIN & RICH CO., L.P.A.
950 Main Avenue, 4th Floor
Cleveland, OH 44113
(212) 696-4441
aaz@zrlaw.com
crr@zrlaw.com
aaz@zrlaw.com
*COUNSEL OF RECORD

VALERIE D. ARNOLD
MICAELA A. WATTENBARGER
MICHAEL G. CAIN
ARNOLD, RODMAN & KRETCHMER, P.A.
2626 E 82nd Street, Suite 355
Bloomington, MN 55425
(952) 955-8008
val@arkmn.com
micaela@arkmn.com
mcain@arkmn.com

Counsel for Petitioner

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTIONS PRESENTED

The 1980 Hague Convention on the Civil Aspects of International Child Abduction ("Convention") requires that a Contracting State stay any child custody proceeding pending its determination on a Petition for Return of a Child. Per Article 16 of the Convention, the stay on the Contracting State's custody jurisdiction is lifted if the child is not returned. The four children in this case went to Japan with Petitioner in July of 2014. In January 2016, Respondent obtained an initial Hague Order from the Osaka Family Court in Japan, ordering that the return the children to the state of Minnesota ("Original Hague Order"). The Osaka High Court issued a decision on February 17, 2017, which modified the Original Hague Order by ruling that the children did not need to be returned to the United States based upon Article 13 affirmative defenses ("Modified Hague Order"). In December 2017, the Supreme Court of Japan issued its decision confirming the Modified Hague Order and finding, specifically, that the children need not return ("Final Hague Order"). As a result of the Final Hague Order, the children were not returned, and child custody proceeding were commenced in Japan. Despite Japan's resolution of the Hague petition, the Minnesota court disregarded Japan's Final Hague Order, ignored Japan's custody jurisdiction, and proceeded with its own simultaneous custody proceedings. The questions presented are:

1. Whether the Minnesota courts' refusal to acknowledge the ultimate outcome of Convention proceedings by a Contracting State

and declining to afford comity to the Final Hague Order of the Supreme Court of Japan impermissibly frustrates a core purpose of the Convention?

2. Whether a Contracting State's custody jurisdiction authorized by Article 16 of the Convention supersedes a State's exercise of child custody jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) when a Contracting State does not order the return of a child?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

RELATED CASES

- *In re the Marriage of, James Edward Cook, II, and Hitomi Arimitsu*, Court File No. 27-FA-15-499, Hennepin County District Court, Fourth Judicial District of Minnesota. Judgment entered June 10, 2019.
- *In re the Marriage of, James Edward Cook, II, and Hitomi Arimitsu,* A17-0861, State of Minnesota in Court of Appeals. Decision filed January 22, 2018.
- *In re the Marriage of, James Edward Cook, II, and Hitomi Arimitsu,* A17-0861, State of Minnesota in Supreme Court. Order filed April 17, 2018.
- *In re the Marriage of, James Edward Cook, II, and Hitomi Arimitsu,* A19-0247, State of Minnesota in Court of Appeals. Order filed, March 26, 2019.
- *In re the Marriage of, James Edward Cook, II, and Hitomi Arimitsu,* A19-1235, State of Minnesota in Court of Appeals. Unpublished opinion filed, April 27, 2020, Judgment entered August 24, 2020.
- *In re the Marriage of, James Edward Cook, II, and Hitomi Arimitsu,* A19-1235, State of Minnesota in Supreme Court. Order filed July 21, 2020.

TABLE OF CONTENTS

APPENDIX INDEX

TABLE OF AUTHORITIES

CASES

RULES AND STATUTES

TREATIES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

PETITIONER HITOMI ARIMITSU RESPECTFULLY PETITIONS FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE MINNESOTA COURT OF APPEALS AS THE MINNESOTA SUPREME COURT DECLINED DISCRETIONARY REVIEW.

OPINIONS BELOW

The Minnesota Court of Appeals opinion is available at 2020 Minn. App. Unpub. LEXIS 360. App. 1a. The Order of the Minnesota Supreme Court denying review is available at App. 192a. The relevant district court opinions are available at 2018 Minn. Dist. LEXIS 110 (App. 85a.-105a.) and 2019 Minn. Dist. LEXIS 190. App. 27a.-69a.

JURISDICTION

The judgment of the Minnesota Court of Appeals was entered on August 24, 2020. The Minnesota Supreme Court denied review by Order issued July 21, 2020. This Court has jurisdiction under 28 U.S.C. § 254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

The Hague Convention and relevant portions of its enabling statute, the International Child Abduction Remedies Act, 22 U.S.C. §§ 9001 & 9003 ("ICARA"), as well as the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") (Minn.

Stat. §518D), are reproduced in the Appendix. App. 242a.-253a.

STATEMENT

Recognition of treaty partners' decisions under the Convention is fundamental to being a Contracting State and a core principle of the Convention. Respecting those decisions—and treaty partners exercising custody jurisdiction under those decisions—furthers the Convention's goals and avoids international jurisdictional competition over children. The Convention is in part jurisdictional in its application, in that one of its purposes is to "provide for a reasoned determination of where jurisdiction over a custody dispute is properly placed." *Barzilay v. Barzilay*, 600 F.3d 912,916-18 (8th Cir. 2010), quoting *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005). Article 16 of the Convention contemplates that a Contracting State will exercise custody jurisdiction when it determines that a child is not ordered to return to his or her place of habitual residence.

The Minnesota Supreme Court's decision to allow the Minnesota Court of Appeals' decision to stand frustrates a core purpose of the Convention. By declining to extend comity to a treaty partner's final order, the Minnesota Supreme Court ignores the Supremacy of the Convention and sets a dangerous precedent that will open the floodgates for re-litigation of foreign Convention decisions by our state trial courts. Additionally, it undermines the credibility of the United States as a Contracting State, exposes our decisions to re-litigation through the courts of our co-Contracting States, and frustrates a core purpose of the Convention

The Court should grant review to develop and clarify an important question of federal law—namely, the recognition of treaty partners' orders absent application of a very narrow legal standard to preserve the United States' international integrity as a Contracting State. This Court should also grant review to address how application of the Convention should be treated when addressing a direct conflict between Article 16 of the Convention and the exercise of custody jurisdiction under the UCCJEA when a Contracting State determines that a child will not be returned to the United States. Both issues reflect important federal questions that lack clarity under existing law and are likely to generate competing international custody litigation and frustrate core purposes of the Convention.

1. In 1980, the member states of the Hague Conference on Private International Law – including the United States – unanimously adopted the 1980 Hague Convention on the Civil Aspects of International Child Abduction. *See* U.S. Dep't of State, *Hague International Child Abduction Convention; Text and Legal Analysis*, Letter of Submittal from George P. Schultz to Pres. Ronald Reagan (Oct. 4, 1985), 51 Fed. Reg. 10,494, 10,496 (Mar. 26, 1986). Pursuant to Article 1 of the Convention, one of the primary objects is to "ensure that the rights of custody and access under the law of one Contracting State are effectively respected in other Contracting States."

As explained by the Eighth Circuit in *Barzilay v. Barzilay*, the Convention determines child custody jurisdiction in international cases. 600 F.3d 912, 916-18. Pursuant to the Convention's Preamble, a primary

purpose of the Convention is "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." *Id.* 917-17, citing the Convention at 98. The Convention establishes this goal not by establishing any substantive law of custody, but by acting as a forum selection mechanism. The purpose of the Convention is, in other words, to "provide for a reasoned determination of where jurisdiction over a custody dispute is properly placed." *Barzilay* at 916-918, quoting *Yang v. Tsui*, 416 416 F.3d 199 at 203. In cases where the Contracting States does not order the return, this forum selection process should determine jurisdiction to be in the place where the children remain following the final conclusion of the Hague Proceeding. This is the crux of the instant litigation.

In 1988, Congress passed the Convention's enabling statute, the ICARA. *See* Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified at 22 U.S.C. §§ 9001-9011). In its findings relative to this statute, Congress reiterated the Convention's purpose, which is "to help resolve the problem of international abduction and retention of children" and to return children who are wrongfully removed or retained "unless one of the narrow exceptions set forth in the Convention applies." § 9001(a)(4). The Convention explicitly provides that the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes his or her return establishes an applicable defense, including that "there is a grave risk that his or her return would expose the child to

physical or psychological harm or otherwise place the child in an intolerable situation." *See Art. 13.* Moreover, the requested State may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views. *Id.* As a quasi-jurisdictional treaty, the Convention's Article 16 recognition of custody jurisdiction when a return is not ordered serves the purpose of ensuring that custody decisions are made in the jurisdiction where the children are appropriately located, and not, for example in the jurisdiction that poses a "grave risk" of harm to the child. When Congress adopted legislation implementing the Convention, it emphasized "the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B).

2. Petitioner Hitomi Arimitsu, a Japanese citizen, and Respondent James Edward Cook, II, an American citizen, were married in 1998 and began residing together in Minnesota. App. 29a. The parties have four children, twins born in 2002, and twins born in 2008. App. 39a. Following the birth of the second set of twins, Arimitsu was a full-time homemaker. App. 43a. Facing ongoing financial difficulties due to Cook's chronic unemployment, the parties made plans for Arimitsu and the children to move to Japan. App. 29a. Cook was involved in an extramarital affair and chose to remain Minnesota. *Id.* On July 13, 2014, Arimitsu moved with the children to Japan to live with her parents, who had been supporting them financially. *Id.* Cook visited the children in Japan. *Id.* Cook supported the children's move to Japan by completing

enrollment paperwork for them to attend school in Japan. App. 187a.

3. In 2015, Cook initiated divorce proceedings in Minnesota. *Id.* at 2a. Initially, the Minnesota district court found that it lacked subject matter jurisdiction over the children and was not the children's "home state" under the UCCJEA. *Id.* Cook failed to appeal this determination.

In 2016, Japan issued the Original Hague Order requiring return of the children to the United States. *Id.* at 148a.-191a. Based on that Order, Cook filed a motion before a newly assigned judicial officer to reestablish subject matter jurisdiction over child custody *Id.* at 3a. On December 2, 2016, the Minnesota district court ordered registration and enforcement of the Original Hague Order and overturned its prior ruling to exercise subject matter jurisdiction over child custody. App. 142a.

Arimitsu provided notice in Minnesota that the Original Hague Order was subject to an appeal in Japan, and as such, was not a final order. App. 4a. Arimitsu appealed the December 2016 Minnesota decision. App. 5a. Arimitsu also appealed the Original Hague Order in Japan. App. 4a.

In February 2017, Japan issued the Modified Hague Order, which determined that the children were *no longer required to return* to the United States pursuant to Article 13 of the Convention. *Id.*

Despite receipt of the Modified Hague Order, the Minnesota district court continued to recognize only the Original Hague Order, and found Arimitsu in constructive civil contempt for failing to return the children to Minnesota. App. 78a. On April 4, 2017, the Minnesota district court denied Arimitsu's motion for

amended findings and upheld its December 2016 Order—that it had custody jurisdiction over the children and its 2015 Order declaring that Minnesota was not the children's "home state" was "clearly erroneous." App. 34a. On June 12, 2017, the Minnesota district court issued additional orders enforcing the Original Hague Order and ignoring the Modified version.

Arimitsu appealed the Minnesota district court's April 2017 decision, arguing Minnesota lacked subject matter jurisdiction under the UCCJEA to hear the parties' custody dispute. App. 5a. Arimitsu also asserted that there was no proper registration of the Original Hague Order. *Id.* She further argued that by ignoring the practical and legal ramifications of the Modified Hague Order, the district court applied a double standard to the two Japanese orders which would have the effect of undercutting the intent of the Convention, as well as the intent of the UCCJEA, both of which aim to avoid jurisdictional conflicts. *Id.* On January 22, 2018, the Minnesota Court of Appeals affirmed the district court's April 4, 2017 Order. *Cook v. Arimitsu*, 907 N.W.2d 233 (Minn. App. 2018), *rev. denied*. ("Cook I").

4. On December 21, 2017, while Arimitsu's 2017 Minnesota appeal was pending, the Japanese Supreme Court affirmed the Modified Hague Order that the children need not be returned to the United States, issuing its Final Hague Order. The Final Hague Order determined that the older two children objected to being returned and had attained an age and degree of maturity to take account of their views per Article 13; it determined that the younger two children should not be returned per Article 13(b) both

because they would be separated from their older siblings and due to Cook's inability to provide for them. App. 130a.-132a. On March 26, 2018, the Osaka Family Court vacated money judgments previously entered against Arimitsu in Japan. *Id.* at 129.

On May 23, 2018, Arimitsu filed for registration and enforcement, pursuant to the UCCJEA, of the Final Hague Order, the Modified Hague Order, and the Certification of the final decision, which ordered that the children need not return to the United States. Following Cook's objection to registration and enforcement, Arimitsu filed a motion on September 17, 2018 seeking registration and enforcement of the above-referenced Orders pursuant to the UCCJEA and/or under the doctrine of comity, as well as recognition of the 2018 Decision of the Osaka Family Court, which vacated monetary judgments ordered against Arimitsu. App. 93a. Arimitsu's motion also included a request for an order recognizing the child custody jurisdiction of Japan or, in the alternative declining jurisdiction as Japan was the more appropriate forum. *Id.* By Order filed December 10, 2018, the Minnesota district court denied Arimitsu's motions in their entirety. *Id*. at 104a.

5. On February 8, 2019, Arimitsu appealed the district court's December 10, 2018 Order, *Id.* at 5a. The Minnesota Court of Appeals, without the benefit of full briefing or oral argument addressing the impact of the new Japanese court orders, dismissed the appeal as an improper request to reverse *Cook I* on March 26, 2019. *Id.*

6. On May 7, 2019, the Minnesota district court held a trial on the dissolution matter including child custody. Arimitsu did not appear. On June 10, 2019,

the district court filed its Findings of Fact, Conclusions of Law and Judgment and Decree. App. 27a.-69a. Cook was awarded sole legal and sole physical custody of the children, subject to Arimitsu's right to supervised parenting time. In its findings, the district court concluded that Japan's rescission of the earlier Original Hague Order was "in abject violation of the Hague Convention." App. 56a. The district court disregarded the Modified Hague Order and the Final Hague Order, finding that the Minnesota district court found that it had a "duty to uphold the tenets of the Hague Convention—even if a sister signatory fails to do so—and Japan has failed in this case at every juncture—to the detriment of destroying the childhood of each of the four children present in this case." App. 30a. It concluded that Japan had acted "contrary to the intention of the Hague Convention" and its decision "rests on a faulty application of Article 13(b) of the Hague Convention". App. 58a.

On June 10, 2019, without notice to Arimitsu, the district court filed an Order for Contempt (App. 6a.) issued a bench warrant (App. 80a.) and entered judgment as to contempt. App. 79a.

7. Arimitsu appealed the district court's June 10, 2019 Judgments and Orders on August 6, 2019. App. 6a. By Unpublished Order filed April 27, 2020, the Court of Appeals affirmed the decisions of the district court, except that it reversed and remanded the contempt order for further proceedings. *Cook v. Arimitsu*, 2020 Minn. App. Unpub. LEXIS 360 (Minn. App., Apr. 27, 2020), *rev. denied.* ("Cook II"). On July 21, 2020, the Minnesota Supreme Court denied Arimitsu's petition for further review. App. 192a.

8. Custody proceedings concerning the parties' four (4) children are ongoing in Japan; Cook actively participates in these proceedings. Simultaneously, the Minnesota district court continues to exercise custody jurisdiction over the children. Accordingly, the Japanese and Minnesota courts' contrary and conflicting orders will continue absent a determination as to the Supremacy of the Contracting State's jurisdiction when a return order is denied.

REASONS FOR GRANTING THE PETITION

In the past decade, this Court has granted review four times to clarify application of the Convention. *See Lozano v. Montoya Alvarez*, 572 U.S. 1 (2014)(equitable tolling); *Chafin v. Chafin*, 568 U.S. 165 (2013)(mootness); *Abbott v. Abbott*, 560 U.S. 1 (2010)(custody rights); and *Monasky v. Taglieri*, 140 S. Ct. 719 (2019)(habitual residence). The Court has never addressed either of the following: (1) recognition of treaty partners' orders under the Convention; or (2) the direct conflict between Article 16 and the UCCJEA, including specifically the implications of Article 13 defenses on state subject matter jurisdiction regarding child custody as well as when a return order is denied on other grounds. This case provides the Court with a valuable opportunity to address important federal questions about our responsibilities as a Contracting State and when state courts must yield child custody jurisdiction to a treaty partner when a child is not ordered to return.

The Minnesota courts' decision to ignore the Final Hague Order of the Supreme Court of Japan sets a dangerous precedent that will open the floodgates for re-litigation of foreign Convention

decisions by our state courts and will undermine the credibility of the United States as a Contracting State. Of further concern is the inconsistency between our own governmental bodies with respect to whether or not the Order of the Supreme Court of Japan is "contrary to the intention of the Hague Convention." While the Minnesota courts found that the Final Hague Order is "contrary to the purpose of the Convention," the U.S. Department of State disagrees. The 2019 and 2020 Annual Reports on International Child Abduction issued by the U.S. Department of State pursuant to the Sean and David Goldman International Child Abduction Prevention and Return Act of 2014, 22 U.S.C. § 9111, et. seq. ("ICAPRA"), provide that Japan is not a country that has demonstrated a pattern of noncompliance. Rather, the 2020 Report notes that "[t]he United States and the Japanese Central Authorities have a strong and productive relationship that facilitates the resolution of abduction cases under the Convention." The Reports also suggest that the U.S. State Department considers the *present* case as being resolved as the 2019 IPCA cases listed by the U.S. State Department do not identify outstanding cases involving Japan listed for Minnesota.

Contrary to the Minnesota Court of Appeals' reference to the "unique facts" of this case, these legal issues will surface *each time* a Contracting State declines to order the return of a child to the United States under the Convention. The Minnesota lower courts' analyses are critically defective by rejecting a treaty partner's application of an affirmative defense under the Convention. Similarly, the lower courts' analyses undermine the purpose and effect of Article

16 of the Convention, which provides that a Contracting State may exercise jurisdiction over child custody once it is determined that child "is not to be returned." If the Japanese Supreme Court's Final Hague Order and similar determinations by other Contracting States are not recognized by United States state courts, the result will be a continuation of simultaneous and inconsistent litigation and court rulings in both Contracting States.

The Court should not permit this intolerable tension between Contracting States to persist in the United States. In the absence of clarity, this Minnesota decision and others like it will inevitably have the effect of encouraging jurisdictional competition and will undermine the purposes of the Convention and principles of federal and international law in direct contravention of Congress's emphasis on "the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B).

This Court should grant review to restore the "uniformity" that Congress deemed essential in the Convention setting and Certiorari is warranted to resolve whether Minnesota courts' refusal to acknowledge the ultimate outcome of Convention proceedings by a co-Contracting State impermissibly frustrates a core purpose of the Convention.

I. CERTIORARI IS WARRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER LOWER COURTS CAN REFUSE TO ACKNOWLEDGE THE ULTIMATE OUTCOME OF CONVENTION PROCEEDINGS BY A CO-CONTRACTING STATE AND DECLINE TO

AFFORD COMITY TO A FINAL HAGUE ORDER FROM THE SUPREME COURT OF JAPAN, THEREBY IMPERMISSIBLY FRUSTRATING A CORE PURPOSE OF THE CONVENTION.

The Japanese Orders, specifically the Final Hague Order affirming the Modified Hague Order, should be afforded comity; refusing to do so undermines and frustrates a core purpose of the Convention. Japan's interpretation of Article 13(b) of the Convention is fully consistent with the purpose of the Convention and the interpretation of other jurisdictions, including the Eighth Circuit as set forth below. The presumption is that treaty partner's orders should be afforded comity; the lower courts failed to show that these Japanese Orders meet the very narrow exception set forth in existing case law. The Final Hague Order is not a "clear misrepresentation of the Hague Convention" and meets a minimum standard of reasonableness. The lower courts erred in declining to afford comity to the Japanese Orders and expanding a narrowly tailored exception to substitute their judgment for that of a treaty partner's highest court.

1. As the Ninth Circuit stated in *Asvesta v. Petroutsas*, 580 F.3d 1000, 1011 (9th Cir. 2009):

> The few United States courts that have addressed the extension of comity to Hague Convention orders or foreign courts "have observed that comity 'is at the heart of the Hague Convention.'" *Diorinou v. Mezitis*, 247 F.3d 133, 138-39 (2d Cir. 2001)(quoting *Blondin v. Dubois*, 189 F.3d 240, 248 (2d Cir. 1999)). The Second Circuit has noted that, where

> comity is at issue, a court properly begins its analysis "with an inclination to accord deference" to a foreign court's adjudication of a related Hague petition. *Diorinou*, 237 F.3d at 145. We agree. Such an approach is consistent with the Convention drafters' primary concern "with securing international cooperation regarding the return of children wrongfully taken by a parent from one country to another.

Gonzalez v. Gutierrez, 311 F.3d 942, 944 (9th Cir. 2002).

The Ninth Circuit, however, also found United States courts may "properly decline to extend comity to the [foreign] court's determination if it clearly misrepresents the Hague Convention, contravenes the Convention's fundamental premises or objectives, or fails to meet a minimum standard of reasonableness." *Id.*

The lower courts declined to extend comity to the Final Hague Order (affirming the Modified Hague Order) on three grounds: (1) because the findings supposedly "lacked support in the factual record" and the conclusions were made "absent any evidence."; (2) because the findings were "contrary to the Hague Convention text and purposes," and in "violation of the Hague Convention,"; and (3) because the findings were "inconsistent with how courts in the United States interpret the Hague Convention's limited exceptions" and are "contrary to…U.S. law." App. 96a. The lower courts accordingly rejected these Orders' application of Article 13 defenses.

The strong presumption is that comity should be afforded absent meeting a very narrow exception. Here, the lower courts ignore the presumption *for* comity and use the exception to "swallow" the rule. The lower courts show no deference to the Final Hague Order from Japan's highest court and instead conduct a re-trial of the Japanese's courts factual findings and substitute their interpretation of the Convention when the narrow exceptions did not apply. Simply put, there was no deference to the Japanese courts' factual findings and Minnesota applied a new standard of 're-finding the facts.' Moreover, Japan's interpretation of Article 13's "mature child" defense and the grave risk of harm defense are consistent with the interpretation of other jurisdictions, including various U.S. Circuits, and should have been afforded comity, recognized, and enforced.

The Japanese courts found the "mature child" defense was applicable as the parties' oldest children strongly objected to being returned to the United States and have attained an age and degree of maturity at which it is appropriate to take account of their views. App. 130a. At the time of the Japanese trial, the older children (twins) were twelve years and nine months (12 years, 9 months) of age; when the Final Hague Order was issued, the older twins had turned fifteen (15). Accordingly, the Japanese trial court declined to order the return of the older children. *Id*. The Japanese Supreme Court further affirmed the conclusion that the children would be placed in an intolerable situation if the younger children were returned to the United States without their older siblings given their close relationship. App. 131a.

Additionally, Cook did not have the ability to provide the children with stable housing or a suitable custodial environment. *Id.*

The Japanese Court's findings regarding the maturity of the older children and the impact on the children (collectively) of separating them are in direct conflict with the findings of the Minnesota trial court. The Minnesota decision does not just incorrectly apply the facts to the law, it fashions a new legal standard that gives absolutely no deference to the Contracting State's decision and no presumption in favor of comity.

2. The lower courts improperly declined to afford comity to the Japanese Orders based on a finding that the Japanese Court lacked supporting evidence. App. 96a. The district court's role in deciding whether to afford comity to a foreign order is to determine whether the Japanese Court "clearly misrepresented the Convention or failed to meet a minimum standard of reasonableness." App. 140a. This is not and should not be a pure *de novo* review or an alteration of the result because Minnesota *could have* found differently. The legal standard does not permit 're-finding of facts' without any deference. App. 9a. Moreover, the Minnesota courts did not have access to the 2017 Japanese record—so it was impossible for them to determine what "supporting evidence" was presented, much less that it was insufficient. App. 96a. Because an analysis of whether the Japanese Court's findings were properly supported by the record is both outside of the Minnesota court's role and impossible given the information available to the trial court, it was improper for the trial court to decline to afford comity to the Japanese Orders based

on a finding that the Japanese Court lacked supporting evidence.

Moreover, the Japanese Court's Final Hague Order (and Modified Hague Order), largely relied on previous findings made in the Original Hague Order concerning the older twins' objections to being returned to the United States, their maturity, appropriate reliance on the older twins' statements, and the close relationships between the siblings. App. 116a., 130a. The Minnesota trial court previously affirmed these prior findings by recognizing and enforcing the Original Hague Order in its December 2, 2016 Order. App. 135a. It is illogical and clearly erroneous for the district court to then find that the Japanese Court's findings "lacked supporting evidence" when it previously *affirmed* many of the same findings by recognizing and enforcing the Original Hague Order.

3. The trial court improperly declined to afford comity to the Japanese Orders based on a finding that the findings in the Japanese Orders were contrary to the Convention. App. 139a.

The trial court completely failed to identify which findings in the Japanese Order it believed were contrary to the Convention. The Minnesota lower courts acknowledged and enforced the Original Hague Order but then failed to acknowledge and enforce the Final (and Modified) Hague Order which overturned it. *Id*. This inconsistent recognition has created chaos resulting in inconsistent rulings and obligations while undermining uniform application of international law.

This Court, in *Abbott v. Abbott*, 560, 23, U.S. 1 (2010), found that "the best interests of the child are

well-served when decisions regarding custody rights are made in the country of habitual residence." *Abbott*, however, specifically did not involve interpretation or application of Article 13 exceptions. *Id*. at 22. While it is true that, generally, the Convention intends that custody rights be determined in the place of the child's habitual residence, the Convention also expressly provides the defenses in Article 13 to address situations where the child will, appropriately, not be returned to the child's place of habitual residence and where, accordingly, custody rights will be determined by the place the child now resides. Japan applied Article 13 defenses to determine that all the children should not be returned to their habitual residence; such a situation is contemplated by the Convention. The Minnesota courts are flawed in their view that it is "contrary to the Convention" not to order a return in all cases. App. 139a

4. The lower courts erred and improperly declined to afford comity to the later Japanese Orders based on a conclusion that the findings in those Japanese Orders were inconsistent with how courts in the United States interpret the Convention's Article 13 defenses. While this conclusion is demonstrably inaccurate, the correct standard is whether Japan clearly misinterpreted the Convention or failed to meet a minimum standard of reasonableness, not whether a Japanese Order is specifically consistent with how the United States has interpreted the Convention defenses. This conflict of standards requires this Court's intervention.

Moreover, Japan's interpretation and implementation of the "mature child" defense is *consistent* with the interpretation of other

jurisdictions, including the United States. In *Custodio v. Samillan*, 842 F.3d 1084 (8th Cir. 2016), the court held that for a parent to succeed on a mature child defense the parent must establish by a preponderance of the evidence, "(1) that the child has 'attained an age and degree of maturity at which it is appropriate to take account of its views' and (2) 'that the child objects to being returned.'" *Id.* at 1089, citing Convention Art. 13; *see* 22 U.S.C. § 9003(e)(2)(B)(burden of proof); *Rodriguez v. Yanez*, 817 F.3d 466, 474 (5th Cir. 2016)(affirming this two-part test). The Eighth Circuit held that the child's objections themselves are reviewed using a clear error standard, as a finding of whether or not a child has objected is a "fact-intensive" determination. 842 F.3d at 1089. In fact, the court held that "[t]he child's objections can be the sole reason that a court refuses to order return, but when they are, the 'court must apply a stricter standard in considering a child's wishes.'" *Id.*, quoting *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 278 (3d Cir. 2007)(quoting *de Silva v. Pitts*, 481 F.3d 1279, 1286 (10th Cir. 2007)). This reasoning is consistent with the Perez-Vera Explanatory Report, which indicates that the drafters of the Convention believed a mature child's views on return can be "conclusive." *Id.*, citing Elisa Perez-Vera, *Explanatory Report: Hague Convention on Private International Law* ¶ 30 (1981), http://assets.hcch.net/upload/expl28.pdf ("Perez-Vera Report"). The Perez-Vera Report also noted that "in this way, the Convention gives children the possibility of interpreting their own interests." *Id.*

In *Custodio*, the child wished to remain in the United States because he did not want to be separated from his siblings or mother, because he did not feel

safe with his father, who was aggressive, and because he liked his friends and school in the United States. *Custodio,* 842 F.3d at 1090. The trial court found the child was "very thoughtful and intelligent" and that his testimony represented his "genuine thoughts and feelings", *Id.*, and refused to order his return to Peru. *Id.* The 8th Circuit affirmed, acknowledging the mother's actions in bringing the children to the United States with no intention of returning the children and thereafter disobeying five orders from the Peruvian court compelling her to return the children were concerning, but found that the trial court's decision to nonetheless respect the 15-year-old's opposition to returning to Peru was not an abuse of discretion. *Id.* at 1091-1092.

Additionally, other U.S. Circuits have employed this defense in cases involving separation of siblings. In *Ermini v. Vittori*, 758 F.3d 153, 167 (2d Cir. 2014), the Second Circuit affirmed the lower court's declination to separate children, as "[c]ourts in [the Second] Circuit have frequently declined to separate siblings, finding that the sibling relationship should be protected *even if only one of the children can properly raise an affirmative defense under the Hague Convention.*" *Id.* quoting *Ermini v. Vittori*, 2013 WL 1703590 (emphasis added), citing *Blondin v. Dubois*, 78 F. Supp. 2d 283, 291 (S.D.N.Y. Jan. 12, 2000), *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1005-06 (N. D. Ill. 1989), and *Broca v. Giron*, No. 11 CV 5818 (SJ)(JMA), 2013 WL 867276, at *9 (E.D.N.Y. Mar. 7, 2013).

Many courts have found that children age 12—or younger—have reached an age and maturity level sufficient to trigger the Article 13 "maturity"

provision. *See Simcox v. Simcox,* 499 Supp. 2d 946,952 (N.D. Ohio 2007) (12- and 10-year-old children found to be of sufficient age and maturity); See *Giampaolo v. Erneta,* 390 F.Supp.2d 1269 (N.D.Ga.2004) (age 10); *Anderson v. Acree,* 250 F. Supp.2d 876, 883-884 (S.D. Ohio 2002) (age 8); *Blondin v. Dubois,* 238 F.3d 153, 164 (2d Cir. 2001) (age 8).

In the instant case, in its October 30, 2015 Order the Osaka Family Court found that the older children (who were 12 years and 9 months old at that time) had an independent, reliable basis for objecting to being returned to the United States. They were of sufficient age and maturity to have their opinions considered by the Court. App. 177a.

The two older children had several reasons for objecting to being returned to the United States, including social relationships and friends in Japan, fear of being separated from their siblings and mother, strong preference for the Japanese educational system, and identification with and assimilation into Japanese culture. *Id*. at 178. Importantly, one child clearly stated he was afraid of Cook and that Cook's mother had threatened him. App. 176a.

The Osaka Family Court found the older children stated their wishes clearly and logically. They both had an objective and proper understanding of the situation. There was no indication that their opinions were swayed by either parent. Considering the boys' ages and maturity level, the Osaka Family Court concluded their opinions should be considered. App. 177a. At the same time, the Osaka Court found the two younger children were not of sufficient age or

maturity to express an independent, reliable preference, with an objective understanding of the situation. *Id*.

The Original Hague Order ordered all children return to the United States, as it would be harmful to separate the children. The Osaka Family Court, however, did find the older children "were matured enough [sic] for their age (12 years and 9 months)" and found "they stated their own opinions to the probation officer, keeping a certain distance from both [Cook's] and [Arimitsu's] ideas" and "do not seem to have been under the undue influence of [Arimitsu]." *Id*. The Minnesota trial court affirmed this Order, and therefore, its findings, when it recognized and enforced it.

In the subsequent Modified Hague Order, the Osaka High Court, found the older children continue to strongly refuse to be returned to the United States, and that, based on that objection, no return was ordered. App. 130a. The High Court also found Cook did not have stable housing in the United States, that it was not clear whether he would be able to provide stable housing or a stable environment for the children if they returned, that Cook did not have adequate support in the United States, and Arimitsu would not be able to feasibly return to the United States with the children in order to provide them with stable housing and a stable custodial environment. App. 132a. The Osaka High Court found the above circumstances constituted a grave risk of physical and psychological harm if the children are returned or would otherwise place the children in an intolerable situation. App. 8, 58, 97, 114-116, 131.

On December 21, 2017, the Japanese Supreme Court affirmed the Modified Hague Order and issued the Final Hague Order. App. 106a.-120a. In doing so, the Japanese Supreme Court found the older children had expressed their intention that they strongly refused to be returned to the United States and that all children expressed a wish to not be separated from their siblings. App. 116a. The Japanese Supreme Court thus concluded there were grounds for refusing to return the older children in that they strongly object to being returned and for refusing to return the younger children on the grounds that it would create an intolerable situation to separate the children (collectively), who have a close relationship. *Id.*; see also *Ermini*, at 167.

Japan's decision not to return the older children due to their ongoing objections as mature children is entirely consistent with Article 13(b). See, e.g., *Custodio*, at 189.

5. The Japanese Court's interpretation of the grave risk of harm defense is also consistent with that of other United States Circuits. In *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995), the court held "[t]he Article 13b inquiry does not include an adjudication of the underlying custody dispute and only requires an assessment of whether the child will face immediate and substantial risk of an intolerable situation if he is returned to [the place of habitual residence] pending final determination of the parents' custody dispute." 58 F.3d at 377 (internal citations omitted). The court went on to state:

> [b]ecause Article 13 provides that the state 'shall take into account the information relating to the social

> background of the child,' it has been held that the court may consider the environment in which the child will reside upon returning to the home country….To ensure that the child is adequately protected, the Article 13b inquiry must encompass some evaluation of the people and circumstances awaiting that child in the country of his habitual residence.

Id. at 377, citing *Currier v. Currier*, 845 F. Supp. 916, 923 (D.N.H. 1994) and *In re Coffield*, 644 N.E.2d 662, 665 (Ohio Ct. App. 1994). The Second Circuit found it was appropriate to refuse to separate siblings even if only one or some of the siblings could raise an affirmative defense under the Convention. *Ermini*, 758 F3d at 167.

These U.S. courts found it harmful to separate siblings as a result of some, but not all, of the children being able to claim a separate affirmative defense. Here, Japan ultimately found it would create an intolerable situation for the children to be separated, if the older children remain in Japan and the younger children are returned to the United States. On that basis, the Japanese Supreme Court found that the younger children should also not be returned. This is entirely consistent with the considerations in *Ermini* and *Nunez-Escudero* of the environment to which the children would be returned.

Japan's interpretation of the "grave risk" defense and, in particular, what constitutes an "intolerable situation," and the application of this defense to the present case, is consistent with how the various United States Courts of Appeal have

interpreted and applied this defense and, thus, cannot be a "clear misrepresentation of the Convention." Accordingly, to the extent they were made on the grounds of the grave risk defense, the later Japanese Orders should be afforded comity, recognized, and enforced.

Other circuits have recognized different forms of psychological harm under Article 13(b). In *Ermini,* the Second Circuit concluded that removing a child from his therapy program for autism and being repatriated put the child in grave risk of harm. *Ermini,* 758 F.3d at 165-167. The *Ermini* court noted that "Article 13(b) explicitly lists 'psychological' harm and 'physical' harm as appropriate harms for triggering the Convention's affirmative defenses" and deferred to the trial court's factual findings. *Id.* at 166.

The Japanese Courts' considered the psychological harm to the children and found that Cook's financial circumstances not only served as a change of circumstances warranting revisiting the Osaka Family Court's prior orders, but also posed a "grave risk of harm" in that the children would not even have suitable housing or an adequate custodial environment if returned to the United States. App. 114a. The Japanese Supreme Court found Cook did not have an economic base necessary to provide adequate care to and nurture of the children, and that he was not in a situation where he could expect to receive support from his relatives. *Id.* The Japanese Supreme Court found Cook's inability to provide stable housing and to care for and nurture the children posed a grave risk to the children's physical

or psychological wellbeing if they were to be returned to the United States. *Id*.

The forgoing is consistent with how other international courts have interpreted "grave risk of harm." The appellate level of the Family Court of Australia addressed this issue in *Harris v. Harris* [2010] FamCAFC 221 (5 November 2010) (INCADAT reference HC/E/AU 119). There, the court accepted the trial court's finding that returning the child from Australia to Norway would place him in an intolerable situation as the mother, who had brought the child to Australia, would be in a financially precarious position if she returned to Norway with the child. App. 224a.-228a. She would be without emotional support, and isolated. *Id*. Accordingly, the Australian Court found, as the child was dependent on the mother for all his needs, a return to Norway would place him in an intolerable situation. *Id*. at 228a.

Similarly, the French Cour d'appel de Paris, Pole 1, chamber 1, addressed the grave risk of harm defense in CA Paris, 13 Avril 2012, No de RG 12/0617 (INCADAT reference HC/E/FR 1189). There, the appellate court found the children could not be returned to Belgium from France without being returned specifically to their mother's care, as father was established in France. App. 241a. The court further found it had been established the material conditions of the mother's living were incompatible with care for the daughters, and that the mother's home was not adequate for the girls' mental and educational environment. *Id*. The court also noted the girls had expressed their wish to continue living with their father in France. *Id*.

This issue was again addressed by a Dutch court in *De directive Preventie, optredend voor zichzelf en namens Y (the father) against X (the mother)* (7 February 2001, ELRO nr. AA9851 Zaaknr:813-H-00) (INCADAT reference HC/E/NL 314). The appellate court there held the trial court appropriately refused to order the return of the child, despite a wrongful removal, both on the grounds the child had expressed strong opposition to returning to Canada and on the grounds the child's mother would not be able to return to Canada since she had no means of support there. App. 195a. Consequently, the child would have to return alone and the separation from his mother would cause him a grave risk of harm. *Id.*

A Scottish court made a similar decision in *C. v. C.*, 2003 S.L.T. 793 (INCADAT reference HC/E/UKs 998). The court there exercised its discretion in declining to enter a return order on the grounds that it would put the child in an intolerable situation if she were returned when it was not possible or practicable for her mother to return with her. App. 197a.-198a. Likewise, here, Arimitsu's financial circumstances represented a genuine obstacle to her returning. *Id.*

In the present case, the Osaka High Court found Cook lost his house, did not have financial support or means to obtain a suitable living environment, and that neither custody by Arimitsu's relatives nor by Cook's relatives was feasible. App. 132a. The Final Hague Order accordingly affirmed that a return of the children to the United States would put them in grave risk of harm. App. 114a.

Because Japan's interpretation of Article 13 is consistent with that of other jurisdictions, it is not a "clear misrepresentation" of the Convention. The

lower Minnesota courts erred by ignoring the strong presumption in favor of comity for Treaty Partners' decisions (see *Asvesta* and its progeny) and declining to afford comity to the Final Hague Order. The lower courts invented a new and inappropriate legal standard in which what is to be a narrow exception becomes a chasm and Treaty Partners' findings of fact are re-litigated. The lower courts then substituted their errant judgment to conclude that the Japanese Orders were inconsistent with how courts in the United States interpret the Convention's exceptions.

II. CERTIORARI IS WARRANTED TO ADDRESS THE CONFLICT BETWEEN ARTICLE 16 OF THE HAGUE CONVENTION AND THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA) WHEN CONTRACTING STATES DO NOT ORDER THE RETURN OF A CHILD.

The lower courts erred by exercising subject matter jurisdiction over child custody in violation of Article 16 of the Convention as Japan is now the proper place to make a custody determination. This Court must clarify the United States' interpretation of Article 16 so as to comply with the text of the Convention and to address inconsistent applications. The Minnesota courts should have deferred to Japan's custody jurisdiction and dismissed its action because the Japanese Supreme court made a final determination that the children need not return to Minnesota. On that basis, Japan properly initiated child custody proceedings consistent with its own laws and Article 16 of the Convention.

When lower courts ignore Article 16 and continue to exercise custody jurisdiction in absence of a return order, an unacceptable tension arises between the Convention and the UCCJEA that has not been directly addressed. Absent clear direction, future cases—like this one—will result in competing court orders in multiple jurisdictions, with the subject children caught in the middle.

1. Article 16 of the Convention states that a "Contracting State to which the child has been removed…shall not decide on the merits of rights of custody *until* it has been determined that the child is not to be returned under this Convention…" Art. 16 (emphasis added). The clear text of Article 16 provides a jurisdictional threshold.

The prohibition against a Contracting State that is not the child's habitual residence exercising custody jurisdiction "disappear[s] when it is shown that, according to the Convention, it is not appropriate to return the child, or where a reasonable period of time has elapsed without an application under the Convention having been lodged." *Perez-Vera Report*, at 463. Article 16 clearly contemplates circumstances where—when the child is not ordered to return for a variety of reasons, including Articles 12, 13 or 20—the Contracting State where the child is then located *should and will* exercise custody jurisdiction.

2. The Minnesota Court of Appeals asserted subject matter jurisdiction over custody on January 22, 2018 when it affirmed the district court's April 4, 2017 Order. *Cook I*. That decision was based on the now-modified Original Hague Order (which initially ordered the return of the children). The Final Hague Order (affirming the Modified Hague Order) was

ignored and Arimitsu's appeal was dismissed without allowing the parties full briefing or oral argument. App. 5a. Moreover, the Minnesota district court made additional findings of facts and conclusions of law relative to child custody in its June 2019 and December 10, 2019 Orders. App. 27a.-69a., 85a.-107a. Accordingly, Arimitsu unsuccessfully raised the issue that Minnesota's usurping subject matter jurisdiction *again* is in direct conflict with Article 16 and federal law, including the Supremacy Clause.

3. In effect, the Convention is jurisdictional in its application. As explained in *Barzilay v. Barzilay*, the Convention determines child custody jurisdiction in international cases. *Barzilay,* 536 F.3d at 853. The Convention accomplishes this goal not by establishing any substantive law of custody, but by acting as a forum selection mechanism, operating on the principle that the country where the children are ultimately ordered to reside is "the best place to decide upon questions of custody and access." *Id.*; see also *Villegas Duran v. Arribada Beaumont*, 534 F.3d 142, 146 (2d Cir. 2008). In other words, the purpose of the Convention is to "provide for a reasoned determination of where jurisdiction over a custody dispute is properly placed." *Id.*, quoting *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005).

4. Pursuant to Article 16 of the Convention, Japan is the proper jurisdiction to determine custody as the Japanese Supreme Court found that the children need not be returned to Minnesota and to return them would expose them to a grave risk of harm. Pursuant to the Supremacy Clause of the United States Constitution, the Convention supersedes state law to the contrary. *See* U.S. Const., art. VI, cl. 2; *Voorhees*

v. Fischer & Krecke, 697 F.2d 574, 575 (4th Cir. 1983)(the Convention is considered to be of equal dignity with acts of Congress); *see also Shults v. Shults*, 2012 WL 254496 (Minn. Ct. App. 2012) (by virtue of the Supremacy Clause, the Convention pre-empts inconsistencies prescribed by state law in all cases to which it applies). App. 237a. Thus, the Convention, as federal law, supersedes the UCCJEA to the extent they are inconsistent.

5. Important principles of U.S. federal law require the United States and the several states to interpret child custody laws, such as the UCCJEA, in a way consistent with the Convention and with other signatory countries' application of the Convention.

By way of illustration, the UCCJEA was promulgated to clarify a number of ambiguities that caused the Uniform Child Custody Jurisdiction Act ("UCCJA"), to be interpreted differently and applied inconsistently from one U.S. jurisdiction to another. See *Watson v. Watson*, 724 N.W.2d 24 (Neb. 2006), citing Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA) – A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N.D. L. Rev. 301 (1999). The UCCJEA clarified the rule for original, modification, and enforcement jurisdiction in a way that minimized concurrent jurisdiction and jurisdictional conflict. *Id.*, citing *Seamans v. Seamans*, 37 S.W. 693 (Ark. App. 2001). In the same way the consistent, application of the Convention is needed to avoid jurisdictional conflict.

The UCCJEA (Minn. Stat. § 518D) states, a court of this state may enforce an order for the return of the child made under the Hague Convention... as if

it were a child custody determination." Minn. Stat. § 518D.302. The lower courts interpreted an "order for the return of the child," as *only* an order granting the return of the child. However, this view violates Article 16 which clearly recognizes orders *not to return* as valid under the Convention. By interpreting the statute in this way, the lower Minnesota courts construed the UCCJEA in a way that ignores its purpose and actually serves *to create* jurisdictional conflict, including conflict with the Convention.

6. Ironically, the lower court reasserted jurisdiction to be consistent with the Original Hague Order. The Original Hague Order's requirement to return the children to the United States was the crux of the district court's finding that the "Japanese court has effectively declined or likely will decline to exercise jurisdiction on the ground that [Minnesota] is the more appropriate forum by ordering the return of the children to the United States." App. 141a. However, the Modified—and then Final—Hague Orders reversed the Original Hague Order and determined the children should not be returned. Pursuant to Article 16, once Japan made this determination, it could and did assert custody jurisdiction. By the district court's earlier reasoning, it had no choice but to recognize Japan's determination that it has the authority to determine custody.

The district court erred in at least two ways by determining the Hague Final Order (affirming the Modified Order) did not have a material impact on subject matter jurisdiction. The district court ignored Convention Article 16, which provides that the Contracting State to which a child is removed must

not decide on the merits of rights of custody "*until* it has been determined that the child need not be returned under the Convention." Convention, Article 6 (emphasis added). The district court reasoned that while the Modified Hague Order altered the Original Hague Order such that the children were no longer required to return to the United States, it did not explicitly modify any of the other findings in the Original Hague Order. App. 4a, 33a., 90a., 97 a. This myopic analysis misses the primary significance of the Modified (and Final) Hague Order—namely *the critical fact that the children were no longer required to be returned to Minnesota.* This determination triggers the clear text of Article 16. The lower courts then had an obligation under the Convention to recognize and enforce the relevant Japanese Hague Orders as part of its duty as a member state under the Supremacy Clause, U.S. Const., art. VI, cl. 2. The lower courts failure to do so frustrates the principles behind Article 16 and the UCCJEA and should be reversed.

7. A child may not be ordered to return to its country of habitual residence for many reasons set forth in the Convention, including Articles 12, 13, and 20. The text of Article 16 creates a jurisdictional threshold when the Contracting State where the children are located should exercise custody jurisdiction. Without guidance from this Court, the UCCJEA authorizes a state court to *also* exercise custody jurisdiction and march forward with simultaneous custody proceedings. This conflict will arise again and again when a child is not ordered to be returned to his or her habitual residence, putting children and parents in impossible situations.

This Court should grant review to address the conflict between Article 16 of the Convention and the UCCJEA when Contracting States do not order the return of a child.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO ADDRESS THESE TWO IMPORTANT QUESTIONS.

The Court has an opportunity to resolve questions about the legal standard for comity of Treaty Partner's decisions under the Convention and affirm the strong presumption in favor of comity, recognition, and enforcement. The Court must affirm that the exceptions to this presumption must be very narrowly construed.

The Court should further seize this valuable opportunity to resolve important questions regarding the interplay between federal law and international treaties where a foreign court declines to order the return of a child and then exercises its right to determine custody issues under Article 16. Without clarity, under the UCCJEA, states like Minnesota may then proceed with simultaneous and conflicting custody actions. Courts and litigants alike need certainty about the proper jurisdictional venue for child custody in situations where the children are not ordered to be returned to their place of habitual residence.

This case presents an excellent opportunity for the Court to resolve these important questions and to provide guidance to state courts, provide uniformity throughout the United States to prevent a flood of re-litigation of foreign Convention decisions, and to

preserve the credibility of the United States as a Contracting State.

CONCLUSION

The Convention serves as an important deterrent to, and remedy for, wrongful parental abduction. It is equally important, however, for U.S. courts to honor, recognize, and enforce final Hague decisions of Treaty Partners, in order to prevent a flood of re-litigation of those decisions in U.S. state courts and to preserve the integrity of the United States as a Contracting State. The Minnesota lower courts' decisions set a dangerous precedent. To permit state courts to ignore final decisions of other Contracting States on this issue of international law, re-litigate the facts, and substitute its judgment threatens existing federal case law with a strong presumption in favor or comity. Minnesota's decision only encourages jurisdictional competition and undermines core purposes of the Convention and principles of federal and international law. The Court should grant review before the purpose of the Convention and integrity of the United States are further undermined by similar court rulings.

Respectfully submitted:

AMY M. KEATING*
ANDREW A. ZASHIN
CHRISTOPHER R. REYNOLDS
ZASHIN & RICH CO., L.P.A.
950 Main Avenue, 4th Floor
Cleveland, OH 44113
(212) 696-4441
aaz@zrlaw.com
crr@zrlaw.com
aaz@zrlaw.com
*COUNSEL OF RECORD

VALERIE D. ARNOLD
MICAELA A. WATTENBARGER
MICHAEL G. CAIN
ARNOLD, RODMAN & KRETCHMER, P.A.
2626 E 82nd Street, Suite 355
Bloomington, MN 55425
(952) 955-8008
val@arkmn.com
micaela@arkmn.com
mcain@arkmn.com

Counsel for Petitioner

DATED: December 18, 2020