No. _____

In the
Supreme Court of the United States

SERGE ALUKER,
Petitioner,

v.

SIMIN YAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Article 3 of the Hague Child Abduction Convention requires that a parental agreement have legal effect under the substantive law of the country of the child's habitual residence in order to impact a parent's rights of custody under the treaty. Did the Fourth Circuit's decision write that article 3 requirement out of the Hague Child Abduction Convention?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

STATEMENT OF RELATED PROCEEDINGS

The opinion of the court of appeals is unreported.

The opinion of the district court is unreported.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Serge Aluker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unreported. Pet. App. 1-8. The opinion of the district court is unreported. Pet. App. 9-27.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2021. Pet. App. 1-8. A petition for rehearing was denied on August 31, 2021. Pet. App. 28. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY PROVISIONS INVOLVED

Articles 3 and 5 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention" or "the Convention"), Oct. 25, 1980, 1343 U.N.T.S. 89, as implemented in the United States through the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. §§ 9001-9011, provide as follows:

Article 3

The removal or retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the

State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 5

For purposes of this Convention –

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

STATEMENT

Determining the parties' respective "rights of custody" to a child is fundamental to the outcome of every case under the Hague Convention. The Convention is a text-based treaty founded upon private international law. It seeks to protect children who have been removed from their habitual residence by one parent in violation of the other parent's "rights of custody" to the child. Convention, art. 1; *Abbott v. Abbott*, 560 U.S. 1, 8 (2010). "Rights of custody" under the Convention "may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." Convention, art. 3.

The decision below perpetuates the trend among lower courts of writing in additional requirements not permitted by the text of the Convention, and writing out requirements contained in the plain text of the Convention. The decision below does the latter. It writes out of the Convention the requirement that an agreement between the parents must have "legal effect" in order to impact the parents' respective "rights of custody." The non-text-based approach to treaty interpretation taken by the lower courts here is contrary to this Court's precedent in *Abbott v. Abbott*, *Chafin v. Chafin*, *Lozano v. Montoya Alvarez*, and *Monasky v. Taglieri*, all of which require a text-based interpretation of the Convention. And it creates a division among the circuits on the scope and interpretation of the "agreement having legal effect" language, and "rights of custody" under the Convention.

The Court should grant review to impose consistent, text-based interpretation and application of the Convention's article 3 requirement that a parental agreement have "legal effect" under the substantive law of the country of the child's habitual residence in order to impact a parent's "rights of custody" under the treaty.

1. Petitioner Serge Aluker (the "Father") and Respondent Simin Yan (the "Mother") are the parents of two sons. Pet. App. 2. The parties were married in 2006 in China and moved to Virginia in 2008. *Id*. The parties' older son was born in the District of Columbia in 2009 and their younger son was born in Virginia in 2011. Pet. App. 10. Both parents are named on both children's birth certificates. *Id*. The children are United States citizens, Russian citizens, and legal residents of Portugal. Pet'r's Pet. for Return ¶ 13, Sept. 24, 2020, ECF No. 1. The Mother is a United States citizen. Pet. App. 2. The Father is a United States citizen, Russian citizen, and legal resident of Portugal. *Id*.

In September 2015, the family relocated to Madrid, Spain. Pet. App. 2, 10. The parties had been struggling in their marriage and decided together to move to Europe for a fresh start for their marriage and family. Pet. App. 2. In furtherance of their plan, the parties shipped their necessary personal belongings to Spain, sold their vehicles in the United States, and rented out their former family home in Virginia to tenants. Pet. ¶ 16, ECF No. 1. The parties also changed their mailing address for their banking, tax reporting and other items to a California-based mail processor so that they would receive their mail through the processor, rather

than via delivery to their former home. *Id*. The family lived together in Madrid until September 2017. *Id*. at ¶ 17.

In September 2017, the family moved to Lisbon, Portugal. Pet. App. 2, 10. The family continued to lived together initially. *Id*. The Mother and Father separated in February 2018. *Id*. The Father moved out of the family apartment and began living in a separate apartment in Lisbon, Portugal. Pet. ¶¶ 24-26, ECF No. 1. Throughout the rest of 2018, the Mother and Father lived separately but shared parenting responsibilities for the children. Pet. App. 2, 10. They worked together to arrange a parenting time schedule between themselves and planned for both parties to spend quality time with the children. Pet. ¶ 27, ECF No. 1. The parties' parenting relationship was amicable. *Id*. at ¶¶ 27, 29. In the summer of 2018, the parties enrolled the children for the next year of school (2018-2019) in Portugal. *Id*. at ¶ 28. The children were also later enrolled and began the school year in Portugal for the 2019-2020 school year. *Id*. at ¶¶ 28, 36. Both children were enrolled and attended extracurricular activities in Lisbon associated with the school and outside school. *Id*. They became fluent in Portuguese. *Id*. The Mother and Father also made friends in Portugal and integrated into Portuguese culture. *Id*.

By the end of 2018, the parties had lived separately for nearly a year and decided to separate their financial lives. Pet. App. 2-4, 10-12. They entered hurriedly into a written Property Settlement Agreement ("PSA") at the end of 2018 to take advantage of certain alimony-related tax benefits before such benefits were

to expire on December 31, 2018. Pet. App. 2-4, 24-25. The PSA was prepared under Virginia law. Pet. App. 4. The parties executed the PSA in Portugal. Pet. App. 10. In addition to addressing the parties' finances, the PSA provides that the Mother would have sole legal and physical custody of the children. Pet. App. 3, 11. After the parties signed the PSA, neither party sought to have the PSA incorporated into any order or judgment or otherwise recognized by any court or administrative authority anywhere in the world. Pet. App. 4, 12.

The parties continued to co-parent their sons in Portugal. Between January 2019 and September 2019, the parties' relationship became strained and co-parenting deteriorated. Pet. App. 13. In May 2019, the Father initiated child custody proceedings in Portugal. Pet. App. 4, 13. The Mother told the Father during the summer of 2019 that she wanted to relocate out of Portugal with the children. Pet. ¶ 35, ECF No. 1. The Father did not agree to the children relocating out of Portugal. *Id*. By the end of summer 2019, the Mother told the Father she would continue living in Portugal with the children. *Id*. The parties therefore had no further discussions about the Mother's proposed relocation with the children. *Id*.

On October 3, 2019, the Mother sent the Father an email stating that she was moving with the children to the United States. Pet. App. 4, 13. The Mother was already at her departure airport when she sent the email. *Id*. At the time the Mother removed the children from Portugal, the child custody case was still pending in the Portuguese court. Pet. App. 4. Several months after she arrived in the United States with the

children, the Mother requested, for the first time, that the Fairfax County Juvenile and Domestic Relations District Court (the "Virginia State Court") incorporate the PSA into an order. Pet. at ¶¶ 45-49, ECF No. 1. To this day, that has never happened. Pet. App. 4.

2. The Father filed his Hague Convention application with the Central Authority of Portugal the day after the Mother removed the children from Portugal. Pet. ¶ 44, ECF No. 1. He obtained an emergency Portuguese court order for custody of the children and for the return of the children to Portugal. *Id*. at ¶¶ 45-49. Thereafter, he then filed a Petition for Return of the children under the Hague Convention in the district court. Pet. App. 4, 13. The Mother's Virginia State Court case is stayed under article 16 of the Hague Convention pending the conclusion of these Hague Convention proceedings. Pet. App. 13.

The district court scheduled the evidentiary hearing on the Father's Petition for Return to begin on February 3, 2021. Pet. App. 14. The Father filed two Affidavits of Portuguese Law in advance of the evidentiary hearing, setting out his expert's opinion that the Father had and continues to have "rights of custody" to the children under Portuguese law. Ribeiro Aff., Sept. 24, 2020, ECF No. 3; Ribeiro Rebuttal Aff., Jan. 26, 2021, ECF No. 35-1. The Father's expert opined that the Father's "rights of custody" under Portuguese law arise from the following: (1) *renvoi* under Portuguese choice-of-law rules, which require the substantive custody law of Virginia to be applied because the parties' common nationality is American; and (2) the Father's *ne exeat regno* right under

Portuguese law, which prohibits one parent from removing a child from Portugal without the other's consent; and (3) the Father's parental responsibility rights under Portuguese internal law, which cannot be renounced by a party or allocated between parties by agreement absent ratification by a court or civil registry office. *Id.*

On the morning of the district court evidentiary hearing, the Mother filed a written Rule 52(c) Motion for Judgment on Partial Findings with a supporting memorandum and appendices. Pet. App. 4. Her motion challenged only the second prong of the Father's *prima facie* case—the Father's rights of custody under Portuguese law. Pet. App. 4. The district court continued the evidentiary hearing for the Father to file a response. Pet. App. 4. Then, without holding the evidentiary hearing, the district court dismissed the Father's Petition for Return. Pet. App. 14. It determined that the Father did not have "rights of custody" to the children under Portuguese law. Pet. App. 17-26. In its order, the district court concluded that the PSA signed by the parties had the "legal effect" of terminating all of the Father's "rights of custody" under the Convention, even though the terms of the PSA were never entered as or incorporated into an order of any court or otherwise approved by any court. *Id.*

3. The Father timely appealed to the circuit court. Pet. App. 4. He argued that he has, and had at the time of removal, three categories of "rights of custody" under Portuguese law. Pet. App. 6.

First, the Father argued that his rights of custody arise from a Portuguese choice-of-law analysis, which applies Virginia substantive custody law. Appellant's Br. 21-41, Apr. 15, 2021, ECF No. 14. Article 57 of the Portuguese Civil Code provides, in relevant part, that relations between parents and children—not between parents and the sovereign nation—shall be governed, *inter alia*, by the national law common to both. *Id*. at 25-26. Here, the Father argued, the national law common to both is the United States, and Virginia in particular. *Id*. He argued that the PSA has no legal effect on the parties' respective "rights of custody" under Virginia substantive law. *Id*. at 21-41. Virginia jurisprudence has long held that parties cannot contract for rights of custody or child support. *Id*. While parties may agree as to custody arrangements for their children, a Virginia court must accept or reject any such agreement to give the agreement any legal effect. *Id*. An agreement between parents relating to custody is not binding on a Virginia court in making a custody determination. *Id*. It is merely one factor a Virginia custody court may consider in making its custody determination. *Id*. Any such agreement between parents has no legal effect under Virginia law unless it has been approved, ratified, or incorporated into an order of the Virginia court. *Id*. Absent any such order, parents by operation of law are the joint guardians of their children in Virginia and are equally and jointly charged with the child's care, nurture, welfare, education and support. *Id*. The PSA here has never been approved, ratified, or incorporated into any court order. *Id*. It therefore has no legal effect on the parties' respective rights of custody under Virginia law. *Id*. The

parties had on the date of removal and continue to have joint "rights of custody" to the children. *Id.*

Second, the Father argued that in addition to his affirmative "rights of custody" arising from the Portuguese choice-of-law analysis, he has a *ne exeat* right under Portuguese law. *Id.* at 42-45. The Portuguese *ne exeat* right is freestanding and not subject to the doctrine of *renvoi* because it is a right between the sovereign nation and the children. *Id.* Under Portuguese sovereign law, neither parent may remove a child from Portugal without the other's consent. *Id.* The Father's *ne exeat* right derives from the fact that he has joint "rights of custody" to the children. *Id.* Parents in Portugal have *ne exeat* rights over their children, which are well-recognized stand-alone Convention article 5a "rights of custody." *Id.*

Third, the Father argued he also has "rights of custody" in the form of parental responsibility rights under Portuguese internal law. *Id.* at 45-49. Parental responsibility is shared jointly by married parents in Portugal and includes the rights and duties to look after all aspects of the children, including the children's maintenance, health, safety, education, and the right to establish the children's residence and the power to demand that the children remain there. *Id.* Under Portuguese law, a parent cannot renounce parental responsibility (with certain exceptions not applicable here relating to adoption proceedings). *Id.* When parents separate or divorce, any agreement between them relating to parental responsibility is subject to ratification by either the court or the civil registry

office. Any such agreement has no impact on the parties' statutory parental responsibility rights and duties without the required ratification. *Id*.

4. The circuit court affirmed the district court's decision in an unreported per curiam opinion holding that the PSA resulted in the Father having no "rights of custody" on the date the Mother removed the children from Portugal to Virginia, even though the PSA has never been approved, ratified, or incorporated into any court order. Pet. App. 1-8. It held, without any analysis of the meaning of "legal effect," that the "district court did not err in holding that the PSA had 'legal effect' within the meaning of the Hague Convention, and that Aluker failed to prove his claim of wrongful removal." Pet. App. 8.

The circuit court's decision perpetuates the trend of lower courts veering from the text of the Convention by writing in additional requirements or writing out text-based requirements of the Convention. The decision creates a split among the circuits (and a conflict with this Court's precedent) on the broad interpretation of "rights of custody" under the Convention.

REASONS FOR GRANTING THE PETITION

A. Need for Resolution of Lower Courts' Analyses Beyond the Scope of the Treaty's Text.

1. The Convention is a text-based treaty and must be interpreted accordingly.

The Convention is a text-based treaty. *Abbott*, 560 U.S. at 12. Courts must therefore "begin with the text

of the treaty and the context in which the written words are used" in analyzing treaty claims. *Monasky v. Taglieri*, 140 S. Ct. 719, 726 (2020) (citing *Air France v. Saks*, 470 U.S. 392, 397 (1985) (internal quotations omitted)). Lower courts may not write in additional requirements to the treaty; nor may they write out any provisions of the treaty. As in this case, all four of the Hague Convention cases this Court has decided have dealt with the problems created by lower courts either writing in or writing out requirements of the treaty rather than conducting a text-based interpretation. Here, the lower courts have written out the "having legal effect" requirement for "rights of custody" to be impacted by private agreements between parents. Pet. App. 1-27. Previous substantive issues have been: *ne exeat* rights being written out of the Convention; mootness on appeal being written into the Convention; equitable tolling being written into the Convention; and certain categorical requirements for establishment of habitual residence being written into the Convention. *See Abbott*, 560 U.S. 1 (*ne exeat* rights as "rights of custody"); *Chafin v. Chafin*, 568 U.S. 165 (2013) (mootness); *Lozano v. Montoya Alvarez*, 572 U.S. 1 (2014) (equitable tolling); *Monasky*, 140 S. Ct. 719 (habitual residence).

In *Abbott*, the Court held that a *ne exeat* right is a "right of custody" as defined by article 5*a* of the Convention. 560 U.S. at 11. In so holding, this Court addressed certain circuits that were writing out part of the definition of "rights of custody" from the Convention. *Id*. at 7-15. The Court held that the text of the treaty defines "rights of custody" to "include rights relating to the care of the person of the child and in

particular, the right to determine the child's place of residence." *Id*. at 11. The Court looked to the text of the treaty and the plain meaning of the term "determine" to conclude that a *ne exeat* right is a "right of custody" as defined by the Convention. *Id*.

This Court next addressed certain circuits that were writing in mootness as a basis to dismiss a Hague Convention appeal if the child is returned to the habitual residence before the conclusion of the appeal. *Chafin*, 568 U.S. 165. The Court held that a Hague Convention appeal is not moot upon the child's return to the habitual residence while the appeal is pending. *Id*.

Next, in *Lozano v. Montoya Alvarez*, this Court addressed certain circuits that were writing in an equitable tolling provision to the Convention's "well-settled" exception to return. *Lozano*, 572 U.S. 1. The Court emphasized that in treaty interpretation cases, the Court's duty is to ascertain the intent of the States Parties by looking to the document's text and context. *Id*. at 11 (citations omitted). The Court concluded that the text of the Convention does not address equitable tolling and that the treaty drafters did not intend equitable tolling to apply to the Convention. *Id*. at 18.

Most recently, this Court addressed the writing in of an "actual agreement" requirement by some circuits into the habitual residence analysis. *Monasky*, 140 S. Ct. 719. This Court held again that the Convention is a text-based treaty and that the text of the Convention does not impose any "categorial requirements for establishing a child's habitual residence—least of all an actual agreement requirement . . ." *Id*. at 728. This

Court explained that an "actual-agreement requirement is not only unsupported by the Convention's text and inconsistent with the leeway and international harmony the Convention demands; [such an agreement] would thwart the Convention's 'objects and purpose.'" *Id.*

There is a fifth case, *Golan v. Saada*, No. 1034, currently pending on the Court's petition docket and scheduled for conference on December 3, 2021. The petitioner in *Golan* also seeks to challenge the writing in by some circuits of additional treaty requirements. In *Golan*, the Second Circuit has required the consideration of "ameliorative measures" in analyzing the respondent's article 13*b* grave risk defense. 903 F.3d 533 (2d Cir. 2019); *Saada v. Golan*, 833 F. App'x. 829 (2d Cir. 2020), *petition for cert. filed* (U.S. Jan. 26, 2021) (No. 1034). The concept of ameliorative measures (also known, *inter alia*, as undertakings or alternative remedies) appears nowhere in the Convention. *See* Brief of United States as Amicus Curiae at 9, *Golan v. Saada*, No. 1034 (U.S. Oct. 27, 2021). Yet several circuits require a consideration of whether any ameliorative measures would mitigate the grave risk of harm in returning a child to its habitual residence after a respondent meets its burden to establish grave risk by clear and convincing evidence. *Id*. at 20. The United States Government has filed an *amicus* brief in support of the petition for writ of certiorari. *Id*. at 8. 23. The Government's position is that no such requirement exists in the treaty, and therefore an analysis of ameliorative measures is not required. *Id*. It is not a part of the treaty's text. *Id*. at 8.

In the present case, the lower courts have written out of the treaty the requirement that any agreement between the parents purporting to affect the parents' respective rights of custody must be an agreement "having legal effect." Pet. App. 1-27. As in this Court's previous treaty cases, this issue is important for this Court to address to prevent the undermining of the Convention's text.

The Hague Convention does not define the term "agreement having legal effect." *See*, Convention, art. 5*a*; *see also* ELISA PEREZ-VERA, Explanatory Report: Hague Conference on Private International Law in 3 Acts and Documents of the Fourteenth Session 445 ¶ 70 (1980) (the "Perez-Vera Report"). "Legal efficacy" is defined in Black's Law Dictionary as "the quality of having significance or force under law to produce certain effects." Efficacy; Legal Efficacy, Black's Law Dictionary (11th ed. 2019). The Convention's text alone does not tell us what makes an agreement between parents relating to custody one with "legal effect." *Cf. Monasky*, 140 S. Ct. at 726 (explaining that the Convention's "text alone does not definitively tell us what makes a child's residence sufficiently enduring to be deemed 'habitual'" . . . but that the term 'habitual' suggests a particular type of inquiry the courts must undertake in a habitual residence analysis). But the inclusion of the term "having legal effect" in the text of the Convention does suggest that there are requirements beyond the parents simply desiring to enter into any sort of alleged agreement. *Id*.

As in *Monasky* with respect to habitual residence, the Convention's explanatory report here confirms

what the Convention's text suggests with respect to "agreements having legal effect." Perez-Vera Report at ¶ 70; *see also Monasky*, 140 S. Ct. at 726. The drafters of the Convention intentionally did not define the phrase "agreement having legal effect." Perez-Vera Report at ¶ 70. They left interpretation of the phrase to the States Parties to the Convention. *Id*. The explanatory report provides further context, explaining that even though simple private agreements *may in principle* be sufficient, such agreements must provide a basis for presenting a legal claim in order to be considered as "having legal effect":

> . . . *In principle*, the agreements in question may be simple private transactions between the parties concerning the custody of their children. The condition that they have 'legal effect' according to the law of the State of habitual residence was inserted during the Fourteenth Session in place of a requirement that it have the 'force of law,' as stated in the Preliminary Draft. The change was made in response to a desire that the conditions imposed upon acceptance of agreements governing matters of custody which the Convention seeks to protect should be made as clear and as flexible as possible. As regards the definition of an agreement which has 'legal effect' in terms of a particular law, it seems that there must be included within it any sort of agreement which is not prohibited by such a law *and which may provide a basis for presenting a legal claim to the competent authorities.*

Id. (emphasis added).

The explanatory report highlights the intent of the drafters: defining "rights of custody" in a manner to recognize that a petitioner's "rights of custody" had actually been exercised in each particular case:

> Now, to go back to the wide interpretation given by article 3 to 'the notion of the law of the State of the child's habitual residence,' the law concerned can equally as well be the internal law of that State as the law which is indicated as applicable by its conflict rules. It is for the authorities of the State concerned to choose between the two alternatives, although the spirit of the Convention appears to point to the choice of the one which, in each particular case, would recognize that custody had actually been exercised.

Id.

The explanatory report then continues, explaining that " . . . [o]n the other hand, the Convention does not state, in substance or form, the conditions which these agreements must fulfil, since these will change according to the terms of the law concerned." *Id*. The explanatory report concludes its commentary on "rights of custody" by emphasizing that " . . . it should be stressed now that the intention is to protect *all* the ways in which custody of children can be exercised." Perez-Vera Report at ¶ 71.

2. Application to the present case.

The lower courts here wrote out of the Convention the "legal effect" requirement relating to agreements in the "rights of custody" analysis. Virginia jurisprudence—like that of many states of the United States—has long held that parties cannot contract for rights of custody or support with respect to their children under the same general principles of contract law that otherwise govern financial settlement agreements between parents. *Cabral v. Cabral*, 62 Va. App. 600, 609 (2013). Special rules govern child custody and support issues. *Id.* "While parties may agree as to the custody of their minor children, it is still the court's responsibility to either accept or reject such an agreement." *Patin v. Patin*, 45 Va. Cir. 519, 1 (Fairfax Co. Cir., 1998).

Any such parental agreement has no legal effect under Virginia law until it has been approved, ratified, or incorporated into an order of the court. *See Haase v. Haase*, 20 Va. App. 671, 683-84 (1995); *Verrocchio v. Verrocchio*, 16 Va. App. 314, 317 (1993) (citing *Williams v. Woolfolk*, 188 Va. 312, 317 (1948); *Buchanan v. Buchanan*, 170 Va. 458, 477 (1938); *Gloth v. Gloth*, 154 Va. 511, 551 (1930)). Any agreement between parents is not binding on a Virginia court in making a custody determination because the Virginia court must make its own independent best interest determination. *Id.*

This Court has addressed this very issue. *Ford v. Ford*, 371 U.S. 187 (1962). In *Ford*, a mother and father were engaged in custody litigation in Virginia. The parties engaged in negotiations and their respective

counsel advised the court that the parties had reached an agreement with respect to custody. *Id.* at 188. In summary, the parties had agreed that the children would live with the father during the school year and with the mother during summers and holidays. *Id*. The court in Virginia dismissed the pending custody case upon being notified of the parties' agreement. *Id*. The court did not enter any custody orders; rather, it simply dismissed the case noting that the parties had "agreed concerning the custody of the infant children." *Id*.

Several months later, when the children were in South Carolina with the mother for the summer, she commenced custody litigation in South Carolina, seeking "full custody" of the children. *Id*. The father argued in the South Carolina court that the South Carolina court should be bound by the Virginia court's dismissal of the custody case, which was based on the parties' agreement. *Id*. at 189. The South Carolina court disagreed, conducted a trial and an independent best interests analysis, and awarded custody to the mother. *Id*. at 189-90. The appellate court in South Carolina reversed, and the Supreme Court of the United States granted *certiorari* to consider the question of full faith and credit.

The *Ford* Court held that it need not reach the question of full faith and credit because South Carolina would only be required to recognize a Virginia order as binding if a Virginia court would be bound by it. *Id*. at 192. The Court explained that agreements and dismissals of cases in other private controversies are treated differently than in child custody matters. *Id*. The Court further explained that "the [Virginia trial

court's] order meant no more than the parents had made an agreement between themselves. Virginia law, like that of probably every state in the Union, requires the court to put the child's interests first." *Id*. at 193 (citations omitted). This Court further explained:

> The Supreme Court of Appeals of Virginia has stated this policy with unmistakable clarity:
>
> In Virginia, we have established the rule that the welfare of the infant is the primary, paramount, and controlling consideration for the court in all controversies between parents over the custody of their children. All other matters are subordinate. *Mullen v. Mullen*, 188 Va. 259, 269 (1948).
>
> Unfortunately, experience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of the parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice. In Virginia, parents cannot make agreements which will bind courts to decide a custody case one way or another. The Virginia Supreme Court of Appeals has emphasized this deep-rooted Virginia policy by declaring: 'The custody and welfare of children are not the subject of barter.' *Buchanan v. Buchanan*, 170 Va. 458, 477 (1938).

Id. at 193.

This policy-driven approach has been applied consistently by the Virginia courts. *See, e.g., Haase*, 20

Va. App. at 683-84; *Verrocchio*, 16 Va. App. at 317; *Buchanan*, 170 Va. at 477; *Gloth*, 154 Va. at 551. The Supreme Court of Virginia explained in *Buchanan* (the case relied upon by this Court in *Ford*) that ". . . a contract is not binding upon a court, as to the custody of infants, nor will the courts permit a parent, under any or all circumstances, to transfer to another his common-law obligation to his children. The custody and welfare of children are not the subject of barter." *Buchanan*, 170 Va. at 477. The *Buchanan* Court further explained that it was the lower court through its order that deprived the father of his custody rights over two of the parties' children, based on an application pending before the court. *Id*. The father had not "severed" his right by entering into a contract with the mother. *Id*.

The Virginia Court of Appeals re-affirmed the *Buchanan* court's analysis in *Verrocchio v. Verrocchio* in 1993. The *Verrocchio* Court explained the rationale behind Virginia's position on custody contracts. *Verrocchio*, 16 Va. App. at 317. "Recognition of the potential conflict between the interests of parents and their children in custody cases has been firmly established in Virginia law and is the basis for the rule that a contractual agreement between parents as to custody is not binding upon our courts." *Id*. (citations omitted).

The Convention's text requires that any agreement between the parents have "legal effect" in order to impact the parents' respective "rights of custody." Convention, art. 3. The explanatory report puts the requirement in context, explaining that the drafters'

intent was to recognize a petitioner's "rights of custody" in as many cases as possible. Perez-Vera Report at ¶ 71. And the report further explains that in order to have "legal effect" any such agreement must be able to provide a basis for presenting a legal claim when analyzed under the relevant substantive law. *Id*. at ¶ 70.

In recognizing the PSA here as impacting the parties' respective "rights of custody," when it does not meet Virginia's requirements for having "legal effect," the lower courts here have written the "legal effect" requirement out of the Convention. Likewise, the lower courts have compromised the intent of the Convention because by writing out the "legal effect" requirement, the lower courts are recognizing fewer "rights of custody" rather than maximizing the recognized rights of custody of the petitioner. This Court should therefore grant *certiorari* to resolve this deviation from the plain text of the Convention.

B. Circuit Split on "Rights of Custody" and Agreements Having "Legal Effect"

In addition to deviating from the plain text of the Convention, the lower courts here have created a split in the circuits on the interpretation of the term "agreement having legal effect" and in the interpretation of the broader concept of "rights of custody." The circuit court's decision in this case also conflicts with sister States Parties' decisions. And it conflicts with this Court's own precedent in *Abbott*.

"Rights of custody" are to be construed broadly to include the widest possible range of ways in which a

parent may have rights to a child, which allows the greatest possible number of cases to be brought into consideration. *Palencia v. Perez*, 921 F.3d 1333, 1338-39 (11th Cir. 2019) (citing *Hanley v. Roy*, 485 F.3d 641, 645 (11th Cir. 2007)); *see also*, *Abbott*, 560 U.S. at 10 (holding that a statutory *ne exeat* right constitutes a right of custody); Perez-Vera Report at ¶¶ 70-71. Under the Convention, rights of custody include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Convention, art. 5. "The violation of a *single* custody right suffices to make removal wrongful." *Palencia*, 921 F.3d at 647 (emphasis in original and citations omitted).

Article 3 of the Convention does not provide a mechanism for private custody agreements between parents to create or sever "rights of custody" as the lower court wrongly held. Article 3 of the Convention provides that rights of custody ". . . may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an *agreement having legal effect* under the law of the habitual residence." Convention, art. 3 (emphasis added).

This is not the first case where a respondent has argued that a private custody agreement affects the parties' article 5*a* "rights of custody" under the Convention. Courts in the United States and in our sister States Parties have addressed this argument and found that article 3 does not create a way around the law of the habitual residence or the law of the *renvoi*

state to create "rights of custody" based on a private custody agreement.

The Seventh Circuit has addressed and rejected this very same argument, but in the context of a petitioner trying to establish article 5*a* "rights of custody" by relying on a private custody agreement. *Martinez v. Cahue,* 826 F.3d 983, 990 (7th Cir. 2016). In *Martinez*, the mother and father entered into a private written custody agreement in which the father agreed to have "access" with the child on certain days each week. *Id*. at 987. Neither party "ever took any steps to memorialize this arrangement in a court order." *Id*. Approximately three years later, the mother removed the child from Illinois to Mexico without the father's consent. *Id*. The following summer, the mother sent the child to the father in Illinois to visit with the father for the summer. *Id*. at 988. At the end of the summer visit, the father did not return the child to the mother in Mexico. *Id*. The mother attempted to retrieve the child from Illinois but was unsuccessful in her efforts. *Id*. Thereafter, the mother filed a Hague Convention petition against the father in federal district court in Illinois. *Id*.

The district court denied the mother's petition for return. *Id*. It found that the parents did not jointly intend for the child to relocate to Mexico in the first place, and therefore (under the habitual residence standard at the time) the child's habitual residence never became Mexico. *Id*. The district court emphasized the lack of shared parental intent in its determination that the child's habitual residence remained Illinois during the year the child was in Mexico. *Id*.

The Seventh Circuit reversed, holding that the father did not have "rights of custody" and did not have any *ne exeat* rights under Illinois law at the time the mother relocated to Mexico with the child. *Id*. at 991. The Court therefore held that without "rights of custody," the father's joint intent was not required for the mother to remove the child to Mexico, and Mexico did indeed become the child's habitual residence. *Id*. The Seventh Circuit further explained that under Illinois law, the law presumes that the mother of a child born out of wedlock has sole custody, absent a court order to the contrary. *Id*. at 990. The parties had never been married. *Id*. The father had not obtained a custody order before the mother removed the child to Mexico. *Id*. at 991. Under Illinois law, the father therefore had no rights of custody. *Id*. The Court also examined the parties' private custody agreement. *Id*. It found that the parties' agreement only provided the father with agreed visitation rights, not custody, so the father could not have pursued the remedy of return from Mexico under the Convention on the basis of the private agreement. *Id*. But the Court took the analysis one step further and explained that " . . . even if that agreement had spoken to custody, it would not have legal effect . . ." *Id*. The Seventh Circuit explained that (just as the Virginia cases explained *infra*), on a policy basis, the law of Illinois severely limits the enforceability of contracts affecting child custody. *Id*.

In *Shalit v. Coppe*, the Ninth Circuit also addressed "agreements having legal effect." 182 F.3d 1124, 1129-30 (9th Cir. 1999). The argument was again made in the reverse of the argument in this case—the father in *Shalit* sought the return of the child from Alaska to

Israel. *Id*. The Ninth Circuit held that the father did not prove he had rights of custody under Israeli law for several reasons. Firstly, the Court found that the father did not prove that he had rights of custody by operation of Israeli law because the father's expert's affidavit did not address the conflict of law issue at all. *Id*. at 1130. The father's expert simply concluded that the father had rights of custody under Israeli law without explaining how the expert reached the conclusion that Israeli internal law applied. *Id*. Secondly, the Court found that the father did not prove that he had rights of custody pursuant to any judicial or administrative decision. Finally, the Court further held that the alleged "agreement" the father asserted did not have legal effect. *Id*. at 1131. The Court further explained that even if it were to assume that Israel's choice-of-law rules in its conflict of law analysis were to apply Israel's internal law, the parties' "agreement" in the case did not have legal effect. *Id*. As in Virginia, Israel's internal law requires that agreements between parents living separately "shall be subject to the approval of the Court." *Id*. The parties' agreement in *Shalit* was never approved by any Israeli or American court. *Id*. The Ninth Circuit therefore concluded that the parties' agreement was not a source from which the father could derive rights of custody.

In *Currier v. Currier*, the District of New Hampshire held that a marital agreement between the spouses purporting to award the respondent sole custody was without legal effect under the law of the habitual residence because it had not been approved by the court, as required by the law of the habitual residence. 845 F. Supp. 916, 921 (D.N.H. 1994).

The appeal court of one of our sister States Parties, the Court of Appeal of New Zealand, has also addressed the issue, in the context of explaining the difference between "validity" of a contract under normal contract formation principles and the lack of "legal effect" of a private contract relating to child custody. *D v. C* [1999] ZNFLR 97 (Court of Appeal of New Zealand, 1998). [1]

In *D v. C*, the New Zealand court addressed the issue of whether a petitioner had rights of custody to a child based on a parenting agreement. *Id*. The New Zealand court explained that although an agreement may be considered "valid" under certain contract formation laws, such "validity" does not mean the agreement is considered to have "legal effect" under the Convention. *Id*. at pp. 7-8. The court held that "the interpretation of [legal effect] that best accords with the International Child Abduction statutory scheme is 'an agreement which is legally enforceable'" *Id*. at p. 8. In *D v. C*, the court held that the document at issue did not constitute an agreement at all, in that it did not meet the ordinary contract formation requirements. *Id*. But it further explained that even if the document had been an agreement, it would not have had legal effect because it would have been merely a contract between the parties that had not been approved and given legal effect by a court. *Id*. at 7-8. Under the relevant

1 "In interpreting any treaty, the opinions of our sister signatories … are entitled to considerable weight." *Abbott*, 560 U.S. at 16 (citing *El Al Israel Airlines, Ltd*. v. *Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999)). "The principle applies with special force here, for Congress has directed that uniform international interpretation of the Convention is part of the Convention's framework." *Id*. (citing ICARA § 9001(b)(3)(B)).

substantive law, as in Virginia, private custody agreements do not have any legal effect absent court approval. *Id*.

The1980 Hague Convention is not a treaty on the enforcement of "agreements" between parents. Indeed, the Hague Conference on Private International Law's Council on General Affairs and Policy has convened an Experts' Group to study and make recommendations on whether the negotiation and drafting of a treaty on the cross-border recognition of agreements in family matters involving children should be undertaken. No such treaty negotiation or drafting has yet been convened or undertaken.[2]

Yet the circuit court's opinion here creates a split in the circuits, a conflict with at least one of our sister States Parties, and a conflict with this Court's *Abbott* decision. Writing out the "legal effect" requirement of the treaty, and in doing so recognizing the PSA as changing the parties' respective custody rights without approval, ratification, or incorporation by a court is the opposite approach of the other circuits that have addressed the issue. Such an approach results in the Father's Portuguese *ne exeat* and parental responsibility rights not being recognized at all.

It is time for this Court to address the interpretation of "agreements having legal effect" relating to "rights of custody." The Court should grant review to impose consistent, text-based interpretation and application of the Convention's article 3

2 https://www.hcch.net/en/projects/legislative-projects/recognition-and-enforcement-of-agreements (last visited November 23, 2021).

requirement that any parental agreement must have "legal effect" under the substantive law of the country of the child's habitual residence.

CONCLUSION

The petition for a writ of certiorari should be granted.

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