No. 21-797

In the Supreme Court of the United States

SERGE ALUKER,

Petitioner,

v.

SIMIN YAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

KELLY R. OELTJENBRUNS
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW
Suite 900
Washington, D.C. 20037
koeltjenbruns@HuntonAK.com
(202) 419-2126

MAYA ECKSTEIN
Counsel of Record
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
meckstein@HuntonAK.com
(804) 788-8788

Counsel for Respondent

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

QUESTION PRESENTED

Whether a private child custody agreement governed by Virginia law has "legal effect" as that term is used in the Hague Convention on Civil Aspects of International Child Abduction.

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

JURISDICTION

The Court of Appeals for the Fourth Circuit entered judgment on August 5, 2021. The court denied Petitioner's request for rehearing on August 31, 2021. Petitioner filed a petition for a writ of certiorari on November 24, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The opinion below unremarkably concludes that private child custody agreements have "legal effect" under Virginia law. It does not merit this Court's review.

Since fall 2019, Respondent Simin ("Jasmine") Yan has resided with her sons in the Virginia home she once shared with Petitioner Serge Aluker. Pet. App. 215. [1] Yan, a Chinese citizen, and Aluker, a Russian citizen, met and married in China, and moved to the United States in 2008. Pet. App. 196. They spent the next several years in their Virginia home, welcoming two boys in 2009 and 2011. Pet. App. 196-97.

Throughout their marriage, Petitioner Serge Aluker was the parties' primary breadwinner and decision-maker. See, *e.g.*, Pet. App. 197. He is co-founder and CEO of a Northern Virginia-based data management company. Pet. App. 199. Yan stopped

[1] References to "Pet. App." are to the Appendix filed by Petitioner in the court of appeals.

working outside the home when their first son was born. Pet. App. 198; 295-96. Aluker handled the family's finances and unilaterally determined where the family lived. Pet. App. 197, 229.

Aluker decided to move the family from Virginia to Madrid, Spain, in 2015. Pet. App. 197. Yan did not want to go. Pet. App. 197. Undeterred, Aluker unilaterally sold the family's car, rented the house, stored their belongings, obtained visas for the family, and assured Yan that the family could move back to Virginia whenever she chose. Pet. App. 197. The family moved to Madrid in summer 2015. Aluker again moved the family against Yan's wishes in fall 2017, this time to Lisbon, Portugal. Pet. App. 199. Again, Aluker promised that the family could return to Virginia if Yan wished. Pet. App. 199.

By the time they moved to Portugal, Aluker and Yan had struggled with marital discord for five years. Pet. App. 200. Aluker was "mentally violent" to Yan. Pet. App. 253. He controlled the couple's finances, made decisions, and largely kept Yan in the dark with business matters, even those involving her assets. Pet. App. 229. He unilaterally made arrangements for the moves to Spain and Portugal, often without consulting Yan. Pet. App. 197. When the couple purchased an apartment in Madrid in Yan's name, Aluker initiated and facilitated the transaction, and Yan signed where told. Pet. App. 198. Yan did not help obtain visas when the family moved; Aluker handled all the paperwork. Pet. App. 197. Yan continually expressed her desire to move back to the United States, and Aluker repeatedly convinced her to stay with the family. Pet. App. 200. Eventually, though, the parties agreed to live separately, and Aluker moved out of the family's Portugal apartment

in September 2017. Pet. App. 200. Yan consistently lived with and cared for the children. E.g., Pet. App. 200.

In 2018, Aluker learned that United States tax law would change on January 1, 2019, making it desirable to enter into an alimony agreement before then. Appellant's Br., No. 21-1279 (4th Cir.), dkt. no. 14, at 7. Facing an impending separation with Yan, Aluker obtained legal counsel to draft a separation agreement and ensure that he could avail himself of the "tax benefits." *Id*. His counsel drafted a Separation and Property Settlement Agreement ("PSA"), which provided that Aluker would pay alimony totaling $2.87 million over the span of eight years. Pet. App. 50. The parties signed the agreement in November 2018, in time for Aluker to obtain the expiring tax benefit. Pet. App. 60.

The PSA, which is governed by Virginia law, is comprehensive and, per its express terms, independently enforceable. Pet. App. 57. In addition to providing for alimony, it states that "[Yan] shall have sole legal and primary physical custody of [the children] . . . [Aluker] shall be entitled liberal and reasonable visitation with the children." Pet. App. 49. It further provides that "[Yan] shall be responsible for the children's living expenses" except private school tuition that exceeds $5,000/year. *Id.* The agreement awards Yan the parties' Virginia home and permits each party "the right to reside at any place … without the consent of the other party." Pet. App. 49, 51. The parties agreed that, upon their divorce, the PSA would be incorporated (but not merged, so as to retain the tax benefit) into the divorce order, and that the PSA was enforceable "independently as a contract" between Aluker and Yan. Pet. App. 57. Yan did not

engage an attorney to represent her interests, as Aluker insisted that she did not need one. Pet. App. 206.

After signing the agreement, the parties continued living separately in Portugal. Pet. App. 200. Eventually, the couple had an altercation in which Aluker hit Yan forcefully on her shoulder, pushing her into the street while their oldest son watched. Pet. App. 253, 302. Their son began hitting Aluker until Yan pulled him away. Pet. App. 253, 302. Yan later emailed Aluker that she was "really scared [of him] now." Pet. App. 253.

Yan and the boys left for Virginia on October 3, 2019. Pet. App. 199. She emailed Aluker as much, and Aluker said he was "ok" with the children living and going to school in Virginia. Id. A week later, Aluker for the first time accused Yan of "abduct[ing his] kids." Pet. App. 225-26; 253. He filed divorce proceedings in Portugal family court and, despite the PSA's provisions requiring that it "be submitted to the Court in which any divorce action is filed," did not file or mention the PSA in the Portugal family court. Pet. App. 57, 202. Without hearing from Yan and without any knowledge of the PSA, the Portuguese court entered an order in December 2019 permitting the boys to live with Aluker. Pet. App. 14, 202.

Aluker next filed a petition in Fairfax County in April 2020 seeking to register the Portuguese court's order. Br. at 12. Yan learned of Aluker's court activity for the first time when she was served with notice of the Fairfax County action. Pet. App. 206. She submitted the PSA and a letter to the Portuguese court, explaining that the PSA governed custody disputes and that Aluker had thereunder

relinquished his custody rights. Pet. App. 202. She also filed a pro se divorce complaint in Virginia, describing the PSA. Pet. App. 202. Once she obtained counsel in Virginia for the divorce proceeding, she submitted the PSA and asked for its incorporation into a divorce decree. Pet. App. 202.

In September 2020, almost a year after Yan and the children's returned to Virginia, Aluker filed this action in the Eastern District of Virginia alleging that Yan wrongful removed the children under Article 3 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 through the International Child Abduction Remedies Act, 22 U.S.C. §§ 9001-9011, and seeking their return to Portugal. Pet. App. at 7-29. Aluker's petition stayed all other related proceedings.

After Yan obtained counsel and answered Aluker's Hague petition, and the parties conducted discovery, Yan filed for judgment as a matter of law under Fed. R. Civ. P. 52(c) on grounds that Aluker relinquished his custody rights by entering into the PSA and, therefore, could not invoke the Hague Convention's right of return. Pet. App. 333-38; see also Pet. App. 339-46.

The district court granted Yan's motion and dismissed Aluker's petition, holding that Virginia law governed the question of whether Aluker had the "rights of custody" required by the Convention to successfully petition for a child's return. Pet. App. 17-24. The court explained that, under Virginia law, a private custody agreement can have "legal effect" within the meaning of Hague Convention Art. 3 even

if it has not been incorporated into a court order. Pet. App. 582-94. Because the PSA left Aluker without custody rights under Virginia law, his petition failed to meet the Hague Convention's requirement that the petitioning party have "rights of custody." App. 26.

The Fourth Circuit Court of Appeals affirmed in an unpublished, per curiam opinion, No. 21-1279. The Court agreed that "Aluker [] failed to prove under Virginia law that he had any custody rights at the time the children were removed from Portugal." App. 7. It held that a custody agreement under Virginia law has "legal effect" unless and until it is modified by a court. App. 7. Here, the PSA unambiguously provided Yan with "sole legal and primary physical custody" of the children, and no court had modified it. App. 7. Because Aluker willingly gave up his custody rights, his wrongful removal claim failed. App. 8. That same month, Aluker's request for rehearing was denied. App. 28.

Aluker timely filed a petition for writ of certiorari.

REASONS FOR DENYING THE PETITION

The unpublished decision below is unremarkable. It hinged on an interpretation of state law, resulted in no disagreement among circuit courts, and is a poor vehicle to resolve the abstract issue Petitioner purports to present.

I. This case turns exclusively on Virginia law.

The Petition frames this case as one about the interpretation of Hague Convention text. It is not. It turns exclusively on interpretation of Virginia law, confining any error in the decision below to a non-precedential read of that state's law.

The Fourth Circuit interpreted the Hague Convention's text only as a noncontroversial first step in its analysis. Petitioner filed his lawsuit under the Convention, which (with certain exceptions) provides for the return of a child to his or her country of "habitual residence" if, *inter alia*, the child's removal breached "rights of custody" held by the party invoking the Convention pursuant to the laws of the country of the child's habitual residence. Hague Convention, art. 3. The Convention further provides that "rights of custody" may arise "by reason of an agreement having legal effect under the law of that State." [2]

The parties agree that, regardless of whether the children habitually resided in Portugal or the United States, courts in both countries would apply Virginia law to an underlying custody dispute. See, *e.g.*, Pet. 9 (admitting that Portuguese choice of law analysis requires application of Virginia law). And so, for purposes of the Convention, determining whether Petitioner had a "right of custody" turned on whether

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[2] Hague Convention, art. 3. The full text of Article 3 provides: "The removal or the 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."

the PSA was "an agreement having legal effect under the law of" Virginia. Pet. 18, App. 8.

Thus, the second step of the court's analysis required it to interpret Virginia law to determine whether a private custody arrangement had "legal effect" thereunder. This did not require further interpretation of the Hague Convention's text because the Convention explicitly directs the "law of that State [of habitual residence]" to define the term "legal effect." Nor does this issue invoke United States federal law. If a child's habitual residence is the United States, or if United States law nonetheless applies (as it would here under Portugal's choice-of-law provision), the federal courts will apply and interpret the law of the appropriate state—in this case, Virginia—and not federal law. This is why no circuit court has interpreted "legal effect" as a matter of *federal* law; it is a *state* law issue.

The central issue in the opinion below, therefore, was an interpretation of Virginia law, not of federal law or the Hague Convention. App. 7 ("Aluker has failed to prove under Virginia law that he had any custody rights at the time the children were removed from Portugal."). Petitioner acknowledges as much; his "Application" section argues that the PSA "does not meet Virginia's requirements for having 'legal effect'" and cites exclusively cases interpreting Virginia law. Pet. 18-22. And that is the issue that Petitioner now appeals.

Recognizing that a state law issue does not merit this Court's review, Petitioner invents an abstract "question presented" asking if "the Fourth Circuit's decision write[s] that article 3 requirement [that an agreement have legal effect] out" of the Convention.

Pet. i. But, again, Petitioner's argument rests solely on its interpretation of *Virginia* law—*not* on an incorrect reading of the text of the Hague Convention. An interpretation of "legal effect" under Virginia law, even if incorrect, is not a "compelling" reason justifying certiorari. Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons.").

The only interpretation of the Hague Convention in which the Fourth Circuit engaged was an uncontroversial recitation of Article 3, which requires a petitioner show a "right[] of custody." App. 5. Then, without deciding whether the United States or Portugal was the children's country of habitual residence, the court applied Portugal's choice-of-law rules to conclude that Virginia law applied to the question of custody rights—a conclusion Petitioner does not challenge. App. 6-7. And, finally, the court determined that, under Virginia law, Petitioner lacked "rights of custody" pursuant to the PSA. App. 7-8. It is this interpretation of *Virginia* law that Petitioner now questions. In short, this is not a dispute about the Fourth Circuit's application of the Convention or of federal law, but a dispute about that court's application of Virginia law to a question that the Convention places squarely under the jurisdiction of state law. Petitioner may disagree with the court's interpretation of Virginia law, but that is not an issue that compels this Court's review.

In any event, the Petition's proposed interpretation of Virginia law—that a private agreement lacks legal effect until it is incorporated into a court order—does not accord with Virginia court precedent or common sense. As the opinion below explains, private custody arrangements have

"legal effect" and are binding on parties when entered. App. 7. This is true despite the courts' obligation to review and alter child custody agreements to ensure they comport with a child's best interests before incorporating them into a court order. *Verrocchio v. Verrocchio*, 16 Va. App. 314, 317 (1993).

Nor does the appellate court's interpretation of Virginia law create a conflict with this Court's opinion in *Ford v. Ford*, 371 U.S. 187 (1962). Petitioner argues that this Court has addressed whether an "agreement between parents" is "binding on a Virginia court" and is dispositive here. Pet. 18 (citing *Ford v. Ford*, 371 U.S. 187 (1962)). But that misses the mark. The issue in *Ford* was whether Virginia *courts* are bound by a private custody agreement. 371 U.S. at 193 ("In Virginia, parents cannot make agreements which will bind courts to decide a custody case one way or another."). The issue here, on the other hand, is whether a private agreement has "legal effect" that binds *the parties* in the first instance. While this Court has not ruled on *that* issue, the Fourth Circuit did, holding that, under Virginia law, parties may reach a custody agreement that has legal effect even if it is not incorporated into a divorce decree.

In short, to resolve this case, this Court will have to apply almost exclusively Virginia state law to the facts at hand. Expounding on a Virginia state law issue seems hardly the province of this Court.

II. There is no circuit split.

Petitioner claims there is a split among circuits as to the interpretation of the term "agreement having legal effect" and in the interpretation of the broader concept of "rights of custody." Pet. 22. No such split exists.

The Petition cites two cases as evidence of a circuit split: *Martinez v. Cahue*, 826 F.3d 983 (7th Cir. 2016), and *Shalit v. Coppe*, 182 F.3d 1124 (9th Cir. 1999).[3] The *Martinez* court reached the straightforward conclusion that a private agreement providing for visitation rights does not grant custody rights under *Illinois* law where none originally existed. The court's brief discussion regarding whether private custody agreements can have "legal effect" was dicta and, regardless, limited to Illinois law. Relevant here, the court did not analyze the meaning of "legal effect" under the Hague Convention's text or United States federal law because, per the court's dicta, the meaning of "legal effect" was an issue of Illinois law. And the Ninth Circuit in *Shalit* applied *Israeli* law to the question whether a private custody arrangement has "legal effect" under the Hague Convention. Because Israeli law requires that custody agreements between parents living separately "be subject to the approval of the Court," the court held that such agreements did not have legal effect until they received such court approval. *Id*. at 1131.

Neither case evidences a circuit split. Indeed, these opinions counsel *against* granting certiorari because they each turn on interpretation of *state or national law*, not the Hague Convention's text. If anything, these cases establish agreement amongst the circuit courts that the law of the state of the children's habitual residence governs whether a private custody agreement has legal effect. See, *e.g.*,

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[3] The Petition also cites a lone New Hampshire district court opinion and a single case from New Zealand. Pet. 26-28. Even if the Petition correctly represented these opinions, which it does not, these bear none on whether there is a circuit split on the issue presented here.

Martinez, 826 F.3d at 991 (explaining in dicta that it would apply Illinois law to question whether private custody agreement had "legal effect" under the Hague Convention). That the different state and national laws interpreted yielded different conclusions is hardly extraordinary.

Nor did the Fourth Circuit create a "conflict" with this Court's holding in *Abbott v. Abbott*, 560 U.S. 1 (2010). The Petition suggests that the opinion below conflicts with *Abbott* in two ways. First the Petition asserts that the Fourth Circuit took a "non-text-based approach to treaty interpretation." Pet. 3. But the Fourth Circuit reviewed and interpreted the Convention's text consistent with *Abbott*. App. 5-8. In *Abbott*, the Court applied the law of Chile, which the parties agreed was the country of habitual residence, to determine whether the petitioner had "rights of custody" to the child at issue. 560 U.S. at 10-11. Here, the Fourth Circuit determined that, regardless of whether the children habitually resided in the U.S. or Portugal, the laws of the United States applied to determine whether Petitioner had the requisite rights of custody to the children.

Second, the Petition suggests that the opinion below somehow disagrees with *Abbott's* holding that a statutory *ne exeat* right is a "right of custody" under the Convention. Pet. 12-13, 23. Not so. The Fourth Circuit did not address this issue because it did not need to. Whether Portugal recognizes a *ne exeat* right was immaterial once the Fourth Circuit held that Portuguese choice-of-law rules required application of *Virginia*, not Portuguese, law to determine whether Petitioner had "rights of custody." App. 6-7. Thus, Virginia law defined Petitioner's rights of custody, not

Portugal's, rendering discussion of Portugal's *ne exeat* rights irrelevant.[4] App. 7.

Nor does the appellate court's ruling conflict with this Court's rulings in *Monasky v. Taglieri*, 140 S. Ct. 719 (2020), *Lozano v. Montoya Alvarez*, 572 U.S. 1 (2014), or *Chafin v. Chafin*, 568 U.S. 165 (2013). *Monasky* involved the standards for determining a child's habitual residence; *Lozano* involved equitable tolling of the one-year period for seeking a child's return; and *Chafin* addressed the mootness of a Hague return petition after the child is returned to the country of habitual residence. None of these questions were at issue below.

The issue in this case is whether a private custody arrangement has "legal effect" under Virginia law. No other circuit court has addressed that issue and, as such, there is no circuit split.

III. This case is a poor vehicle to resolve the meaning of "legal effect" under either state law or the Hague Convention.

This case presents a poor vehicle to address the issue of whether a private agreement has "legal effect" under Virginia law, or any antecedent question as to the definition of "legal effect" under the Hague Convention.

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[4] Several additional factors dictated a different result here than that reached in *Abbott*. First, unlike this case, *Abbot* did not involve a private custody agreement between the parties that set forth rights and responsibilities separate from that provided for in Chilean (here, Portuguese) law. Second, *Abbott* did not involve a choice-of-law analysis requiring the application of U.S. law to the private custody agreement, rather than Chilean (here, Portuguese) law.

First, the opinion below was unanimous and unpublished. It is therefore not precedential. Second, Aluker's petition for rehearing en banc was denied without dissent. Third, the Fourth Circuit did not view its holding as controversial or inconsistent with decisions from sister circuits or this Court. Fourth, even if there was a split as to whether a private custody arrangement can ever have "legal effect," the Fourth Circuit is the only circuit court to have properly weighed in on this issue. This Court's intervention is neither needed nor warranted where, as here, one circuit court interpreting state law may conflict with dicta from another circuit court interpreting a different state's, differently-worded law.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,
HUNTON ANDREWS KURTH LLP
/S/ MAYA ECKSTEIN

MAYA ECKSTEIN
Counsel Of Record
951 East Byrd Street, East Tower
Richmond, Virginia 23219
meckstein@HuntonAK.com
(804) 788-8788

KELLY R. OELTJENBRUNS
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW
Suite 900
Washington, D.C. 20037
koeltjenbruns@HuntonAK.com
(202) 955-1500
Counsel for Respondent