

No. 12-820

In the Supreme Court of the United States

MANUEL JOSE LOZANO, PETITIONER

v.

DIANA LUCIA MONTOYA ALVAREZ

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

**BRIEF FOR THE NATIONAL CENTER FOR MISSING AND
EXPLOITED CHILDREN AS AMICUS CURIAE IN SUPPORT
OF PETITIONER**

MARIA CARBONI
CARMEL SHACHAR
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199-3600

YIOTA SOURAS
PRESTON FINDLAY
THE NATIONAL CENTER
FOR MISSING AND EX-
PLOITED CHILDREN
699 Prince Street
Alexandria, VA 22314

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
MARIEL GOETZ
ROPES & GRAY LLP
One Metro Center
700 12th Street, N.W., Suite 900
Washington, D.C. 20005
(202) 508-4600
*Douglas.Hallward-Driemeier
@ropesgray.com*

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INTEREST OF AMICUS¹

The National Center for Missing and Exploited Children (“NCMEC”) was established in 1984 as a private, non-profit 26 U.S.C. 501(c)(3) organization to assist law enforcement and families in the prevention of child abductions, the recovery of missing children, and the provision of services to combat child sexual exploitation. NCMEC has been designated by Congress as “the official national resource center and information clearinghouse for missing and exploited children,” and

¹ Both parties have consented to the filing of this amicus curiae brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

receives funding from the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention. 42 U.S.C. 5773(b). In addition to working with the Office of Juvenile Justice and Delinquency Prevention, NCMEC works in cooperation with federal, state, and local law enforcement agencies, state missing children clearinghouses, and international law enforcement agencies. NCMEC also works frequently with foreign government entities, including the formally designated Central Authorities of Hague Convention Contracting States, on cases of international family abduction. 42 U.S.C. 5771(9)(C).

Since its inception, NCMEC has been heavily involved in combatting child abductions. Because of its connections to international, federal, state, and local law enforcement agencies and networks, NCMEC frequently transmits information regarding missing and exploited children to law enforcement and other agencies across the globe. NCMEC has also been designated by Congress to track and report on the number of missing children cases, including family abductions.

From 1995 through April 2008, NCMEC fulfilled the functions of the United States Central Authority under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention"), Oct. 24, 1980, T.I.A.S. No. 11,670, 13433 U.N.T.S., for "incoming cases," in which a parent abducts a child into the United States from a Contracting State. NCMEC's work on incoming cases was performed on behalf of the United States Department of State ("Department of State") pursuant to a cooperative agreement among the Department of State, the United States Department of Justice, and NCMEC.

NCMEC handled approximately 5,600 incoming cases before the Department of State assumed primary responsibility over all incoming cases in 2008.

During NCMEC's involvement with incoming cases, it assisted left-behind parents with assembling their applications for relief under the Convention, securing legal counsel, obtaining law enforcement assistance and social services as needed, and obtaining clarification of foreign custody laws from foreign authorities. Although NCMEC no longer handles incoming cases, it continues to provide technical assistance and resources to parents, attorneys, judges and law enforcement officials involved in these cases. NCMEC also continues to maintain the International Child Abduction Attorney Network, a network of attorneys providing pro bono representation in family abduction matters of all kinds, including Convention cases. NCMEC provides legal technical assistance for attorneys at any point during Convention related litigation, including discussing legal questions, referring attorneys to mentors, discussing alternate legal strategies, arranging logistical support, providing third party referrals for counseling and other support, and troubleshooting. Lastly, NCMEC has maintained many of the relationships it developed with Central Authorities, legal representatives, and other agencies in many Convention Contracting States. Its involvement with these key stakeholders, both domestically and internationally, provides NCMEC with valuable insight into the operation of the Convention in the United States and in other Contracting States.

NCMEC also has provided and continues to provide assistance to families on "outgoing" Hague Convention cases, in which a parent abducts a child from

the United States to a Contracting State. To date, NCMEC has provided assistance on over 2,300 outgoing cases.

In addition, NCMEC operates several other programs to assist law enforcement in battling child abduction and locating missing children. NCMEC created “Team Adam,” a program that includes dozens of retired law enforcement professionals with experience in missing and abducted children cases to provide technical assistance to local law enforcement and families at no cost. NCMEC supports and provides secondary distribution of the AMBER Alert program to rapidly respond when children are abducted. Congress recently passed legislation creating the National Emergency Child Locator Center at NCMEC to respond to emergencies and major disasters. NCMEC also offers forensic and biometrics services to help law enforcement on long-term missing children cases. Few organizations in the United States have a deeper understanding of the process and resources locating abducted children requires.

NCMEC participates as an amicus before this Court in cases that will have a significant impact on the efficacy and execution of the Convention. NCMEC believes the Convention should operate to best facilitate the return of abducted children and to encourage litigation of custody rights in the appropriate countries. NCMEC has a strong interest in ensuring that Contracting States interpret the Convention consistently and children who are “wrongfully removed” or “wrongfully retained” within the meaning of the Convention are reunited with their families and returned to their countries of habitual residence.

NCMEC believes that the court of appeals' rejection of equitable tolling with respect to Article 12's one-year period undermines the operation of the Convention and, contrary to the Convention's purpose, establishes incentives that promote, rather than combat, international child abduction. NCMEC asks the Court to reverse the Second Circuit's decision and hold that equitable tolling is available where an abducting parent has concealed the whereabouts of the abducted child and, as a result, the left-behind parent is unable to file within Article 12's one-year period.

SUMMARY OF THE ARGUMENT

Equitable tolling is a critical tool for United States courts to give effect to the intended purpose of the Hague Convention's return provisions. As Petitioner explains, Pet. 2, the central and undisputed purpose of those provisions was to protect children from international abductions by removing incentives for abducting parents to flee to another country in the hope of obtaining a more favorable custody determination. By providing that abducted children *must* be returned to their home country if the left-behind parent files a petition for return within one year of the abduction, the Convention seeks to deter abductions from occurring in the first place.

Where an abducting parent has concealed the whereabouts of a child, however, the process a left-behind parent must navigate to file a return petition is a difficult and long one, riddled with myriad obstacles. NCMEC is well familiar with these obstacles from its experience working with left-behind parents searching for children believed to be in the United States as well as its previous experience performing Central Authority duties for the United States. Because of these difficulties, which are explained further below, it is NCMEC's experience that many left-behind parents can diligently search for their concealed children but nonetheless be unable to file a petition within one year of the abduction. In such circumstances, if equitable tolling is not available, the abducting parent is able to reap the benefit of the concealment by asserting the "settled" defense—which is *only* available to that parent by virtue of his or her year-long concealment of the child's whereabouts. Equitable tolling allows courts to

prevent this unfair outcome by taking account of the practical complications that arise in finding abducted children whose location has been kept hidden from the left-behind parent. By precluding the abducting parent from raising the “settled” defense where his or her own misconduct has delayed the filing of a return petition, equitable tolling serves Article 12’s overriding goal of deterring and remedying abductions.

No foreign court of last resort has made a final determination regarding the availability of equitable tolling in such circumstances. Because the Contracting States to the Convention strive to consistently enforce its mandates, this Court’s decision may influence the adjudication of cases abroad. The availability of equitable tolling in foreign courts would have a significant impact on United States-based left-behind parents whose children have been concealed after being abducted from the United States. As NCMEC knows from its continuing role in helping United States-based parents locate children abroad, the difficulties in such cases are often compounded by the insufficient resources (including inadequate law enforcement or organizational assistance, or availability of other services to assist with locating abducted children) provided in other countries.

NCMEC accordingly urges the Court to reverse the Second Circuit’s decision and make clear that equitable tolling applies to Article 12’s one-year period.

ARGUMENT

I. EQUITABLE TOLLING SERVES THE PURPOSES OF THE HAGUE CONVENTION BY TAKING ACCOUNT OF THE SIGNIFICANT DIFFICULTIES—BOTH PRACTICAL AND PROCEDURAL—IN LOCATING A CHILD WHEN HIS OR HER WHEREABOUTS ARE CONCEALED BY AN ABDUCTING PARENT

A. The Convention Was Designed To Deter Child Abduction By Returning The Custody Dispute To The Proper Venue

The central purpose of the Hague Convention is to remedy and prevent the problem of international child abduction, a troubling and growing phenomenon with a devastating impact on children and families throughout the world. See Convention Preamble; Elisa Pérez-Vera, *Explanatory Report: Hague Conference on Private International Law*, 3 Acts and Documents of the 14th Session, §§ 16, 25 (1980) (translation of the Permanent Bureau) (“Pérez-Vera Report”). Although no comprehensive statistics exist for how many children each year are abducted, the most recent global data regarding return applications filed under the Convention suggests that well over one thousand children are internationally abducted per year. In 2008 alone, 1,961 return applications were filed under the Convention worldwide. Nigel Lowe, *A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part I—Global Report 9* (Nov. 2011) (“Part I—Global Report”). More recently, in 2012 the Department of State received 1,143 new cases of internationally abducted children, involving 1,617 children.

United States Dep't of State, New Outgoing Cases CY 2012, http://travel.state.gov/pdf/CY2012-Outgoing_Openstats.pdf; United States Dep't of State, New Incoming Cases CY 2012, http://travel.state.gov/pdf/CY2012-Incoming_Openstats.pdf. Of these cases, 799 involved American children wrongfully removed to Contracting States (referred to as “outgoing” cases). *Ibid.* That same year, the United States received 344 “incoming” cases—involving children abducted from other countries and taken to the United States—involving 473 children. *Ibid.*

The international abduction of a child can devastate a family. Parental child abduction has been recognized as a serious form of abuse for over 30 years. See Dorothy S. Huntington, *Parental Kidnapping: A New Form of Child Abuse* (1982), in American Prosecutors Research Institute's National Center for Prosecution of Child Abuse, Parental Abduction Project, Investigation and Prosecution of Parental Abduction (1995). The abducted child experiences the instantaneous loss of community, which can lead to prolonged depression. The child also loses a sense of security or stability and the ability to trust others, and acquires a fear of abandonment. See United States Dep't of Justice, The Crime of Family Abduction: A Child's and Parent's Perspective 7 (May 2010) (“The Crime of Family Abduction”), <https://www.ncjrs.gov/pdffiles1/ojdp/229933.pdf>. As this Court previously recognized, studies have shown that separation by abduction can cause psychological problems ranging from depression and acute stress disorder to posttraumatic stress disorder and identity-formation issues. *Abbott v. Abbott*, 130 S. Ct. 1983, 1996 (2010) (citing Nancy Faulkner, Parental

Child Abduction is Child Abuse (1999), <http://www.prevent-abuse-now.com/unreport.htm>). These issues are only magnified when a child is abruptly taken to a new country, with potential communication barriers and different customs. The aftermath of abduction can be lengthy, as reunification with left-behind family members can be a difficult process. See Geoffrey L. Greif, *The Long-Term Aftermath of Child Abduction: Two Case Studies and Implications for Family Therapy*, 37 *Am. J. of Family Therapy* 273 (June 16 2009). Preventing and deterring abductions is critical because there is no way to “un-ring the bell” when it comes to the trauma faced by children and left-behind parents.²

Troublingly, some sources indicate a long-term upward trend in international child abductions. A survey of return applications in 2008 indicates a 56% increase from the total number of applications received in 2003 and a 106% increase from the number of applications in 1999. Part I—Global Report at 9. Excluding new Contracting States, there was a 45% increase in return applications from 2003 to 2008. *Ibid.* The United States is directly impacted by this growing problem, having received, for example, 283 incoming cases in 2008—the highest number of return applications received that year by any Contracting State, and representing fourteen percent of that year’s total “incoming”

² International abductions can happen in a variety of ways, including taking a child to another country ostensibly for another purpose—such as for vacation, to visit family, or to care for a sick relative—but then refusing to return. See *The Crime of Family Abduction* at 26-27, 29. Such conduct constitutes wrongful removal or retention under the meaning of Article 12.

cases worldwide. *Ibid.* The United States also filed 309 outgoing cases in 2008. *Id.* at 13.

As the number of incoming cases continues to rise, the requests for assistance to networks providing pro bono counsel for left-behind parents also increases, making it less likely that each parent in need will obtain the help he or she needs in a timely manner. All the while, international abduction continues to exert a devastating emotional, financial, and social toll on the families and children involved.

B. The Operation Of The Convention's Return Remedy

To achieve its goal of curbing international child abductions, “[t]he Convention’s central operating feature is the return remedy.” *Abbott*, 130 S. Ct at 1989. A Contracting State must “order the return of the child forthwith” when the child has been “wrongfully removed to or is retained in” a Contracting State other than his or her country of habitual residence. Convention Arts. 1, 3, 12. Through the return remedy, the Convention is intended to preserve the “pre-abduction allocation of custody rights.” *Abbott*, 130 S. Ct. at 1989. Notably, courts hearing Convention cases do not decide the merits of an underlying custody dispute, but simply determine the appropriate jurisdiction in which the custody dispute is to be heard. See Convention Arts. 16, 19; 42 U.S.C. 11601(b)(4). The ultimate custody determination is made in the proper venue, which is the judicial system of the child’s habitual residence.

The Contracting States’ Central Authorities play an important role in carrying out the Convention’s aims, and are charged with helping investigate the

whereabouts of the child and, where possible, facilitating the voluntary return of the child, among other responsibilities. See Convention Art. 7; Pérez-Vera Report at 435, ¶ 35. In cases where a child is abducted to the United States, the Central Authority of the country of origin receives the application from the left-behind parent and then forwards it to the United States Central Authority (“USCA”), who helps the left-behind parent prepare to initiate court proceedings seeking return of the child.³

As Petitioner rightfully emphasizes, Pet. Br. 3-4, Article 12’s return remedy is the primary means by which the Convention’s deterrence and remediation goals are carried out. It does this by setting forth a mandatory rule: if the petition was filed within the one-year period, the child *must* be returned to his or her home country. Convention Art. 12; see also *Abbott*, 130 S. Ct. at 1989 (noting the “central operating feature” of the Convention is the “return remedy”). Article 12 thus not only confers a clear right to the left-behind parent—to have the child returned to his or her home country to determine custody—but also sends an un-

³ When a child is abducted from the United States to another Contracting State, the USCA likewise facilitates efforts to secure the return of the child, and NCMEC may also provide assistance. See United States Dep’t of State Office of Children’s Issues, http://travel.state.gov/abduction/solutions/opencase/opencase_3849.html; United States Dep’t of State Office of Children’s Issues, http://travel.state.gov/abduction/solutions/locatechildren/locatechildren_3850.html; see also United States Response: Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (2006), http://www.hcch.net/upload/abd_2006_us.pdf.

ambiguous message to abducting parents that they will not be allowed to get away with international abduction. Article 12, in addition, sets up a secondary rule: If the child has been abducted for over a year, the court still must return the child to his or her home country so long as the abducting parent cannot demonstrate that the child is settled in his or her new environment. Convention Art. 12 (noting that, where a petition for return is filed more than one year after the wrongful international removal, courts “shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment”). Article 12’s provisions are supplemented by Article 18, which states that there is no limit on the power of a judicial or administrative authority to order the return of the child at any time. Convention Art. 18 (“The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.”).

As further detailed below, NCMEC believes that equitable tolling of the one-year period in Article 12 is necessary in order to prevent the “settled” exception from swallowing the rule of the return remedy—a result that would contravene the overriding purpose of the Convention. The process of locating an abducted child and preparing the case to be filed is lengthy and difficult, and can easily take longer than Article 12’s one-year period. As detailed below, this demonstrates that left-behind parents can diligently search for their concealed children but still miss the one-year period, all through no fault of their own. Equitable tolling prevents left-behind parents from being further disadvantaged by abducting parents’ wrongful conduct and

avoids creating perverse incentives for abducting parents to conceal the whereabouts of their children.

C. The Obstacles Left-Behind Parents Confront

To secure the return of their abducted children from the United States pursuant to the Convention's provisions, left-behind parents must at a minimum (1) discover where the child has been taken; and (2) obtain the assistance of legal counsel. Neither of these tasks is easy and both can be extremely time consuming, quickly "running out the clock" on the year allotted before the abducting parent becomes entitled to assert a settled defense. In addition, left-behind parents may have to contend with language barriers, financial constraints, and lack of knowledge and familiarity with a foreign court system.⁴ Having assisted in thousands of incoming cases up until 2008, and continuing to play an active role in outgoing cases today, NCMEC is well-aware of these burdens and how they play out in practice.

When an abducting parent has concealed the whereabouts of the child, accomplishing these tasks becomes even more difficult. In case after case, NCMEC has seen first hand that an abducting parent's concealment of the child's location is all too often successful in preventing the left-behind parent from locating the abducted child.

⁴ Moreover, it is NCMEC's experience that left-behind parents frequently lack awareness of the Convention's existence, the return remedy it provides, or the local resources available in the parents' home countries.

At the outset, it is important to recognize that concealment can take a number of forms, all of which make finding an abducted child difficult and, in some unfortunate cases, practically impossible. On one end of the spectrum are a number of dramatic ways in which an abducting parent can conceal the whereabouts of the abducted child. For example, the abducting parent may attempt to live under an assumed name, refuse to enroll the child in school, or even alter his or her own appearance or that of the child.

Importantly, however, less dramatic types of concealment—such as refusing to provide information to the left-behind parent as to where the abducted child has been taken—can make it just as difficult to locate the abducted child. These more passive forms of concealment can consist of failing to return phone calls from the left-behind parent, *Atunez-Fernandes v. Connors-Fernandes*, 259 F. Supp. 2d 800, 808 (N.D. Iowa 2003); claiming to go on vacation while actually moving to a different country with the child, *Belay v. Getachew*, 272 F. Supp. 2d 553, 557 (D. Md. 2003); taking the child to a different country under the guise of another excuse, such as interviewing at schools, *Croll v. Croll*, 229 F.3d 133, 136 (2d Cir. 2000), cert. denied, 534 U.S. 949 (2001); leaving a family member’s address as the mail forwarding address, *Furnes v. Reeves*, 362 F.3d 702, 708 (11th Cir. 2004); preventing the child from telling the left-behind parent where the child is located, *In re Giampaolo*, 390 F. Supp. 2d 1269, 1274-1275 (N.D. Ga. 2004); or asking family and friends to keep silent about the new location of the child, *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1342 (S.D. Fla. 2002).

In NCMEC's experience, these methods of concealment can stymie a search just as effectively as more extreme tactics, and can easily cause even well-resourced and diligent parents to file outside the one-year period. Accordingly, the Court should not make the availability of equitable tolling dependent on the lengths to which the abducting parent goes to conceal the child's whereabouts. When that concealment has been successful—i.e., where it has contributed to the left-behind parent's inability to file within Article 12's one-year period despite diligent efforts—courts should equitably toll the one-year period to prevent the abducting parent from gaining a considerable advantage from his or her inequitable tactics.

1. *The Left-Behind Parent Must Personally Determine Where the Child Has Been Taken*

The first steps in the process to obtain a return order pursuant to Article 12 are confirming that the child has been removed from the country and then determining which country the abducted child has been taken to. This is critical because, in contrast to many other Contracting States, left-behind parents seeking return of a child from the United States cannot commence Convention proceedings merely by contacting their home country's Central Authority or law enforcement agency with a complaint. *Wojcik v. Wojcik*, 959 F. Supp. 413, 418-419 (E.D. Mich. 1997) (finding that the father's filing of a request for the return of his children with the French Central Authority did not commence proceedings). Rather, left-behind parents must initiate court proceedings in the country where the child is actually located. (And in the United States, as further dis-

cussed below, parents must go one step further: they must identify the specific court within whose jurisdiction the child is located.)

Depending on the information disclosed and clues left behind by the abducting parent, this task can range from simple to extremely difficult. Where the abducting parent leaves little or no indication as to the child's whereabouts, a left-behind parent can easily spend the full one-year period specified in Article 12 just trying to determine which country the child may have been removed to, and thus which foreign Central Authority is the correct one to file a return application with.

Consistent with this reality, and to increase the likelihood that left-behind parents will be able to locate their abducted children, NCMEC advises left-behind parents to look for any possible information as to where the abducting parent might have taken the child, and to persist in seeking up-to-date information about their whereabouts. For example, in its litigation guide for counsel representing parents in Convention cases, NCMEC warns that the success of investigations undertaken by Central Authorities to locate abducted children often hinges upon the extent and accuracy of information the left-behind parent can provide, such as the locations of relatives, places of employment, business connections, or other sources of potential support for the abducting parent. See NCMEC, *Litigating International Child Abduction Cases Under the Hague Convention 92* (2012) ("NCMEC Guide"), http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf. For many left-behind parents, the potential avenues of investigation are overwhelming.

In another publication designed to assist left-behind parents in this difficult endeavor, NCMEC further suggests that left-behind parents investigate everything from airline, bus and train records, to garbage left behind by the abducting parent, to firearm registration or licenses and resources at local libraries in order to try to locate the child. NCMEC, *Family Abduction: Prevention and Response* 63-75 (6th ed. 2009). But even where some information is inadvertently left behind by abducting parents, it can quickly become outdated, since abducting parents may move frequently—either to prevent the left-behind parent from locating the child, or for other reasons, such as lack of resources, transitory living accommodations with relatives or friends, difficulty enrolling children in school, illegal immigration status, or a general fear of detection by law enforcement officials. This only makes it more difficult for left-behind parents to locate their children and, accordingly, to file a return petition.

Moreover, undertaking an investigation of this nature can become incredibly expensive, especially when the left-behind parent must turn to professional help to locate the child.⁵ Illustrating the extent of this financial

⁵ To help overcome at least some of the financial burdens involved, NCMEC administers a “Victim Reunification Travel Program,” which funds travel for left-behind parents to attend custody hearings or to be reunited with their children. From 1996-2010, NCMEC disbursed more than \$715,127 in funds to support the travel of left-behind parents. However, the Program is limited to situations in which the child’s location has been determined; it unfortunately is not able to offer financial assistance to left-behind parents seeking to travel to another country to search for their abducted children.

burden, the Department of Justice noted that in a survey of left-behind parents, respondents reported spending an average of \$33,500 for search and recovery efforts and that about one-fourth of these parents reported spending \$75,000 or more. Janet Chiancone et al., *Issues in Resolving Cases of International Child Abduction by Parents*, *Juvenile Justice Bulletin* 6 (Dec. 2001) (“Juvenile Justice Bulletin”), <https://www.ncjrs.gov/pdffiles1/ojjdp/190105.pdf>. More than half of the parents surveyed reported spending as much as or more than their annual income on search and recovery efforts. *Ibid.* Unsurprisingly given these high numbers, a lack of sufficient funds was the most frequently identified obstacle to recovering an abducted child. *Ibid.* Even where left-behind parents can amass the funds to enlist professional help, that process can take considerable time, further delaying the search effort.

In short, because of the difficulty of determining where the abducting parent took the child, a significant amount of time may elapse before the left-behind parent has reliable information that the abducted child may be located in a particular foreign country.

2. *Locating an Abducted Child is Difficult Even Once the Proper Central Authority is Contacted*

Identifying the country to which the abducted child has been taken is only the beginning: the left-behind parent must then determine where *within* that country the child is located. Even with the resources of the United States Government and other organizations, this step, too, can be expensive and time-consuming.

When the child is suspected to be in the United States, the left-behind parent first must contact the Office of Children's Issues of the Department of State, either directly or through the Central Authority of the left-behind parent's country. The Office of Children's Issues then assigns a case officer to help the left-behind parent locate the child. Various entities and agencies assist with this process, including non-governmental organizations, such as International Social Service ("ISS"), the Federal Bureau of Investigation, the International Criminal Police Organization, and individual states' missing-child clearinghouses. In addition, media campaigns sometimes are used to create awareness that can lead to useful information about the location of a child.

Coordinating all of these agencies and entities can be an onerous and slow-moving process. As the Department of State has noted, "[f]or abductions into the United States, the civil nature of the Abduction Convention process has caused some difficulty in liaising with law enforcement entities, which, in spite of federal implementing legislation requiring them to assist with information sharing with respect to location efforts, sometimes consider Abduction Convention cases as a lower priority than criminal enforcement activities." United States Dep't of State, Response to the Questionnaire Concerning the Practical Operation of the 1980 and 1996 Conventions 6 (2011) ("Response to Questionnaire"), <http://www.hcch.net/upload/abduct2011us1.doc>. In addition, some law enforcement entities are reluctant to share information with the USCA because it is not a law enforcement entity itself. *Ibid.* All of these factors can result in a delay, potentially ex-

hausting Article 12's one-year period despite the left-behind parent's diligence.

Other countries and government agencies likewise have noted the difficulties with this stage of the process. Mexico is one of the Contracting States that has the highest number of incoming cases to the United States. In a response to a recent questionnaire distributed by the Hague Conference on Private International Law ("HCCH Questionnaire"), Mexico commented that in the United States there are "[d]ifficulties to loc[ate] the children." Secretaría de Relaciones Exteriores-Dirección General de Protección a Mexicanos en el Exterior, Dirección de Derecho de Familia, Response to the Questionnaire Concerning the Practical Operation of the 1980 and 1996 Conventions 6 (2011) ("Mexico's Response to Questionnaire"), <http://www.hcch.net/upload/abduct2011mx1.doc>. This issue also is noted in a bulletin from the United States Department of Justice, which reported this difficulty in completing the preliminary steps in initiating a Convention case "has been expressed by many left-behind parents and by a number of professionals in the field of missing children." *Juvenile Justice Bulletin* at 15. Especially considering the increasing number of incoming cases, these threshold delays can contribute to the left-behind parent filing after the initial one-year period has elapsed.

The Department of State, in its response to the HCCH Questionnaire, acknowledges that it has experienced some problems relating to the duties of the Central Authority as required by Article 7 of the Convention, which charges Central Authorities with the duty "to discover the whereabouts of a child who has been wrongfully removed or retained." Response to Ques-

tionnaire at 9; Convention Art. 7(a). The Department of State observed that there are difficulties exchanging information related to the “social background” of the child because “respect for family privacy in the United States has created a high threshold for inquiry or intervention of social services, who will normally only act if they receive information that a child is at risk of abuse or neglect.” Response to Questionnaire at 9. This comment illustrates the challenges of coordinating searches with agencies whose main purpose is not to locate internationally abducted children and who must focus on other priorities.

D. Obtaining Counsel Is Difficult And Time Consuming

The last critical step in the process is finding counsel to represent the left-behind parent in his or her effort to obtain a return order under the Convention, which requires initiating court proceedings.⁶ Many left-behind parents face a language barrier and are unfamiliar with the United States court system. Therefore, NCMEC advises in its litigation guide that it is important for left-behind parents to retain counsel. Because many left-behind parents do not have the financial means to pay for legal representation, they may need help not only to find counsel, but also to find an attorney willing to take on their case pro bono. NCMEC, through its work on Hague Convention cases, maintains a network of lawyers in the United States

⁶ This step often must wait until after the child’s location has been identified, since, in order to initiate court proceedings for the child’s return, counsel must be admitted to practice in the appropriate jurisdiction.

who are willing to take on these cases pro bono. Nevertheless, even with these relationships, finding counsel may use up the remaining months left in the initial year period.

There are important distinctions between the processes of obtaining counsel for left-behind parents searching for children in the United States as opposed to other countries. First, the USCA does not bring suit on behalf of the left-behind parent seeking the return of an abducted child from the United States. Second, the USCA does not provide counsel for the left-behind parent.⁷ Third, the jurisdiction in which to file suit must be identified before proceedings can be initiated. By contrast, several Contracting States, such as Austria, Chile, Costa Rica, Denmark, Hungary, Ireland, New Zealand, Norway and the United Kingdom, provide a government-appointed attorney to represent the left-behind parent's interest as soon as the that parent files an application with the Central Authority of these countries. See Bureau of Consular Affairs, Office of Children's Issues, Department of State, Child Abduction Country Information, http://www.travel.state.gov/abduction/country/country_3781.html. In other Con-

⁷ The United States is somewhat unique in requiring left-behind parents to find and pay for counsel. The United States made a specific reservation to Article 26 of the Convention, which prohibits Central Authorities from charging applicants for the cost and expenses of legal counsel or advisors. Hague International Child Abduction Convention, 51 Fed. Reg. 10,494, 10,505 (Mar. 26, 1986). Therefore, unlike in many other Contracting States, the USCA is not required to, and does not, locate and pay for counsel in incoming cases.

tracting States, such as Australia, Belgium, Croatia, the Dominican Republic, France, Greece, Italy, Morocco, South Africa and Turkey, the Central Authority will commence proceedings itself after receiving an application from a left-behind parent. *Id.* In contrast, left-behind parents filing in the United States merely receive a list of potential attorneys from the USCA. After receiving that list, it is up to the left-behind parents themselves to contact the attorneys—even when there is a language barrier—and, in many cases, attempt to convince an attorney to take on their case pro bono.

Left-behind parents have repeatedly noted that obtaining counsel represents another significant hurdle in filing their petitions. As Mexico noted in its response to the HCCH Questionnaire, in the United States “[i]t might take longer than a year to find an attorney to present a case . . . [and] private attorneys are very expensive.” Mexico’s Response to Questionnaire at 6. Mexico also observed that “[i]n the case of the United States a pro bono attorney might be found in most cases however months may elapse until the presentation of the case.” *Id.* at 7. A left-behind parent can do his or her utmost to try to file within the one-year period, but because of the need to find counsel, as Mexico notes, it can be over a year before the petition is filed and the proceeding commences.

Indeed, although Mr. Lozano filed an application with the Central Authority for England and Wales on March 15, 2010 and that application was sent to the Department of State on March 23, 2010, it took until July 27, 2010 for Mr. Lozano to secure pro bono counsel. As in many cases, obtaining pro bono counsel was critical because it was only with the help of the Department of

State, a private investigator and pro bono counsel that Mr. Lozano ultimately was able to locate his daughter. Pet. 6. Absent tolling, the one-year period expired during the four months it took Mr. Lozano to locate counsel in the United States. It would be an additional three months before Mr. Lozano could locate his daughter in the United States and initiate proceedings.

While a search is conducted to pinpoint an abducted child's location within a jurisdiction, or to retain counsel, a left-behind parent's information as to the whereabouts of the abducted child can become stale. Because judges often demand verification of the abducting parent's and child's presence within the court's jurisdiction, left-behind parents and their counsel must be sure they have properly located the child before filing. To that end, NCMEC advises left-behind parents to conduct an independent investigation in anticipation of the court's questions. NCMEC Guide at 92-93. Left-behind parents are advised to "[a]t a minimum, . . . verify the identification of the abducting parent, the presence of the child in the jurisdiction, any school or day care attended by the child, and the existence of any public records confirming their presence in the jurisdiction (such as criminal or property records)." *Ibid.* Even at this advanced stage of the search process, with the investigation completed and counsel in hand, a left-behind parent may initiate proceedings only to discover that the abducting parent has once again relocated (or fled)—requiring the left-behind parent to start the search for child and counsel all over again.

E. Equitable Tolling Allows Courts To Address These Difficulties And Thus To Carry Out The Purpose Of The Convention

Equitable tolling allows courts to take account of the real-world difficulties in mounting a search for an internationally abducted child, and thus to carry out the Convention's purpose of deterring and remedying such abductions. As the above discussion demonstrates, a left-behind parent can search diligently, but through no fault of his or her own, fail to locate the child within Article 12's one-year period. Even determining the country to which the child has been taken can prove a serious challenge, and this alone can take a good deal of resources—such as money for a private investigator, or the ability to fly to the suspected country and track down clues and leads personally. Once the left-behind parent determines he or she should go to the Department of State, rather than the Central Authority of Mexico, France or anywhere else in the world, it may take the Department of State and other assisting entities some time to mobilize the search and determine which jurisdiction the child is living in. Only then can the left-behind parent attempt to retain counsel in the appropriate jurisdiction, which may take months or longer. And when the actual petition is ready to be filed, the child's location must be confirmed again to ensure the child has not been moved and the petition is filed in the correct court.

The instant case demonstrates the simple reality that, where the abducting parent has concealed the whereabouts of a child, the left-behind parent cannot always surmount these considerable obstacles within the one-year period—even with diligent efforts and the

involvement of numerous law enforcement entities, assistance organizations, and pro bono counsel. Ms. Alvarez removed the child to the United States without a visa, overstaying a tourist visit. Pet. 5. Mr. Lozano, the left-behind parent, applied for several disclosure orders⁸ on Ms. Alvarez and her counsel in order to discover his daughter's whereabouts. Mr. Lozano first applied for a disclosure order on September 16, 2009, and his last disclosure order was returned on February 22, 2010. *Id.* at 6. It was only after exhausting the British court system that Mr. Lozano could conclude with any degree of certainty that his daughter was no longer in the United Kingdom. Because Ms. Alvarez refused to inform him about the location of their daughter, Mr. Lozano had to waste precious months determining if his child had been abducted to another country, which country that might be, and whether a Hague petition was appropriate. To refuse equitable tolling in these circumstances would give Ms. Alvarez the benefit of her concealment and would penalize Mr. Lozano for appropriately exhausting his domestic options, as the Convention contemplates.

Other factual scenarios could present additional ways in which the abducting parent's concealment prevents the left-behind parent from being able to file within the one-year period, notwithstanding his or her diligence. The left-behind parent could have been misled by the abducting parent to conclude that the child was taken to an altogether different country, and could

⁸ Disclosure orders are a tool that parents can use in the United Kingdom to compel family and friends served to provide information they are refusing to share.

therefore spend considerable time working with the Central Authority of that country to conduct a fruitless search—only to discover later that his or her efforts had been misdirected. Alternatively, the left-behind parent could have immediately suspected or learned that the child was taken to the United States, but with little else to go on, the search to find the specific United States jurisdiction in which the child was located could take well over a year.⁹ These are just some of the many ways in which difficulties in the search and petition filing process can delay the filing beyond the critical one-year period, even where the left-behind parent pursues the search with diligence.

Equitable tolling allows a court to respond to the realities of the complex search process the left-behind parent must mount, while also undercutting any potential reward the abducting parent might reap by successfully “waiting out” the initial one-year period. Without equitable tolling, courts would be handicapped from giving full effect to the Convention’s anti-abduction purpose.

F. Equitable Tolling Avoids Creating Incentives That Encourage Abduction And Concealment

Rejecting equitable tolling of Article 12’s one-year period not only would prevent courts from carrying out

⁹ For example, in one incoming case NCMEC assisted with, the abducted child was not able to be found for over four years, despite extensive searching, until the left-behind parent saw a picture of the child near Yankee Stadium in New York City, and based on this new information was able to initiate a search for the child’s location in New York.

the full purpose of the Convention, but also would create perverse incentives promoting abduction and concealment. Enticed by the potential availability of the settled defense, abducting parents would be encouraged to stretch out the search process for as long as possible—undercutting the effectiveness of the return remedy and compounding the harms of the already devastating epidemic of international child abduction.

This incentive may lead the abducting parent to avoid enrolling the child in school, obtaining stable housing in the parent's name, or engaging in any other activities that may generate a traceable record (but that may well be in the best interests of the child during the period of abduction). Such behavior would render the already lengthy searches for abducted children even lengthier, as abducting parents that otherwise may have revealed the whereabouts of their children would seek to avoid detection during the one-year period through more extreme measures.

Without equitable tolling, the abducting parent also is incentivized to evade the USCA, at least until after the one-year period expires. Currently, once the USCA locates the abducting parent and child, the USCA will often contact the abducting parent to try to obtain the voluntary return of the child. Such measures sometimes result in the child being returned amicably, side-stepping a potentially lengthy and expensive court battle between the parents. Removing equitable tolling undercuts the effectiveness of this important tool in the USCA's arsenal, since abducting parents might avoid such discussions out of fear that they could lead to the left-behind parent filing a petition for return more promptly.

In short, without equitable tolling, abducting parents are encouraged to evade detection for at least a year through whatever means possible—making the search process more difficult, decreasing the likelihood of a voluntary return, and potentially inflicting further harm to the child’s well-being.

II. REMOVING EQUITABLE TOLLING AS A REMEDY IN THE UNITED STATES IS LIKELY TO ADVERSELY IMPACT AMERICAN OUTGOING CASES

While locating an abducted child in the United States can be extremely difficult, left-behind parents in the United States often face additional burdens when searching for children abducted to foreign countries. These added barriers, coupled with concealment, can cause the one year deadline to lapse before even the most diligent parent can file a petition in the appropriate jurisdiction. As a result, tolling can be a crucial remedy in many outgoing cases. Since the principle of comity guides Contracting States, and since no other court of last resort has reached a definitive answer on the issue, this Court’s decision about the availability of tolling under Article 12 has the potential to affect other Contracting States’ practices regarding tolling and thus American parents’ ability to use this remedy abroad. A narrow interpretation of the one-year requirement, therefore, has the very real potential to disadvantage American parents seeking reunification with their abducted children.

A. Left-Behind Parents In The United States Face Numerous Difficulties When Searching For Their Abducted Children Abroad

Left-behind parents whose children are abducted to foreign countries generally face similarly complex investigations as parents searching for children in the United States, but often must also contend with some combination of less resourced governmental and non-governmental agencies, underdeveloped infrastructures, and fewer financial resources. All of these constraints add debilitating months or years to the search, especially when a child is concealed.

Delays are often experienced when the Central Authorities of the Contracting States are uncooperative or are ill-equipped to conduct an effective search for the abducted child. Response to Questionnaire at 9 (“In some instances, the USCA has had difficulty in achieving effective communication and cooperation with other Central Authorities.”). As the Department of State noted, two main factors “contribute to this problem: first, insufficient resources dedicated to locating these children; and second, an apparent lower priority being given to international abduction cases compared with other criminal legal priorities for law enforcement.” *Id.* at 12.

In its responses to the HCCH Questionnaire, the Department of State has documented the difficulties that American parents face in specific countries. Notably, the United States has highlighted that in Mexico—the country to which the most American children are abducted—“[t]he majority of the long-standing unresolved applications for the return of

children taken from the United States to Mexico result from an inability on the part of law enforcement to locate missing children, due to insufficient resources dedicated to locating these children and an apparent lower priority given to international child abduction cases compared to other criminal activity.” Response to Questionnaire at 8 (noting further that Honduras’s Central Authority found it difficult to locate children in many cases because of limited resources). Likewise, “lack of resources . . . have impeded progress in the first case involving a child abducted to Burkina Faso from the United States,” in part because the Central Authority does not have a centralized e-mail system, widespread internet access or reliable telephone service. *Ibid.* Such barriers can have a direct impact on the amount of time it takes to locate a child no matter how diligent the left-behind parent is in his or her search. For example, of the four outgoing cases from the United States to the Bahamas as of December 2010, the Department of State observed that two of those cases had been pending for sixteen months, citing the Bahamian Central Authority’s poor communication as a contributing factor in the delay. Response to Questionnaire at 7. These difficulties contribute to why, as noted above, American left-behind parents spend an average of \$33,500 to search for and try to recover their abducted children—to make up for the resources that foreign Central Authorities may not have to devote to their searches. *Juvenile Justice Bulletin* 6.

As explained in Section I, *supra*, it is very difficult for left-behind parents to find concealed children in the United States—despite a well-funded Central Aut-

hority, good methods of communication, electronic records, and law enforcement personnel that typically take family abduction cases seriously. American left-behind parents can face an even tougher battle abroad, because they may have to rely on unresponsive or under resourced Central Authorities to locate their children. These additional complications mean that even passive concealment can cause an active search to extend well beyond the initial one-year period, through no fault of the left-behind parent. Once a concealed child is finally located abroad, the ability to request equitable tolling from a foreign court could be crucial to American left-behind parents' efforts to secure the return of their children.

B. This Court's Decision Regarding Equitable Tolling May Influence Other Contracting States Because Comity Is A Central Principle Of The Convention And Because The United States Is A Leader In Combatting International Child Abduction

This Court's decision may affect outgoing Convention cases because it could have important influence on the practices of Contracting States, whose courts emphasize comity in their application of the Convention's provisions. The Hague Convention is intended to promote cooperation among judicial authorities in the Contracting States. Pérez-Vera Report at 435, ¶ 35. Since no supranational body polices the Convention or adjudicates disputes over the meaning of the text, it is vital that Contracting States' courts apply Convention principles consistently among the Contracting States.

For this reason, United States courts frequently consider other Contracting States' judicial decisions when deciding Convention cases, see, *e.g.*, *Furnes v. Reeves*, 362 F.3d 702, 714 (11th Cir. 2004); *Fawcett v. McRoberts*, 326 F.3d 491, 500 (4th Cir. 2003); *Gonzalez v. Gutierrez*, 311 F.3d 942, 952 (9th Cir. 2002); *Croll v. Croll*, 229 F.3d 133, 143 (2d Cir. 2000), cert. denied, 534 U.S. 949 (2001), and accord "considerable weight" to the opinions of other signatories. *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010). Courts in other Contracting States similarly look outside their borders when resolving incoming cases. See, *e.g.*, *Soysa & Commissioner of Police*, [2011] FamCAFC 39, 2011 WL 840211 (Austl.) (considering two United States Circuit Court opinions in determining whether father had "rights of custody" within the meaning of the Convention); *Sonderup v. Tondelli*, (1) SA 1171 (CC) at 24-25 (S. Afr.); In the Marriage Of: Jose Garcia Resina Appellant/Husband and Muriel Ghislaine Henriette Resina Respondent/Wife, at 14 [1991] FamCA 33 (22 May 1991); *Cf.* Vienna Convention on the Law of Treaties, Article 31, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (codifying the principle of international law that subsequent practice in the application of a treaty "shall be taken into account" to establish "the agreement of the parties regarding its interpretation").

While the judicial decisions of any Contracting State have the ability to influence the adjudication and enforcement in other Contracting States, the United States in particular holds a unique and influential position in interpreting and carrying out the obligations of the Convention. The United States has been

involved in combatting international child abduction from the start, having assisted in drafting the Convention and becoming an early signatory. NCMEC Guide at 1. In addition, the United States sends and receives the most return applications under the Convention, and American courts use Article 12 to refuse to return abducted children more frequently than other Contracting States. Nigel Lowe, *A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part III—National Reports* 204 (Nov. 2011). Given the United States' prominent involvement in adjudicating cases under the Convention, this Court's decision on equitable tolling will likely carry significant weight in other Contracting States. *Cf. Cannon v. Cannon*, [2004] EWCA (Civ) 1330, [2005] 1 W.L.R. 32 (Eng.) (explaining that, at the time, the Eleventh Circuit had left open the question as to whether concealment could toll the one-year period and noting that there was "no Federal Appellate Court authoritative decision" on point). Any precedent set in the United States, therefore, may impact the remedies available to American parents seeking the return of their abducted children. NCMEC therefore asks the Court to rule in Petitioner's favor not only to aid incoming cases, but also to preserve the availability of equitable tolling to parents in these outgoing cases.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted.

YIOTA SOURAS	DOUGLAS HALLWARD-DRIEMEIER
PRESTON FINDLAY	<i>Counsel of Record</i>
THE NATIONAL CENTER	MARIEL GOETZ
FOR MISSING AND	MARIA CARBONI
EXPLOITED CHILDREN	CARMEL SHACHAR
	ROPES & GRAY LLP

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