No. 12-820

IN THE

Supreme Court of the United States

MANUEL JOSE LOZANO,

Petitioner,

v.

DIANA LUCIA MONTOYA ALVAREZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF A CHILD IS MISSING, INC., AND PRACTITIONERS AND SPECIALISTS IN HAGUE CONVENTION CHILD ABDUCTION LITIGATION AND THE FIELD OF CHILDREN AND THE LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JOSEPH J. SALTARELLI
Counsel of Record
JACOB F.M. OSLICK
SEYFARTH SHAW LLP
620 Eighth Avenue
New York, New York 10018
212-218-5500

Counsel for Amici Curiae

September 6, 2013

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	10
ARGUMENT	14
I. AN AFFIRMANCE OF THE JUDGMENT BELOW WILL INCENTIVIZE ABDUCTING PARENTS TO CONCEAL THE WHEREABOUTS OF THE CHILD	14
A. The Second Circuit's Decision Creates An Incentive To Conceal The Whereabouts Of An Abducted Child In Order To Prevent The Timely Filing Of A Hague Convention Petition	14
B. Application Of Equitable Tolling Principles To Article 12 Is Consistent With Developing Trends in Private International Law Regarding Child Abduction	19

Page

C. Allowing Abducting Parents To Litigate The "Now Settled" Defense Despite Evidence Of Concealment Effectively Converts Each Hague Convention Proceeding Involving Concealment Into A *De Facto* Custody Determination 26

II. IN CONTRAST TO MOST HAGUE CONVENTION STATES, WHEN AN ABDUCTING PARENT CONCEALS THE CHILD'S WHEREABOUTS IN THE UNITED STATES, ICARA AND THE AMERICAN LEGAL SYSTEM CREATE SUBSTANTIAL OBSTACLES TO THE TIMELY FILING OF A PETITION 29

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

Cases

Ankenbrandt v. Richards,
504 U.S. 689 (1992) 28

Antunez-Fernandes v. Connors-Fernandes,
259 F. Supp. 2d 800 (N.D. Iowa 2003) 17 n.10

Asvesta v. Petroutsas,
580 F.3d 1000 (9th Cir. 2009) 27 n.23

Barber v. Barber,
21 How. 582, 16 L.Ed 226 (1859) 28

Bromley v. Bromley,
30 F. Supp. 2d 857 (E.D. Pa. 1998).....28 n.25

Chafin v. Chafin,
133 S. Ct. 1017 (2013) 20 n.12, 26

DiRuggiero v. Rodgers,
743 F.2d 1009 (3d Cir. 1984).....28 n.25

Duarte v. Bardales,
526 F.3d 563
(9th Cir. 2008) ...12 n.6, 16 n.9, 26 n.22, 35 n.34

F.H.U. v. A.C.U.,
48 A.3d 1130 (N.J. Super. Ct. App. Div.),
cert. denied, 212 N.J. 198 (2012).....17 n.10

Furnes v. Reeves,
362 F.3d 702 (11th Cir.), *cert denied*,
543 U.S. 978 (2004) 12 n.6

Holder v. Holder,
392 F.3d 1009 (9th Cir. 2004) 26 n.22

Page(s)

In re B. del C.S.B.,
559 F.3d 999 (9th Cir. 2009) 35 n.34, 36 n.35

Kufner v. Kufner,
519 F.3d 33 (1st Cir. 2008) 27 n.23

Lozano v. Alvarez,
697 F.3d 41 (2d Cir. 2012),
cert. granted, (U.S. June 24, 2013)
(No. 12-820) 36 n.35

Mendez Lynch v. Mendez Lynch,
220 F. Supp. 2d 1347 (M.D. Fla. 2002).... 16 n.9

Simcox v. Simcox,
511 F.3d 594 (6th Cir. 2007) 27 n.23

Yang v. Tsui,
416 F.3d 199 (3d Cir. 2005),
cert. denied, 546 U.S. 1208 (2006) 27 n.23

Statutes

The International Child Abduction
Remedies Act ("ICARA"),
42 U.S.C. §§ 11601-11610 (2005).....*passim*

Regulations

Legal Analysis of the Hague Convention
on the Civil Aspects of International
Child Abduction, 51 Fed. Reg. 10,503
(Mar. 26, 1986)..... 4, 23

Page(s)

Other Authorities

Antoinette Passanante, *International Parental Kidnapping: The Call for an Increased Federal Response*, 34 COLUM. J. TRANSNAT'L L. 677 (1996) ... 13 n.7

Gloria Folger DeHart, *The Relationship Between the 1980 Child Abduction Convention and the 1996 Protection Convention*, 33 N.Y.U. J. INT'L L. & POL. 83 (2000-2001)..... 20-24

Ion Hazzikostas, *Federal Court Abstention and the Hague Child Abduction Convention*, 79 N.Y.U. L. REV. 421 (2004).....27 n.23, 28 nn. 24-25

Private International Law, Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction 577 (2006) 10

Elisa Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, Actes et Documents de la Quatorzieme session: Child Abduction (1982) 19

Page(s)

Explanatory Report by Paul Lagarde: Hague Jurisdiction Convention (15 Jan. 1997), *available at* http://www.hcch.net/upload/expl34.pdf ...22 n.16

Revised Draft Practical Handbook on the Operation of the Hague Convention of 19 October 1996 on Jurisdiction, Application of Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (May 2011), *available at* http://www.hcch.net/upload/wop/abduct2011pd04e.pdf.....22 n.17

Treaties

The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, *reprinted at* 51 Fed. Reg. 10,494 (1986) .....*passim*

The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 35 I.L.M. 1391 ("Hague Jurisdiction Convention"), *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=70..... 20-25

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae are a non-profit organization dedicated to the recovery of missing children, a distinguished legal scholar whose academic focus is the exploitation of women and children, and leading practitioners and specialists with extensive experience representing parents in child abduction cases brought under the Hague Convention on the Civil Aspects of International Child Abduction. Collectively, *Amici Curiae* practitioners have litigated or been involved in more than 800 child abduction cases under the Hague Convention.

Based on *Amici Curiae*'s experience and expertise, they believe that the one-year period in Article 12 of the Hague Convention must be subject to equitable tolling when an abducting parent conceals the whereabouts of the child or engages in other misconduct that prevents the left-behind parent from locating the child and filing a petition for the child's return within one year of the child's abduction. Absent a mechanism to preclude abducting parents from asserting the "now settled" defense in cases of concealment through the application of equitable tolling principles, abducting parents will be incentivized to conceal the whereabouts of their children, and thereby allowed to frustrate the Hague Convention's fundamental aims, which are to deter child abductions and promptly return kidnapped children to their country of habitual residence for a determination of parental custody. For these reasons, *Amici Curiae*

respectfully submit this Brief in support of Petitioner.[1]

A Child Is Missing is a Florida-based non-profit organization devoted to assisting law enforcement authorities in the search for and recovery of missing children. Sherry Friedlander founded A Child is Missing in 1997. Ms. Friedlander has been a participant in The White House Conference on Missing & Exploited Children, and often speaks publicly regarding efforts to recover missing children. Ms. Friedlander and her organization train law enforcement agencies and police/Sheriff departments in the search for missing children (Autistic/Down Syndrome), the elderly (often with Alzheimer's disease), and the disabled in all 50 states. To support its efforts, A Child Is Missing is a member of the Association of Missing and Exploited Children, Broward Chiefs Association, the Broward Coalition for Human Trafficking, UN-NGO member, and other groups. Ms. Friedlander maintains strategic alliances and sponsorships with companies such as Bank of America, as well as the State of Florida, Florida Department of Law Enforcement, the Georgia Bureau of Investigation and other state bureaus. A Child is Missing is

[1] A letter of consent by Respondent to the filing of this brief accompanies this brief. Petitioner has consented to the filing of *amicus* briefs and has filed a letter reflecting his blanket consent with the Clerk. Pursuant to S. Ct. R. 37.6, *Amici* certify that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

available to assist all of the approximately 18,000 law enforcement departments in the United States free of charge, 24 hours a day, 365 days a year.

Robert D. Arenstein, a family law practitioner for nearly 40 years, has been involved in more than 350 cases brought under the Convention, including many of the most prominent. He was a participant, speaker and/or Delegate to the Hague Convention Meetings on Implementation of The Hague Convention on Civil Aspects of International Child Abduction in the Netherlands in 1993, 1996, 1999, 2003, and 2007, and a member of the United States' delegation to the Hague in 1996. Mr. Arenstein has held numerous positions of leadership in the field of international child abduction litigation. Among other leadership positions, he has acted as chair of the Federal Kidnapping Committee of the Academy of Matrimonial Lawyers, liaison to ABA Parental Abduction Project, and Chairman of the Mentoring Committee of the International Child Abduction Attorneys Network (ICAAN), funded by the Department of Justice in conjunction with ABA Center on Children and the Law and the National Center for Missing and Exploited Children (NCMEC). He has presented a program entitled How to Try a Hague Convention Case, including to the International Academy of Matrimonial Lawyers in 2008, and is the author of several scholarly articles on the Hague Convention.

Dr. Beverly Baker-Kelly is a lawyer and scholar whose area of expertise is international human rights law and related subjects. A Fulbright Scholar, she has published on immigration issues, and

formerly taught international human rights law at the law schools of Golden Gate University and the New College of California, is a scholar-in-residence at the Modern College of Business and Science, and at the Sultan Qaboos University, College of Law in Muscat, Sultanate of Oman, and a visiting professor of law at Howard University School of Law. Her practice has included several significant cases under the Hague Convention and litigation of the issues that are the subject of this case. From April 1999 through July 2000 she was the highest-ranking American as the Deputy Registrar of the International Criminal Tribunal for Rwanda. She is currently co-chair of the International Law Section of the National Bar Association, the nation's oldest and largest national association of predominantly African-American lawyers and judges and international affiliates, which represents a professional network of over 20,000 lawyers, judges, educators, and law students.

Alycia N. Broz, is a Partner in the national law firm Vorys, Sater, Seymour and Pease LLP. Ms. Broz has a broad litigation practice in federal and state courts, and *pro bono* experience litigating children's rights and child abduction issues under the Hague Convention, including substantial involvement with the question before the Court. Ms. Broz received her J.D. from Northwestern University School of Law and was a Note and Comment Editor for the Northwestern University Law Review. She received her B.S. *magna cum laude* from Marquette University. She began her career as a law clerk for The Honorable Algenon L. Marb-

ley, United States District Court for the Southern District of Ohio.

Linda Shay Gardner is Principal with the Gardner Law Office. A leading practitioner in the field, she has worked on or been consulted regarding approximately 200 cases involving child abduction and the Hague Convention. She has testified as an expert witness in cases involving international child custody disputes, and consults with the U.S. State Department's Office of Children's Issues regarding Hague Convention cases, and is an advisor to NCMEC. She is recognized by the American Bar Association's ICAAN project to provide referrals in abduction cases, and often represents clients in interstate custody disputes, usually involving the Uniform Child Custody Jurisdiction and Enforcement Act.

John K. Grubb is Principal with the firm of John K. Grubb & Associates, P.C. Mr. Grubb maintains an active family law practice. His work includes representation of parents in federal court litigation under the Hague Convention on International Child Abduction, including cases dealing with the question presented in this case. Mr. Grubb received an Award Of Merit from NCMEC in 2008 in recognition of and appreciation for his outstanding commitment to the protection of children and knowledge of the Hague Convention.

Rana Holz is a Partner in the law firm Rubinstein & Holz, P.A. She is board certified in marital and family law, which she has practiced exclusively for 22 years. Ms. Holz received an Award of Merit

from NCMEC in 1997, and has represented the left-behind parent in several Hague Convention cases, including the case of *Mendez-Lynch v. Mendez-Lynch*. A recipient of multiple honors, she is the author of, among others, "*International Parental Child Abduction Part One: The Petitioner's Case*," and "*International Parental Child Abduction Part Two: The Respondent's Case*," published in The Florida Bar Journal, June/July-August 2003.

Omonzusi Imobioh is Principal with the Law Offices of Omonzusi Imobioh. Ms. Imobioh focuses her practice primarily in the areas of Family Law, Family-Based Immigration, and Probate. She maintains an active *pro bono* practice, representing *pro bono* clients through the Houston Volunteer Lawyer's Program, YMCA International, and Lone Star Legal Aid of Texas. She has represented a parent in a Hague Convention child abduction case involving the legal question presented in this case.

Lawrence S. Katz, Principal in the law office of Lawrence S. Katz, P.A., has been counsel of record, mentored or consulted in over 250 Hague Convention and child abduction cases. Mr. Katz is a Fellow in the International Academy of Matrimonial Lawyers, a Member of its Board of Directors, and Chair of its Committee on the Hague Conventions. He is also past Chairman of the ABA Family Law Section's Committee on International Law. Mr. Katz is a mentor with ICAAN, the U.S. Department of State Attorney Network, and the ABA International Child Abduction Attorney Network. He has extensive experience litigating under the Hague Convention. He was the first U.S. attorney to

recover children from: Turkey (non-Hague), Iran, Saudi Arabia, Japan, Haiti, the Bahamas, and Russia. Mr. Katz conducted the first international mediation in a Hague case for NCMEC in November of 2005. He has received numerous awards from NCMEC, and a Certificate of Appreciation for Extraordinary Assistance to Hague Convention Applicants from the U.S. Department of State. Mr. Katz focuses on complex matrimonial and child custody cases and represents clients in cases of domestic violence, divorce, paternity and property matters. He also represents clients in complex cases involving international family law, parental kidnapping, interstate and international child custody and support, and out-of-state child abduction. As a respected and highly sought-after speaker, Mr. Katz has conducted seminars on topics such as child abduction, domestic and foreign freeze orders, and cross-border family mediation.

Ricardo A. Kolster is a Partner in the law firm Armstrong Teasdale LLP. Mr. Kolster's practice has included significant involvement litigating the issues in this case. He has been involved with NCMEC, listed on the U.S. Department of Justice List of Attorneys for International Abduction Cases, and is a United Way Ambassador. In 2008, he received an Award of Merit from NCMEC.

Professor Mary G. Leary, Associate Professor of Law at the Catholic University of America, Columbus School of Law, is the former policy consultant and Deputy Director for the Office of Legal Counsel at NCMEC, and a former director of the National Center for the Prosecution of Child Abuse

(NCPCA). She served as the head of delegation for the Holy See at the III World Congress Against the Exploitation of Children and Adolescents. Professor Leary has been a speaker or lecturer at The Department of Justice's Child Exploitation and Obscenity Section, The Child Abuse Group of the Pediatric Academic Society, NCMEC, The National Law Center for Children and Families, The National Advocacy Center, National Judicial College, The National Center for Justice and the Rule of Law, and The International Center for Missing and Exploited Children. She was an original member of the National Coalition for the Prevention of Child Sexual Exploitation. She has published extensively on a range of topics, including the exploitation of women and children.

Christopher J. Schmidt is a Partner in the law firm Bryan Cave LLP. Mr. Schmidt received his B.A. from the University of Notre Dame, and his J.D., *magna cum laude*, from Saint Louis University. He maintains a complex civil litigation and class action defense practice. Mr. Schmidt has been recognized for his significant *pro bono* work trying Hague Convention child abduction cases. He regularly handles international child abduction cases for NCMEC and the U.S. State Department, and is the recipient of a National Award of Merit from NCMEC and a 2013 Justice Award in Child Protection from the Foundation for the Improvement of Justice.

The S&W International ChildFind Program of Sullivan & Worcester LLP in Boston, MA, New York, NY, and Washington, DC provides legal

assistance to parents of limited financial means, whose children have been abducted across sovereign borders. Through this program, with the help of Sullivan & Worcester LLP attorneys, left-behind parents can pursue remedies under international law, including the Hague Convention. The S&W International ChildFind Program and the lawyers at Sullivan & Worcester LLP who have volunteered for the program have helped reunite numerous abducted children with left-behind parents from a variety of foreign countries. Lawyers affiliated with the S&W International ChildFind Program have advised dozens of parents and children involved in international child abductions, appeared in a majority of the Hague Convention appeals to the First Circuit, and participated in many evidentiary hearings to resolve international custody disputes. The S&W International ChildFind Program has been a member of the International Child Abduction Attorney Network formed by the National Center for Missing and Exploited Children, receiving referrals through that network, as well as through the United States Department of State and other sources. They have also authored *amicus* briefs in other Hague Convention cases brought before the Court, in particular advocating in *Abbott v. Abbott* for a flexible analytical approach to *ne exeat* orders like the one that the Court ultimately adopted. The program is directed by Nicholas M. O'Donnell and Kevin M. Colmey, Partners in Sullivan & Worcester LLP's litigation department in Boston.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici Curiae believe that the one-year period under Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention")[2] must be subject to equitable tolling "in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child from the other parent in order to prevent the timely filing of a Hague petition."[3]

In 2006, the Government of the United States officially adopted this position regarding the question before the Court. The Government's position derived from its longstanding view, first articulated 20 years earlier, in 1986, that abducting parents who conceal the whereabouts of children in an effort to delay the filing of a Hague Convention petition should not be "permitted to benefit" from their misconduct.[4] In this case, the Government has turned course 180-degrees on the applicability of equitable tolling to Hague Convention cases.

---

[2] Dated Oct. 25, 1980, T.I.A.S. No. 11, 670, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (Mar. 26, 1986).

[3] Hague Conference on Private International Law, *Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* 577 (2006) (Response of the U.S. State Department); *see* Pet. App. 169a.

[4] *See* Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986).

As the Government previously recognized, the one-year period in Article 12 must be subject to equitable tolling to avoid incentivizing abducting parents to conceal the whereabouts of their children for as long as possible. An abducting parent has such an incentive for an obvious reason: the longer it takes a left-behind parent to locate his or her child and seek relief under the Hague Convention, the greater is the likelihood that lawful custody rights will never be determined, and that *de facto* custody will be awarded to the abducting parent by an American court as part of the "now settled" inquiry provided for in Article 12.

The Government's new position is that equitable tolling principles are inapplicable to Hague Convention cases. It contends that the doctrine is essentially superfluous because courts retain "equitable discretion" under Article 18 to "order the return of the child at any time," including after finding that a child is now settled, or after deciding, in light of "egregious" behavior by the abducting parent, to dispense altogether with the now settled inquiry. Pet. App. 171a-172a, 179a.[5] The Second Circuit adopted this reasoning and held, despite the contrary holdings of three other circuit courts of appeals, that equitable tolling does not apply in Hague Convention cases.

Based on their experience and expertise, *Amici Curiae* believe that the Second Circuit's decision

[5] Article 18 refers to the word "power." With the phrase "equitable discretion" the Government "mean[s] to invoke broadly a court's inherent equitable authority." Pet. App. 172a n.2.

undermines the fundamental purposes of the Hague Convention, which are to deter child abductions and ensure the immediate return of abducted children so a proper determination of parental custody can be made in their country of habitual residence.

The overarching aim of the Convention is to *deter* child abductions by providing a prompt and efficient judicial mechanism to obtain the mandatory return of abducted children.[6] In contrast, the decision below has the perverse effect of *encouraging* parents to take their kidnapped children *to* the United States, and to conceal their whereabouts in the hope of later persuading an American court to find that the child has become settled in this country and, on that basis, deny the left-behind parent's petition to have the child returned.

Moreover, the Convention, its implementing legislation, and longstanding precedent make clear that a Hague Convention proceeding is *not* a child custody determination. Yet, allowing abducting parents to assert the now settled defense when they have concealed the whereabouts of their children, and thereby delayed the left-behind parent's filing of a petition, rewards the misconduct by

---

[6] *Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008) (stating that the "overarching intention of the Convention" is deterring child abduction); *Furnes v. Reeves*, 362 F.3d 702, 717 (11th Cir.) (stating that the aim of the Hague Convention is to deter abductions and ensure return so that custody decisions are made in the child's country of habitual residence), *cert denied*, 543 U.S. 978 (2004).

effectively converting every such case into a *de facto* custody battle in an American court.

Amici Curiae believe that the effect of the Second Circuit's decision will be more child abductions to the United States, and further victimization of those already abducted.[7] These children have been deprived of the love and affection of their left-behind parents and forced into a new way of life far from home by the unlawful actions of their abducting parents, and will now have the crucial questions of where they will be raised, and by whom, decided by the courts of a foreign land, rather than those of their own country. It is hard to imagine a more visceral violation of the spirit of the Hague Convention, and of the rights of the abducted children and left-behind parents the Convention was intended to protect.

For these reasons, and those set forth in Petitioner's Brief, *Amici Curiae* urge the Court to reverse the decision below and hold that the one-year period in Article 12 of the Hague Convention is subject to equitable tolling when (i) the left-behind parent exercised reasonable diligence in seeking to locate his or her child, (ii) the abducting parent concealed the whereabouts of the child, or

---

[7] See Antoinette Passanante, *International Parental Kidnapping: The Call for an Increased Federal Response*, 34 COLUM. J. TRANSNAT'L L. 677, 677 (1996) ("It goes virtually without saying that the true victim of the childnapping is the child himself, who suffers from the sudden upsetting of his stability, and the traumatic loss of contact with the parent who has been in charge of his upbringing . . . .") (citation and internal quotation marks and brackets omitted).

engaged in other misconduct that frustrates the left-behind parent's efforts to locate the child, and (iii) the abducting parent's concealment or other misconduct prevented the filing of a petition within one year of the child's abduction.

ARGUMENT

I. AN AFFIRMANCE OF THE JUDGMENT BELOW WILL INCENTIVIZE ABDUCTING PARENTS TO CONCEAL THE WHEREABOUTS OF THE CHILD

A. The Second Circuit's Decision Creates An Incentive To Conceal The Whereabouts Of An Abducted Child In Order To Prevent The Timely Filing Of A Hague Convention Petition

An abducting parent has every incentive to prevent the timely filing of a Hague Convention petition since a delay of more than one year allows the parent to attempt to demonstrate that the child should not be returned because she is now settled in this country. The Government recognizes this incentive, but argues that its pernicious effects can be minimized by courts' exercise of equitable discretion under Article 18 "to order the return of the child at any time." The Government's current view is that the court retains equitable discretion to order an abducted child's return even if she is settled; indeed, the Government posits that in "egregious" circumstances a court may exercise that

discretion to forego altogether an inquiry into whether the child is settled. Pet. App. 178a-179a.

Equitable discretion to order a child's return at any time, however, even after a now settled finding, is qualitatively different from the application of equitable tolling to preclude an abducting parent from asserting the now settled defense in the first place. Equitable discretion under Article 18 neither subsumes, nor is a substitute for, the doctrine of equitable tolling.

As a threshold matter, it is questionable whether the scope of equitable discretion under Article 18 is so broad as to allow a court to dispense with the now settled inquiry despite a petition having been filed more than one year after the abduction.[8] Arguably, the text of Article 12 precludes such an interpretation. It provides that when a proceeding has been commenced more than one year after the abduction, the child must be returned "*unless it is demonstrated* that the child is now settled in its new environment." Pet. App. 135a (emphasis supplied). Thus, after the passage of one year, Article 12 appears to vest an abducting parent with the

[8] There is palpable tension in the Government's position. It argues that equitable discretion can be used in lieu of equitable tolling to achieve a "similar result," *i.e.*, dispensing with the now settled analysis, yet urges simultaneously that equitable tolling is inappropriate because it "would have the effect *—unintended by the Convention—of foreclosing a district court's analysis*" of the now settled question. Pet. App. 175a (emphasis supplied). Why dispensing with the now settled analysis is acceptable through an exercise of equity under one label but not another is left unaddressed.

procedural right to "demonstrate" that the child should not be returned because she is now settled.

If this view of Article 12 is correct, then the Government is left with the argument that equitable tolling is superfluous because, confronted with evidence of an abducting parent's "egregious" concealment, a court may achieve a similar result by exercising equitable discretion to order return despite finding that the child is now settled in the United States. Pet. App. 178a.

The potential exercise of equitable discretion *after* a now settled finding, however, does little if anything to curb the perverse incentive that naturally arises *before* a petition is filed, when abducting parents know they can procure the right to demonstrate that the child is now settled by virtue of the passage of time, and consequent delay in the filing of a petition, that will result from their concealment of the child's whereabouts.[9] And, it bears stressing, allowing an abducting parent to assert the now settled defense in this context transforms fundamentally the character of the proceeding, from one of a summary nature requiring the automatic return of the child (assuming no other defenses to return exist), into a fact-intensive, mul-

[9] *See Duarte*, 526 F.3d at 569 (recognizing the "potentially prejudicial effect of failing to file within a year from removal"); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002) (holding that, absent equitable tolling "a parent who abducts and conceals children for more than one year will be rewarded for the misconduct by creating eligibility for an affirmative defense not otherwise available").

tiple-factor inquiry regarding the child's current circumstances, during which the court's focus is shifted almost entirely away from the abducting parent's underlying misconduct.

Even if the Government's interpretation of the scope of Article 18 equitable discretion is correct, few courts faced with evidence of concealment are likely to simply dispense with the now settled analysis altogether. Not surprisingly, neither Petitioner nor *Amici Curiae* have found any reported case in the United States where a court has done so.

To the contrary, cognizant of the text of Article 12 and influenced by the understandable impulse to consider the child's interests, *Amici Curiae* believe that a court is far more likely to conduct the now settled analysis, knowing that it retains the power to order the child's return at the conclusion of the proceeding. It seems equally as likely that, after finding that a child is now settled in this country, few courts will exercise equitable discretion under Article 18 to order the child's return solely or primarily because the abducting parent's concealment created the delay that allowed the child to become settled.[10]

---

[10] Among the many hundreds of reported Hague Conventions decisions, there appear to be only two where a court has ordered return despite a now settled finding. In *F.H.U. v. A.C.U.*, 48 A.3d 1130 (N.J. Super. Ct. App. Div. 2012), there was no evidence of concealment. In *Antunez-Fernandes v. Connors-Fernandes*, 259 F. Supp. 2d 800 (N.D. Iowa 2003), the court ordered the return of the children after concluding that the abducting mother "should not ultimately benefit

For these reasons, the incentive to conceal remains as strong as ever despite the equitable discretion grounded in Article 18. Indeed, the facts of this case demonstrate just how powerful is that incentive. By concealing her daughter's abduction to France and then the United States and, thereafter, her whereabouts in this country, Respondent prevented Petitioner from timely filing his petition within one year of the child's abduction. This, in turn, allowed Respondent to assert the now settled defense. The District Court then conducted a factual inquiry into the child's circumstances, and ultimately awarded Respondent what amounts to *de facto* custody. The District Court acknowledged as much when it noted that to the extent Article 12 permits a court to deny return based on a now settled finding, "'*it effectively allows [the court] to reach the underlying custody dispute*, a matter which is generally outside the scope of the Convention.'" Pet. App. 93a (quoting *Blondin v. Dubois*, 238 F.3d 153, 164 (2d Cir. 2001)) (emphasis supplied).

---

from the effects of her own actions" whereby she "knowingly and successfully created language, cultural, distance and financial barriers to [the father's] efforts to seek return of his children to France." *Id.* at 815. Despite evidence of this misconduct, the court conducted the now settled analysis.

B. Application Of Equitable Tolling Principles To Article 12 Is Consistent With Developing Trends in Private International Law Regarding Child Abduction

The Second Circuit relied heavily upon the Pérez-Vera Explanatory Report on the 1980 Hague Child Abduction Convention ("Explanatory Report")[11] to support the conclusion that Hague Convention signatory states did not intend the one-year period in Article 12 to be subject to any sort of equitable tolling in cases where concealment delays a petition's filing. *See* Pet. App. 23a (concluding that "the drafters of the Convention saw value in agreeing to a 'single time-limit of one year' and setting aside 'the difficulties encountered in establishing the child's whereabouts'") (citing Explanatory Report ¶ 108). This was essentially the position urged by the Government. *See* 181a-182a.

The Government's view is that Article 12 provides no basis to equitably toll the one-year period in concealment cases because delegates considered, but ultimately declined to include any reference to the concept of tolling[12] due to the "considerable dif-

---

[11] The Explanatory Report is reprinted at Pet. App. 150a-166a. It espouses the view that under Article 18 a court may decline to order a child's return even if she is settled in her new environment. Pet. App. 166a, at ¶ 112. The Explanatory Report does not, however, state that Article 18 allows a court confronted with an abducting parent's misconduct to dispense with the now settled analysis when the petition has been filed more than one year after the child's abduction.

[12] That the ability to toll the one-year period is not expressly set forth in Article 12 or elsewhere in the Conven-

ficulty" of determining when the left-behind parent "discovered, or should have discovered, the child's location." Pet. App. 182a. This view is somewhat incongruous given that the United States is a signatory to (although it has not yet ratified) the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility, and Measures for the Protection of Children (the "Hague Jurisdiction Convention").[13]

One of the principal purposes of the Hague Jurisdiction Convention is to delineate how long a contracting state from which a child has been abducted continues to have jurisdiction over custody when the child has been taken to another contracting state. The goal was to address "[o]ne of the serious problems with the application of" the Hague Convention, *i.e.*, "courts' apparent assumption in abduction cases that a non-return decision results in jurisdiction to deal with the custody of the child." Gloria Folger DeHart, *The Relationship Between the 1980 Child Abduction Convention and the 1996 Protection Convention*, 33 N.Y.U. J. INT'L

---

tion does not automatically preclude the application of such equitable principles. In *Chafin v. Chafin*, 133 S. Ct. 1017, 1024 (2013), the Court noted that the petitioner's claim for an order of "re-return" of the child, a form of relief not expressly authorized under the Convention, was not "implausible" either "under the Convention itself *or according to general equitable principles*" (emphasis supplied).

[13] The full text of the 1996 Convention is available at http://www.hcch.net/index_en.php?act=conventions.text&cid=70.

L. & POL. 83, 92 (2000-2001) ("DeHart, *Relationship Between Conventions*").[14]

Article 7 of the Hague Jurisdiction Convention provides that jurisdiction shifts to the state where the child has been taken only after she becomes settled there. Significantly, while Article 12 of the Hague Convention provides that a child may be found to be settled one year after her abduction if no petition is filed before then, regardless of the left-behind parent's knowledge of the child's whereabouts, Article 7(1)(b) of the Hague Jurisdiction Convention provides, in contrast, that jurisdiction shifts only when "the child has resided in that other State for a period of at least one year *after* the [left-behind parent] *has or should have had knowledge of the whereabouts of the child*, no request for return lodged within that period is still pending, and the child is settled in his or her new environment" (emphasis supplied).[15]

As noted in the explanatory report accompanying the Hague Jurisdiction Convention, the "underlying idea [behind Article 7] is that the person who makes a wrongful removal should not be able to take advantage of this act in order to modify for his or her benefit the jurisdiction of the authorities called upon to take measures of protection" for the

---

[14] Indeed, the District Court in this case apparently made this precise assumption. Pet. App. 114a (stating that, given the denial of the petition for return, "the custody arrangement of the child should be determined by a New York court").

[15] *See* http://www.hcch.net/upload/expl34.pdf, Article 7(1).

child.[16] In other words, while an abducting parent has an incentive under the Hague Convention to conceal the child's whereabouts because the passage of one year before a petition is filed can give rise to a settled finding, and thus potentially a shift of custody jurisdiction (or, as a practical matter, the granting of *de facto* custody), the Hague Jurisdiction Convention is designed to eliminate this incentive by providing that the one-year clock begins to run only *after* the left-behind parent "has or should have had knowledge of the whereabouts of the child." Under this framework, endorsed by the United States since it is a signatory, abducting parents are not rewarded for concealing the whereabouts of their children.[17]

Although the Hague Jurisdiction Convention has yet to be ratified[18] by the United States, its provi-

---

[16] Explanatory Report by Paul Lagarde (15 Jan. 1997), ¶46, at 557, *available at* http://www.hcch.net/upload/expl34.pdf.

[17] As noted by the Permanent Bureau of the Hague Conference, "[i]n cases of international child abduction, the authorities of the Contracting State of the habitual residence of the child immediately before the wrongful removal retain [custody] jurisdiction" until the specific conditions in Article 7 are met, in order "to deter international child abduction *by denying any jurisdictional benefit to the abducting party*." Revised Draft Practical Handbook on the Operation of the Hague Convention of 19 October 1996 on Jurisdiction, Application of Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (May 2011), at ¶4.20, *available at* http://www.hcch.net/upload/wop/abduct2011pd04e.pdf.

[18] In the opinion of Gloria Folger DeHart, who as an Attorney Advisor with the U.S. Department of State was U.S.

sions regarding international child abductions will be implemented via states' adoption of the latest revisions to the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), approved by the Uniform Law Commission in July 2013.[19] An earlier version of the UCCJEA already has been adopted by 49 states and the District of Columbia.

The intention to not reward kidnappers that underlies Article 7 of the Hague Jurisdiction Convention is consistent with the State Department's longstanding view that when an abducting parent conceals a child's whereabouts, "necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from" such misconduct. 51 Fed. Reg. 10,509. This Court should be guided by the State Department's original admonition, and the text and spirit of the Hague Jurisdiction Convention. As noted by the U.S. Del-

---

Delegate to the Hague Conference on Private International Law that developed the Hague Jurisdiction Convention, the answer to the question of whether ratification of that Convention is "desirable" for the United States "is an unequivocal yes." DeHart, *Relationship Between Conventions*, 33 N.Y.U. J. INT'L L. & POL. at 100. Of course, the views expressed by Ms. DeHart were her own, and not those of the United States. The ABA passed a resolution in August 1997 urging ratification:

> http://www.americanbar.org/content/dam/aba/migrated/domviol/ABA_Policies/122_2_2.authcheckdam.PDF

[19] http://www.uniformlaws.org/shared/docs/Hague_Convention_on_Protection_of_Children/2013AM_UCCJEA_As%20approved.pdf.

egate to the Hague Conference that developed the Hague Jurisdiction Convention, albeit not in an official capacity:

> The combined effect of the two Conventions is to make it completely clear that wrongful behavior should not be rewarded, and that the best interests of the child are served by following the Conventions' mandate and returning the child. Non-return is the last resort, not the acceptable alternative.

DeHart, *Relationship Between Conventions,* 33 N.Y.U. J. INT'L L. & POL. at 94.

In accordance with the State Department's view that the Hague Jurisdiction Convention "complements and reinforces" the Hague Convention, the Court should embrace an interpretation of Article 12 that is consistent with, and complementary to the Hague Jurisdiction Convention[20] and the revised UCCJEA. It should hold that abducting parents who conceal the whereabouts of their children may be precluded from asserting the now settled defense through the tolling of the one-year period or, alternatively, through application of equitable tolling principles as part of the exercise of equitable dis-

---

[20] Press Release, Secretary of State Hillary Rodham Clinton, U.S. Signature of the Child Protection Convention (Oct. 22, 2010), *available at* http://www.state.gov/secretary/rm/2010/10/149860.htm; *see* DeHart, *Relationship Between Conventions*, 33 N.Y.U. J. INT'L L. & POL. at 90 ("Although the Conventions are independent, the relationship between them is very important. The 1996 Protection Convention *supplements and strengthens* the 1980 Child Abduction Convention . . . .") (emphasis supplied).

cretion under Article 18, and articulate the standard to be applied in either instance.

Conversely, rejection of the application of equitable tolling to Article 12 necessarily allows kidnappers to benefit from a qualitatively more favorable legal framework: a court's unmoored discretion replaces the bright-line mandate requiring the return of an abducted child. Worse, the *longer* the kidnapper conceals the child's whereabouts, in continued violation of the laws of his or her country, the more settled the child becomes in the United States and the more likely it is that the kidnapper will be awarded *de facto* custody, in defiance of the aims of both the Hague Convention and the Hague Jurisdiction Convention. Based on *Amici Curiae* practitioners' experience, this is often the case because many left-behind parents lack the financial resources or ability to travel to the United States to either challenge jurisdiction or litigate custody in the state where the abducting parent and child reside, a harsh reality recognized by the District Court.[21] Thus, the inability of courts to

[21] In concluding that "the custody arrangement of [Petitioner's] child should be determined by a New York court," the District Court noted:

> The Court recognizes that this outcome is in many ways unfair to Petitioner, who has been denied access to his child for over two years now. And the Court recognizes that because neither Petitioner nor Respondent appears to have the finances or immigration status to be able to travel easily between the United Kingdom and New York for a custody hearing, this outcome does disadvantage Petitioner (and his opportunities to have a meaningful relationship with his child). . . .

Pet. App. 114a n.21

toll the one-year period sustains the abducting parent's incentive to conceal, often results in the abducting parent being awarded *de facto* custody, and inevitably rewards the most successful child abductors.[22]

C. Allowing Abducting Parents To Litigate The "Now Settled" Defense Despite Evidence Of Concealment Effectively Converts Each Hague Convention Proceeding Involving Concealment Into A *De Facto* Custody Determination

In 1988, Congress passed the International Child Abduction Remedies Act ("ICARA") to implement the Hague Convention. ICARA vests federal and state courts with jurisdiction to "determine only rights under the Convention and not the merits of any underlying child custody claims." 42 U.S.C. § 11601(b)(4). ICARA "ensure[s] that such disputes are adjudicated in the appropriate jurisdiction," not in American courts. For this reason, if "courts find children to have been wrongfully removed or retained," ICARA requires them "'to be promptly returned.'" *Chafin*, 133 S. Ct. at 1022 (quoting 42 U.S.C. § 11601(a)(4)).

---

[22] *Duarte*, 526 F.3d at 570 ("Logic and equity dictate that awarding an abducting parent an affirmative defense if that parent hides the child from the parent seeking return would not only encourage child abductions, but also encourage hiding the child from the parent seeking return."). Denying abducting parents "any tactical advantages" as a result of their misconduct is consistent with the goals of the Hague Convention. *See Holder v. Holder*, 392 F.3d 1009, 1013 (9th Cir. 2004).

Barring application of equitable tolling to Hague Convention proceedings will undermine these principles of limited jurisdiction. It will permit an abducting parent who conceals a child's whereabouts effectively to litigate custody issues in an American court, rather than in the courts of the country of habitual residence where, consistent with the aims of the Hague Convention and the text of ICARA, custody determinations should be made.

By rejecting equitable tolling in Hague Convention cases, the Second Circuit makes it substantially more likely that American courts will end up doing precisely what Congress forbade: adjudicating Hague Convention proceedings as *de facto* child custody disputes.[23]

Moreover, since many Hague Convention cases involve concealment, and the majority are filed in federal district courts as opposed to state courts of general jurisdiction or family courts,[24] the avail-

[23] *See Asvesta v. Petroutsas*, 580 F.3d 1000, 1015 (9th Cir. 2009) (holding that the Convention "is clear that a court considering a Hague petition should not consider matters relevant to the merits of the underlying custody dispute such as the best interests of the child, as these considerations are reserved for the courts of the child's habitual residence"); *see also Kufner v. Kufner*, 519 F.3d 33, 40 (1st Cir. 2008); *Simcox v. Simcox*, 511 F.3d 594, 607 (6th Cir. 2007); *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005). *See generally* Ion Hazzikostas, *Federal Court Abstention and the Hague Child Abduction Convention*, 79 N.Y.U. L. REV. 421, 423 n.9 (2004) ("Hazzikostas, *Federal Court Abstention*").

[24] As of August 26, 2013, a search of the LEXIS databases for all federal and state cases containing the phrases "Hague Convention" and "Child Abduction" returned 945 opinions. More than two-thirds, 645 in total, were federal

ability of equitable tolling in Hague Convention cases involving concealment would minimize the number of *de facto* custody disputes decided by federal courts. Such an outcome would be consistent with the policy underlying the longstanding "domestic relations" exception to federal jurisdiction, applicable in other contexts.[25] *See Ankenbrandt v. Richards*, 504 U.S. 689, 703-04 (1992) (discussing *Barber v. Barber*, 21 How. 582, 16 L.Ed 226 (1859)).

---

court decisions. *See generally* Hazzikostas, *Federal Court Abstention,* 79 N.Y.U. L. REV. at 424 (noting that in light of the limited nature of federal courts' jurisdiction, compared to state courts far more familiar with determining child custody disputes, "many parents strongly prefer to litigate their ICARA claims in federal court").

[25] The exception has been recognized only in the context of diversity jurisdiction. *DiRuggiero v. Rodgers*, 743 F.2d 1009, 1018-20 (3d Cir. 1984). Under ICARA, of course, federal courts have federal question jurisdiction to decide the now settled issue, but that inquiry is limited and not equivalent to a child custody determination. *Bromley v. Bromley*, 30 F. Supp. 2d 857, 861-62 (E.D. Pa. 1998) (stating that, except for the limited forms of relief available under the Hague Convention, state courts are better equipped to handle domestic relations matters). Indeed, in debating the passage of ICARA, there was "contentious" debate "about the appropriateness of federal jurisdiction over ICARA petitions," and Congress "was careful expressly to limit federal court jurisdiction to the narrow questions arising under the Hague Convention." Hazzikostas, *Federal Court Abstention,* 79 N.Y.U. L. REV. at 424 & n.13.

II. IN CONTRAST TO MOST HAGUE CONVENTION STATES, WHEN AN ABDUCTING PARENT CONCEALS THE CHILD'S WHEREABOUTS IN THE UNITED STATES, ICARA AND THE AMERICAN LEGAL SYSTEM CREATE SUBSTANTIAL OBSTACLES TO THE TIMELY FILING OF A PETITION

Amici Curiae practitioners are acutely familiar with another compelling reason the Court should hold that the one-year period in Article 12 is subject to equitable tolling in concealment cases: the complexities, costs, and unique legal obstacles that left-behind parents face when seeking the return of their children in an American court. Compared to other signatory states, the United States is one of the *least* accommodating Hague Convention states for left-behind parents.

The United States is currently a Convention partner with 77 other countries and special administrative regions under the Hague Convention.[26] The U.S. State Department provides country-specific information for 66 of them.[27] Nearly all 66

[26] http://www.travel.state.gov/abduction/resources/congressreport/congressreport_1487.html.

[27] *See* http://travel.state.gov/abduction/country/country_3781.html (last visited August 14, 2013). The State Department's webpage, although including several non-signatories and non-Convention partners, curiously omits information regarding: Cyprus, Luxembourg, Malta, Macau Special Administrative Region, Monaco, Peru, San Marino, Trinidad and Tobago, and three United Kingdom dependencies (the Cayman Islands, the Falkland Islands, and Montserrat).

Convention partners for which information is available make it far easier than does the United States to commence a Hague Convention proceeding.

In 26 Convention partners, for example, a left-behind parent need not bring suit at all.[28] Instead, after he or she files an application with the Convention Partner's Central Authority, the government commences the proceeding, either to represent the child's interests or its interest in enforcing the Convention. In an additional 15 Convention partners, the government appoints an attorney to represent the left-behind parent's interests, at no cost and regardless of the parent's income.[29] Thus, in roughly 62% (41 of 66) of our Convention partners, a left-behind parent does not need to spend precious weeks or months (or a small fortune) trying to locate suitable counsel or familiarize him or herself with a foreign legal system. Many left-behind parents cannot afford the cost of leaving their employment, traveling to the United States, and residing here for the duration of the litigation. It has been *Amici Curiae*'s experience that, like Petitioner,

---

[28] Australia, the Bahamas, Belgium, Bermuda, Brazil, Burkina Faso, Costa Rica, Croatia, the Dominican Republic, El Salvador, France, Greece, Guatemala, Honduras, Hong Kong Special Administrative Region, Italy, Morocco, Panama, Portugal, Romania, St. Kitts and Nevis, South Africa, Spain, Sri Lanka, Turkey, and Venezuela.

[29] Austria, Bulgaria, Chile, Columbia, Denmark, Ecuador, Hungary, Ireland, Latvia, New Zealand, Norway, Slovenia, Ukraine, the United Kingdom, and the Isle of Man (as part of the United Kingdom). In addition, Costa Rica both prosecutes Hague Convention petitions itself, on behalf of the child, and appoints legal counsel for the left-behind parent.

many left-behind parents are forced to participate in the proceedings remotely. During the evidentiary hearing in this case, for example, Petitioner testified via videoconference from his *pro bono* counsel's London office, while Respondent appeared in person and rendered live testimony. Pet. App. 43a. This undoubtedly resulted in a significant tactical advantage for Respondent, the abducting, law-breaking parent.

In most of the remaining Convention partners within the group of 66, the relevant government authority provides at least *some* assistance. For instance, of the governments that neither commence suit nor guarantee counsel, eight (8) at least guarantee counsel depending on financial need; Germany offers all applicants legal representation for □1,500 (about $2,000).[30] And, with some overlap, 13 of these remaining governments provide left-behind parents with a streamlined process to file a court petition: the government either directly refers a Hague Convention application to the appropriate court, or designates one court or agency to hear all petitions.[31]

---

[30] Argentina, Estonia, Netherlands, Poland, Serbia, Singapore, Slovakia, Sweden. In addition to these Convention partners, several governments *both* commence suit as plaintiff *and* guarantee the left-behind parents counsel based on financial need, including Bermuda, Brazil, Croatia, Hong Kong Special Administrative Region, and Panama.

[31] Bosnia and Herzegovina, Finland, Germany, Iceland, Macedonia, Mauritius, Mexico, Montenegro, Poland, Serbia, Singapore, Sweden, and Zimbabwe.

The United States does not and cannot offer similar assistance. Our Central Authority, the U.S. State Department's Office of Children's Issues, does not prosecute Hague Convention proceedings, or appoint or guarantee counsel, even to the financially destitute. And while Article 7(f) of the Convention requires governments to "initiate or facilitate the institution of . . . proceedings," because there is no procedure set forth in ICARA allowing our government to initiate Hague Convention proceedings or single court designated to process them, the State Department can neither stop the clock by filing a petition nor refer a left-behind parent to a specific court so he or she may do so. Thus, even if a parent files a prompt *application* with the State Department in its capacity as Central Authority, the one-year clock keeps ticking[32] while he or she tries desperately to retain counsel or locate *pro bono* counsel, or learn enough about the U.S. legal system (and often the English language) to proceed *pro se*.

When an abducting parent is successful in concealing the child's whereabouts, ICARA's jurisdictional requirements increase these burdens exponentially. To file a petition in an American court the left-behind parent must identify that court "which is authorized to exercise its jurisdic-

[32] Under ICARA, the "commencement of proceedings" contemplated in Article 12 "means, with respect to the return of a child located in the United States, the filing of a petition" "in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed." 42 U.S.C. §§ 11603(b), (f)(3).

tion in the place *where the child is located at the time the petition is filed*." 42 U.S.C. § 11603(b) (emphasis supplied). Like many of *Amici Curiae* practitioners' clients, left-behind parents who do not know where their children are living in the United States cannot assert in good faith that any particular state or federal court has jurisdiction. Indeed, even if a parent knows the general geographic *region* where the child may be residing, state boundaries may pose insurmountable jurisdictional hurdles.

For example, through diligence or sheer good luck, a left-behind parent may learn that an abducting parent works in New York. But, particularly if the left-behind parent lacks sufficient financial resources to hire a private investigator, it may take much longer to uncover whether the abducting parent (and thus the child) lives in New York, or commutes from New Jersey, Connecticut, or Pennsylvania. Without such crucial information, often intentionally concealed or difficult to discover when, as is often the case the abducting parent, like Respondent, resides illegally in the United States, the left-behind parent will be unable to allege sufficient facts to establish a court's jurisdiction under ICARA.

This case demonstrates how frustratingly difficult filing suit in the United States can be. Petitioner filed his application with the United Kingdom's Central Authority on March 15, 2010. Pet. App. 43a. A mere eight days later, the Central Authority forwarded his application to the U.K. Office of Children's Issues. *Id.* Yet it was not until

July 27, 2010, more than four months later, that Petitioner located *pro bono* counsel in the United States. Petitioner's Merits Brief at 16. And it was not until November 2010 that Petitioner (with the aid of *pro bono* counsel and private investigators) was able to discern the specific location of the child. *Id.* at 16-17.

Given the contrast with applicable procedures in other signatory states, it is no surprise that the United States has increasingly become a destination of choice for kidnappers. In fact, reported abductions of children to the United States *rose* 31% from 2011 to 2012.[33] Allowing application of the doctrine of equitable tolling to Hague Convention cases will not eliminate the scourge of child abduction. But holding that the one-year period in Article 12 is subject to equitable tolling will help deter kidnappers who conceal the whereabouts of their abducted children in order to frustrate the lawful efforts of left-behind parents seeking their return, and at a minimum will ensure they are not rewarded for their misconduct.

---

[33] Compare http://travel.state.gov/pdf/Incoming_ Stats2011.pdf (361 children reported abducted to the U.S. in 2011) *with http://travel.state.gov/pdf/CY2012-Incoming_Openstats.pdf* (473 children reported abducted to the U.S. in 2012).

CONCLUSION

For the reasons stated, *Amici Curiae* urge this Court to reverse the decision of the Second Circuit and hold that the one-year period in Article 12 of the Hague Convention is subject to equitable tolling when (i) the left-behind parent has exercised reasonable diligence in seeking to locate his or her child, (ii) the abducting parent concealed the whereabouts of the child, or engaged in other misconduct that frustrates the left-behind parent's efforts to locate the child, and (iii) the abducting parent's concealment or other misconduct prevented the filing of a petition within one year of the child's abduction.[34]

If the Court affirms, and concludes that the question of whether to dispense with the now settled

---

[34] This standard is consistent with that adopted by the Ninth and Eleventh Circuits, which have held that the one-year period in Article 12 is subject to equitable tolling when an abducting parent takes steps to conceal the child's whereabouts and the concealment delays the filing of the left-behind parent's petition. *Duarte*, 526 F.3d at 569-70; *Furnes*, 362 F.3d at 723; *see In re B. del C.S.B.*, 559 F.3d 999, 1014 (9th Cir. 2009) ("adher[ing] closely to parameters set by *Duarte*"). In addition to demonstrating diligence, left-behind parents should not be required to prove either "egregious" concealment, as intimated by the Government, or "extraordinary" circumstances. In light of ICARA's jurisdictional requirements, the act of concealment is *the* circumstance that prevents the proper filing of a petition altogether until the child's whereabouts are discovered. Articulation of a specific standard by this Court will provide guidance to district courts, and help ensure a uniform application of the doctrine in Hague Convention cases. *In re B. del C.S.B.*, 559 F.3d at 1009.

analysis in cases of concealment or other misconduct lies within the equitable discretion afforded under Article 18 to order return of the child "at any time," it should hold that the above standard informs a court's exercise of such discretion. In either instance, the Court should also determine the applicable standard of appellate review.[35]

---

[35] The Court's guidance is needed given the uncertainty surrounding the question of whether application of equitable tolling, or, alternatively, the exercise of equitable discretion, is subject to review only for abuse of discretion or to *de novo* review. The Ninth Circuit has held that, while an application of equitable tolling ordinarily is reviewed under an abuse of discretion standard, tolling in the Hague Convention context is subject to *de novo* review, with the district court's factual findings reviewed for "clear error." *In re B. del C.S.B.*, 559 F.3d at 1008-1009. In *Furnes*, the Eleventh Circuit simply "conclude[d] that the district court did not err in applying equitable tolling given the facts found by the district court." 36 F.3d at 724. On the other hand, in advocating adoption of the equitable discretion standard the Government "[p]resum[ed]" that a court's exercise of such discretion would be "reviewed on appeal for abuse of discretion." Pet. App. 179a n.7. This is a far more deferential review of an equitable determination that is essentially the same as an application of equitable tolling since, as the Government contends, equitable discretion "may, in appropriate cases, yield a similar result" to equitable tolling. The Second Circuit adopted the equitable discretion standard, but left the appellate review question undecided. *Lozano v. Alvarez*, 697 F.3d 41, 50 n.5 (2d Cir. 2012), *cert. granted*, (U.S. June 24, 2013) (No. 12-820). To help ensure uniformity in concealment cases where equitable tolling is applied, *Amici Curiae* urge the Court to adopt the *de novo* review standard articulated by the Ninth Circuit in *In re B. del C.S.B.*

Dated: September 6, 2013

Respectfully submitted,

JOSEPH J. SALTARELLI
Counsel of Record
JACOB F.M. OSLICK
SEYFARTH SHAW LLP
620 Eighth Avenue
New York, New York 10018
(212) 218-5500
jsaltarelli@seyfarth.com

Counsel for Amici Curiae

CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,880 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 6, 2013

JOSEPH J. SALTARELLI
Counsel of Record
JACOB F.M. OSLICK
SEYFARTH SHAW LLP
620 Eighth Avenue
New York, New York 10018
(212) 218-5500
jsaltarelli@seyfarth.com
Counsel for Amici Curiae