

No. 19-0083

In the Supreme Court of Texas

MARCELLE GUIMARAES

Petitioner,

v.

CHRISTOPHER SCOTT BRANN,

Respondent.

On Petition for Review from the First Court of Appeals, Houston, Texas
Cause No. 01-16-00093-CV

BRIEF OF NIWAP, INC. AND AMERICAN GATEWAYS AS *AMICI CURIAE* SUPPORTING PETITIONER

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IDENTITY AND INTEREST OF AMICI¹

NIWAP, Inc., the National Immigrant Women’s Advocacy Project (“NIWAP”) and American Gateways (collectively, “*Amici*”) represent, support, and serve immigrant women and children, who are often the victims of crimes and human-rights violations.

NIWAP is a non-profit, public-policy advocacy organization that develops, reforms, and promotes laws and policies that improve legal rights, services, and assistance to immigrant women and children who are victims of domestic violence, sexual assault, child abuse, stalking, human trafficking, and other crimes. NIWAP and its Director Leslye E. Orloff have published legal and social-science research articles on family violence experienced by immigrant women and children.

NIWAP also offers technical assistance and training to assist a wide range of professionals at the federal, state, and local levels whose work affects immigrant crime victims. As an organization that advocates for immigrant women and children, NIWAP understands how the lower court’s opinion harms immigrants who are victims of domestic violence, sexual assault, child abuse, and other crimes.

¹ In accordance with Rule 11(c) of the Texas Rules of Appellate Procedure, *Amici* confirm that no party, nor any other person or entity, made any monetary contribution to the preparation or submission of this brief. No counsel for a party authored this brief in whole or in part.

American Gateways—formerly the Political Asylum Project of Austin—provides direct legal representation and advocacy to thousands of low-income immigrants in central Texas, including pro se assistance to hundreds of asylum seekers annually. Its mission is to champion the dignity and human rights of immigrants, refugees, and survivors of persecution, torture, conflict, and human trafficking, through free or low-cost legal services, education, and advocacy.

In this brief, *Amici* urge this Court to grant Guimaraes’s Petition for Review. The lower court’s errors threaten to undermine important, well-established protections for the immigrant women and children—particularly those who are victims of domestic violence and child abuse—that *Amici* support.²

SUMMARY OF ARGUMENT

Review from this Court is needed because the lower court failed to extend comity under The Hague Convention on the Civil Aspects of International Child Abduction (“Convention”) as mandated by Congress and the United States Supreme Court. Particularly important to *Amici* is the lower court’s refusal to extend comity to a sister-signatory’s determination that returning N.S.B. to an

² For purposes of this brief, *Amici* incorporate by reference the Statement of the Case, the Statement of Jurisdiction, the Issues Presented, and the Statement of Facts provided by Petitioner Guimaraes in her Petition for Review (“Pet.”), filed May 6, 2019.

abusive environment with Respondent would result in a grave risk of harm to N.S.B.'s psychological health and development.³

At the heart of the Convention is international comity. Only in the rarest of cases—where a sister-signatory's decision clearly misinterprets the Convention's text and purpose—may a court refuse to extend comity. And the refusal to extend comity has wide-reaching implications for how courts here and abroad will interpret this international treaty. As Judge Keyes's dissent from denial of *en banc* reconsideration correctly concluded, the lower court erred in refusing to extend comity on the Brazilian courts' grave-risk determination—particularly because the Brazilian courts' determination was made with full participation from Respondent.

The Brazilian courts' determination that the Convention's grave-risk exception applied was consistent with the Convention's text and purpose. The text of the grave-risk exception and its place in the scheme of the Convention operates to allow parents to remove their child from an abusive, dangerous environment. Removal and retention of a child is not wrongful by virtue of the grave-risk exception when frequent, severe spousal abuse is witnessed by the child. This interpretation of the exception is confirmed by all United States Courts that have considered the question and each study examining the psychological harm spousal abuse has on children of all ages.

³ Petitioner Guimaraes appealed and briefed this error. Pet. at xxxiii, 13–15, 17.

By refusing to extend comity and holding that the grave-risk exception does not protect minor-child N.S.B. from suffering severe psychological harm in the face of the extreme, repeated spousal abuse detailed in the record, the lower court’s decision will undoubtedly harm the immigrant women and children that *Amici* advocate for and provide support to.

ARGUMENT

I. THIS COURT’S REVIEW IS NEEDED TO ENSURE TEXAS COURTS EXTEND COMITY TO DECISIONS FROM SISTER SIGNATORIES OF THE HAGUE CONVENTION

This Court’s review is warranted to correct the lower court’s wide-reaching decision to ignore the Brazil Federal and State Courts’ opinions and orders issued under the Convention. International comity is at the heart of the Convention. *Madrigal v. Tellez*, 848 F.3d 669, 677 (5th Cir. 2017) (citation omitted). When Congress implemented the Convention’s provisions through the International Child Abduction Remedies Act (“ICARA”),⁴ it recognized that the Convention must be uniformly interpreted. 22 U.S.C. § 9001(b)(3)(B).

Comity is crucial in adhering to Congress’s command for uniformity, as interpretations of the Convention’s provisions and exceptions have consequences for how other courts—both here and abroad—will interpret the treaty. *Walsh v. Walsh*, 221 F.3d 204, 221–22 (1st Cir. 2000) (citation omitted). Accordingly, the

⁴ 22 U.S.C. § 9001(b) (2017).

United States Supreme Court has made clear that courts are to give the opinions of the Convention’s sister signatories “considerable weight.” *Ermini v. Vittori*, 758 F.3d 153, 161 (2d Cir. 2014) (citing *Air France v. Saks*, 470 U.S. 392, 404 (1985)).

A court may only decline to extend comity under the Convention if the sister signatory “clearly misinterprets the Hague Convention, contravenes the Convention’s fundamental premises or objectives, or fails to meet a minimum standard of reasonableness.” *Smedley v. Smedley*, 772 F.3d 184, 189 (4th Cir. 2014) (quotation and citation omitted).⁵ Comity may be extended on an entire cause of action, or on a single, particular issue. *Diorinou*, 237 F.3d at 139 (citing *Overseas Inns S.A. v. United States*, 911 F.2d 1146, 1148–50 (5th Cir. 1990)).

Particularly important to *Amici* is the lower court’s decision not to extend comity on a sister-signatory’s determination that the Convention’s grave-risk exception prevented N.S.B.’s return. As this *Amici* brief illustrates, the lower court’s decision not to extend comity to the Brazilian courts’ grave-risk determination misinterprets the Convention, contravenes the Convention’s fundamental policies and objectives, and is unreasonable in light of data showing

⁵ The standard of review in determining whether a court properly extended or declined to extend comity to a foreign court under the Convention is unclear, though the only Federal Court of Appeals to squarely address the question determined that *de novo* review is appropriate. *Smedley*, 772 F.3d at 189 n.7 (citing *Diorinou v. Mezitis*, 237 F.3d 133, 139–40 (2d Cir. 2001)). However, as this brief and the Petition illustrate, the lower court’s refusal to extend comity to the Brazilian courts’ orders—issued in a case where both Petitioner and Respondent fully participated and litigated the issues—was error under either a *de novo* or abuse of discretion standard. *See* Pet. at 17.

the prolonged psychological harm that witnessing domestic violence and spousal abuse has on a child. If left uncorrected, the lower court's opinion will undermine the purposes of the Convention and result in harm to children—like N.S.B.—that the Convention's grave-risk exception was designed to protect.

II. THE LOWER COURT SHOULD HAVE EXTENDED COMITY TO THE SISTER SIGNATORY'S GRAVE-RISK DETERMINATION BECAUSE IT REASONABLY INTERPRETED THE TEXT OF THE EXCEPTION AND WAS CONSISTENT WITH THE CONVENTION'S FUNDAMENTAL PURPOSE

The lower court's refusal to extend comity was in contravention of the grave-risk exception's text and the fundamental purpose of the exception—chiefly, to prevent children like N.S.B. from returning to abusive homes that pose a grave risk of psychological harm. Worse, it ignores the well-settled rule that evidence of frequent spousal abuse—particularly when that abuse is witnessed by the child—establishes psychological harm or an intolerable environment for the child under the grave-risk exception. The lower court's conclusion defies prevalent guidance on the interpretation of the grave-risk exception, and it stands contrary to established data demonstrating the severe psychological impact that spousal abuse has on a child.

A. The Brazilian Courts' Application Of The Grave-Risk Exception Was Consistent With The Plain Text Of The Exception.

The Brazilian courts' determination that the grave-risk exception applied to prevent the return of N.S.B. to the United States was consistent with the text of the

exception. The text of the grave-risk exception allows parents to remove their child from a dangerous, abusive environment. “The interpretation of a treaty, like the interpretation of a statute, begins with its text.” *Abbott v. Abbott*, 560 U.S. 1, 10 (2010) (quoting *Medellín v. Texas*, 552 U.S. 491, 506 (2008)). A court is not required to return a child under the Convention if there is a grave risk that the child’s return: (1) would expose the child to physical harm; (2) would expose the child to psychological harm; or (3) would otherwise place the child in an intolerable situation. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99–11, at 5. As long as one of these three conditions is met, the grave-risk exception applies.⁶

While the court below is correct that the exception is to be narrowly interpreted,⁷ narrow construction of a statutory exception still requires courts to give proper effect to both the exception’s text and to the exception’s role in the statutory design. *See generally Maracich v. Spears*, 570 U.S. 48, 60 (2013) (stating that narrow interpretation of a statutory exception is intended to facilitate the exception’s operation within the statutory scheme). In finding the grave-risk

⁶ ICARA established a clear-and-convincing burden of proof for the grave-risk exception. 22 U.S.C. § 9003(e)(2)(A). Petitioner met her burden. *See* Pet. at 13–15; *Guimaraes v. Brann*, 01-16-00093-CV, 2018 WL 6696769, at *18–19, 22 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, pet. filed) (Keyes, J., dissenting from denial of reconsideration *en banc*).

⁷ *Guimaraes v. Brann*, 562 S.W.3d 521, 541 (Tex. App.—Houston [1st Dist.] 2018, pet. filed); 22 U.S.C. § 9001(a)(4).

exception appropriate here, the Brazilian courts' opinions and orders reasonably interpreted the plain text of the grave-risk exception, warranting the exercise of comity. *See Smedley*, 772 F.3d at 189 (stating that comity should be afforded if the sister court meets a "minimum standard of reasonableness").

B. The Brazilian Courts' Application Of The Grave-Risk Exception Was Consistent With The Purpose Of The Convention.

The Brazilian courts' determination that the grave-risk exception applied to prevent the return of N.S.B. was consistent with the Convention's fundamental purpose and the purpose of the exception. The Convention was designed to prevent the *wrongful* international removal and retention of children. *E.g.*, 22 U.S.C. § 9001(a). Consistent with that goal, the grave-risk exception allows a parent to remove and retain a child when the child faces a grave risk of psychological harm due to frequent and severe spousal abuse.

As the United States State Department noted in its analysis of the Convention to the Senate, while the grave-risk exception was not intended to prevent returning a child to an impoverished home or a home with minimal educational opportunities, the exception *was* intended to allow a parent to remove and retain a child to safeguard it against psychological victimization, such as abuse from the other parent. Hague International Child Abduction Convention; Text and Legal Analysis, 51 FR 10510 (1986) (hereinafter "Convention Analysis").

The Convention Analysis’s examples are telling with regard to the intended scope of the grave-risk exception: irreparably damaging parental behavior—abuse and the harmful effects of abuse—satisfies the grave-risk exception, where mere environmental advantages or disadvantages—a lack of wealth or opportunity—does not.

Frequent spousal abuse, particularly when witnessed by the child, constitutes irreparable damaging parental behavior and satisfies the grave-risk exception. This is confirmed by United States Courts that have considered the question of whether spousal abuse can create a grave risk of psychological harm for a child under the Convention’s exception.⁸

⁸ In *Abbott v. Abbott*, the United States Supreme Court explained that psychological harm to the child under the grave-risk exception can be the result of the mother’s own safety being in grave risk. 560 U.S. at 22 (collecting cases).

United States Courts of Appeals have held the same. *E.g.*, *Ermini v. Vittori*, 758 F.3d 153, 164 (2d Cir. 2014) (stating the well-settled rule that spousal violence can establish a grave risk of harm to the child under the Convention, particularly when it occurs in the child’s presence); *Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005) (reversing district court’s grant of summary judgment on the basis that district court improperly gave less weight to the abuse since it was directed almost entirely at the spouse and not the children); *Walsh v. Walsh*, 221 F.3d 204, 220 (1st Cir. 2000) (district court’s distinction between violence directed at spouse and violence directed at children was in error where acts of violence against spouse were frequent, severe, and witnessed by the children).

And in the cases where spousal abuse did not constitute a grave risk of psychological harm to the child or create an intolerable environment for the child, the record clearly showed that the abuse was infrequent, did not require any medical treatment, and was not witnessed by the children. *E.g.*, *Charalambous v. Charalambous*, 627 F.3d 462, 468 (1st Cir. 2010); *see also Madrigal v. Tellez*, 848 F.3d 669, 676 (5th Cir. 2017) (holding that while threats against a parent can create a grave risk to her children in certain circumstances, a vague email from an unknown source threatening the mother was not sufficient to establish that the children were in grave risk of harm).

In holding that the grave-risk exception applied to prevent the return of N.S.B., the Brazilian courts acted consistently with the purpose of the Convention, warranting the exercise of comity. *See Smedley*, 772 F.3d at 189. As described in Judge Keyes’s dissent from denial of *en banc* reconsideration in the court below, in incorrectly refusing to extend comity on the grave-risk determination, the panel and the trial court ignored “voluminous evidence” in the record detailing the frequent spousal abuse against Petitioner, the severe nature of the abuse against Petitioner, and the fact that N.S.B. witnessed the spousal abuse—all of which Respondent admitted to. *Guimaraes v. Brann*, 2018 WL 6696769, at *19, 21 (Keyes, J., dissenting from denial of reconsideration *en banc*).

This is the exact situation that the grave-risk exception was created to address. *See Convention Analysis*, 51 FR 10510. The Convention was not intended to result in the return of a child to a psychologically damaging home. Yet that is what the lower court ordered. Children like N.S.B. experience a grave risk of psychological harm from being returned to live with a spousal abuser, particularly after witnessing the domestic abuse. This is confirmed by the data examining the effects of spousal abuse and domestic violence on children.

Neuroscience of child-brain development demonstrates the grave, psychological harm that exposure to domestic violence in the home has on children of all ages, including babies. Lynn Hecht Schafran, *Domestic Violence*,

Developing Brains, and the Lifespan: New Knowledge from Neuroscience, 53(3) JUDGES’ J. 32, 32–34 (2014), <https://www.legalmomentum.org/sites/default/files/reports/Judges%27%20Journal%202014%20Domestic%20Violence%20-%20Impact%20on%20Children%20-%20Neuroscience.pdf>. “Continual exposure to witnessing or being involved in emotionally and physically traumatic events can have a cumulative detrimental effect on children.” Jennifer L. Hardesty & Grace H. Chung, *Intimate Partner Violence, Parental Divorce and Child Custody: Directions for Intervention and Future Research*, 55 FAM. REL. 200, 201 (2006). Children exposed to domestic violence face an increased risk of health problems as adults, including depression, anxiety, diabetes, obesity, and heart disease, among others. OFFICE ON WOMEN’S HEALTH, WHAT ARE THE LONG TERM EFFECTS OF DOMESTIC VIOLENCE? (2019). Furthermore, children who witness domestic violence are at a higher risk for continuing the cycle as adults by entering abusive relationships or becoming abusers. *Id.*

It is unsurprising that children who witness repeated spousal abuse—like N.S.B.—face a grave risk of psychological harm from the traumatic effects of the abuse. That is precisely why spousal abuse is grounds for satisfying the grave-risk exception to the Convention. *E.g., Abbott*, 560 U.S. at 22. In refusing to extend

comity to the sister signatory's grave-risk determination, the lower court acted contrary to that well-established purpose of the exception.

PRAYER

Amici urge this Court to accept review of this case. The lower court's refusal to extend comity to a sister-signatory's interpretation of the Convention has a wide-reaching impact and threatens the safety, psychological, and psychical development of the children that the grave-risk exception was designed to protect.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 2,756 words, excluding the portions of the brief exempted by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure.

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Respectfully submitted,

/s/ Elizabeth Boydston

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