No. 11-1347

In The Supreme Court of the United States

JEFFREY LEE CHAFIN,

Petitioner,

v.

LYNNE HALES CHAFIN,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

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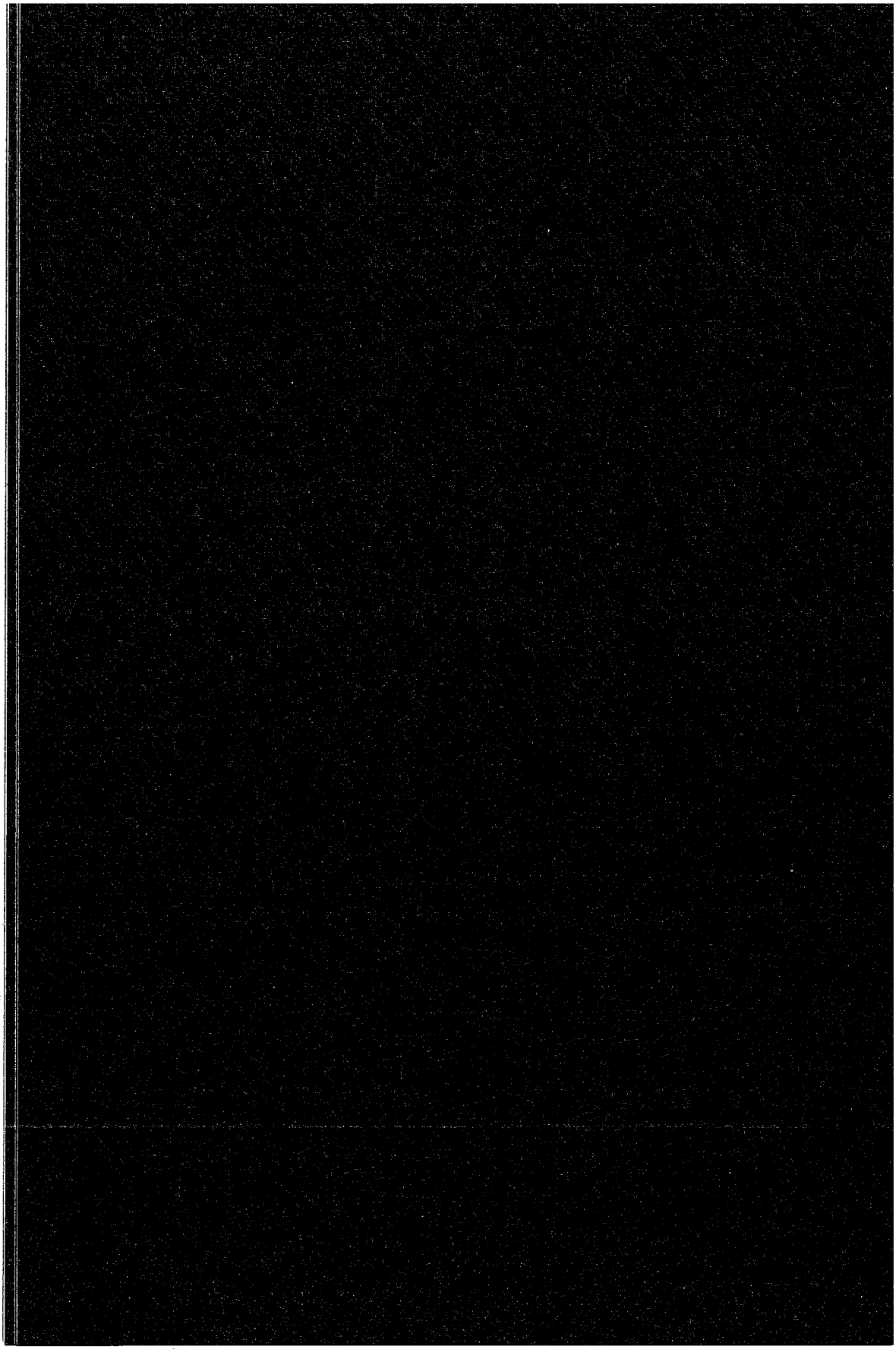

QUESTION PRESENTED

Whether an appeal of a trial court's Hague Convention return order is moot upon the child's exit from the United States and return to her country of habitual residence.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the Constitutional and Statutory Provisions provided in the Petitioner's Petition for Writ of Certiorari, the provision stated below is also relevant to this case.

Article 12, The 1980 Hague Convention on the Civil Aspects of International Child Abduction

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

STATEMENT OF THE CASE

This case is the appeal by Petitioner, Jeffrey Lee Chafin (the "Father"), from the United States District Court for the Northern District of Alabama's Order granting the Verified Petition for Return of Child to Scotland (the "Petition") filed by the Mother. The Mother's Petition was filed pursuant to The Convention on the Civil Aspects of International Child Abduction, done at the Hague on October 25, 1980 (the

"Hague Convention").[1] The child, E.E.C., born in 2007 ("the child"), returned home to Scotland on October 12, 2011 pursuant to the district court's Order, will remain in Scotland and has not left Scotland since her return home.

The Respondent, Lynne Hales Chafin (the "Mother") respectfully submits this Brief in Opposition to Petition for Writ of Certiorari to correct misstatements of fact contained in the Petition and to explain her position with respect to mootness in the context of the appeal of a Hague Convention matter. The Mother does not oppose a Writ of Certiorari being granted in this case. The Father correctly stated in his Petition for Writ of Certiorari that the circuits are split on the issue of whether an appeal of a Hague Convention return order is moot upon the child's exit from the United States. In the Mother's submission, the Eleventh Circuit's position that an appeal is moot upon a child's exit from the United States is correct and there is a clear and straightforward remedy – staying a return order pending an appeal in appropriate cases – to address any concern related to preserving a party's appellate rights after the issuance of a return order.

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[1] T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10,493 (1986); text at: http://www.hcch.net/index_en.php?act=conventions.pdf&cid=24 (last accessed June 7, 2012).

FACTS RELEVANT TO THE QUESTION PRESENTED

Only certain limited facts are relevant to this appeal on the issue of mootness. The Mother sets forth those limited relevant facts below and also addresses certain misstatements of fact contained in the Father's Petition for Writ of Certiorari.

On May 2, 2011, the Mother instituted her action in the United States District Court for the Northern District of Alabama to secure the return of her daughter to Scotland pursuant to the Hague Convention and the International Child Abduction Remedies Act (hereinafter "ICARA"),[2] after the child had been wrongfully retained in the United States by the Father.

The Mother requested that the district court rule that the Father had wrongfully retained the parties' daughter in the Northern District of Alabama and that it should order the child's return to Scotland with the Mother forthwith. A two-day evidentiary hearing was held on the Mother's Petition on October 11 and 12, 2011. At the conclusion of the trial, the district court immediately issued an oral opinion and order from the bench holding that the Father had indeed wrongfully retained the child in the United States and ordering the child to be returned to Scotland with the Mother forthwith.

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[2] 42 U.S.C. § 11601 *et seq.* (2001).

Within minutes after the lower court had issued its oral opinion and order from the bench, and had adjourned the proceedings, and the Petitioner and her counsel had left the courtroom, the Father's counsel handed the Mother's counsel a Motion to Stay Implementation of Order. The Mother's counsel therefore returned immediately to the lower court to bring the Motion to Stay to the Court's attention and to seek direction with respect to responding to the Motion to Stay and whether the Mother and child were still permitted to return to Scotland while the Motion to Stay was pending. The Father's counsel was still present in the courthouse when the Mother's counsel returned seeking direction from the lower court.

The Motion to Stay had not yet even been filed with the Clerk of the Court and therefore at the Court's instruction the Father's counsel was sent to file the Motion to Stay in the Clerk's Office. The lower court then considered the Motion to Stay in chambers and issued a written Order denying the Motion to Stay and further ordering that "[t]he petitioner is permitted to return to Scotland this day with her minor child in accordance with this court's Order."

In his Petition for Writ of Certiorari to this Court, the Father wrongly states that the Mother "made immediate efforts to flee the country within a few hours" of the district court's ruling. (Pet. at 8). The Mother did not "flee" the United States. Rather, with a copy of the district court's October 12, 2011 Order in hand, the Mother and child immediately

returned home to Scotland as ordered by the district court.

On October 13, 2011, the lower court issued a ten (10) page written Order, making its findings of fact and conclusions of law.

The Mother and child are now home in Scotland, will remain in Scotland and have not left Scotland since their return home. The Father also incorrectly states in his Petition for Writ of Certiorari to this Court that the Mother "has not undertaken any steps" to initiate custody proceedings in Scotland. The Mother has, in fact, initiated custody proceedings in Scotland and has obtained interim custody orders from the Scottish court. The custody proceedings are pending in the Scottish court and the Father was provided notice of the Scottish case.

On October 25, 2011, the Father filed a Motion to Alter or Amend Order. The Court issued an Order denying the Respondent's Motion to Alter or Amend Order the next day. On November 14, 2011, the Father filed his Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit. The Mother filed a Motion to Dismiss the Father's appeal as moot because the child had already returned to Scotland.

On February 6, 2012, the Court of Appeals entered an order vacating the district court's order and dismissing the Father's appeal as moot.

ARGUMENT

"A case is moot if no case or controversy exists for [the appellate court] to resolve: 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Bekier v. Bekier*, 248 F.3d 1051, 1054 (11th Cir. 2001) (quoting *Reich v. Occupational Safety and Health Review Comm.*, 102 F.3d 1200, 1201 (11th Cir. 1997) (internal quotations omitted). An appellate court has "no authority 'to give opinions on moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before [the Court].'" *Bekier*, 248 F.3d at 1054 (quoting *Church of Scientology v. U.S.*, 506 U.S. 9 (1992). "If an event occurs during the pendency of an appeal 'that makes it impossible for this court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed.'" *Id.*

In the *Bekier* case, the Court of Appeals for the Eleventh Circuit analyzed the concept of mootness in the context of a Hague Convention case where the child at issue had returned to his habitual residence of Israel with the father. The Eleventh Court held that a child's return to its habitual residence from the United States pursuant to a district court order during the pendency of an appeal of the district court order renders the appeal moot. *Bekier*, 248 F.3d at 1054.

The material facts in this case are akin to the facts in *Bekier*. In *Bekier*, the child at issue had been wrongfully removed from Israel and was being wrongfully retained in the United States by the child's mother. *Id.* at 1053. The father filed a petition in the Southern District of Florida seeking the child's return to his habitual residence of Israel pursuant to the Hague Convention. *Id.* The district court ordered that the child be returned to the father and returned to the child's habitual residence of Israel. *Id.* The mother filed a motion to stay the district court's order. *Id.* The district court issued a conditional stay ordering the child's return to Israel be stayed, but only if the mother filed an appeal within ten days and posted a $100,000.00 bond. *Id.* The mother filed her appeal within ten days but failed to post the required bond. *Id.* The stay therefore expired by its own terms and the father returned to Israel with the child pursuant to the district court's order. *Id.*

When *Bekier* came before the Eleventh Circuit on appeal, the Court held that the child's exit from the United States and return to his habitual residence of Israel pursuant to the district court's order "raised the question of whether [the] case is moot." *Id.* at 1054. The Eleventh Circuit concluded that the child's exit from the United States and return to his habitual residence rendered the case moot. *Id.*

The Eleventh Circuit explained that although the mother had appealed the district court's decision, "what relief we can offer her or what 'legally cognizable interest [she has] in the outcome [of this appeal]'

is not clear." *Bekier*, 248 F.3d at 1054 (quoting *Wakefield v. Church of Scientology of Cal.*, 938 F.2d 1226, 1229 (11th Cir. 1991)). The Eleventh Circuit further explained that a reversal of the district court's order would "provide Ms. Bekier with no actual affirmative relief. [The child] has already returned to Israel. Ms. Bekier's potential remedies now lie in the Israeli courts. Any words by us would be merely advisory." *Bekier*, 248 F.3d at 1054 (internal citations omitted).

The Eleventh Circuit explained that although a party "need not necessarily seek a stay of a lower court's judgment to perfect an appeal, 'the consequence of failing to obtain a stay is that the prevailing party may treat the judgment of the district court as final.'" *Bekier*, 248 F.3d at 1054 (quoting *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.3d 1294, 1295 (11th Cir. 1984)). The Eleventh Circuit continued: "[w]hen [the child] returned to Israel with his father, we became powerless to grant the relief requested by Ms. Bekier. And so we *must* dismiss this appeal." *Bekier*, 248 F.3d at 1055 (emphasis added).

Ms. Bekier argued to the Eleventh Circuit that dismissal of her appeal would defeat the spirit and intention of the Hague Convention. *Id.* The Court considered her position, but determined that "the United States Courts are restricted by the jurisdictional doctrine of mootness. Given our duty to respect the limits of our judicial authority, we will not create a 'live' case or controversy in an effort to promote the spirit of the Convention." *Id.* (citing *Walsh v. Walsh*,

221 F.3d 204, 214 (1st Cir. 2000) ("Neither the Convention nor the U.S. implementing legislation restricts the appellate process")).

The Eleventh Circuit concluded in *Bekier* that "[w]here a case becomes moot after the district court enters judgment but before the appellate court has issued a decision, the appellate court must dismiss the appeal, vacate the district court's judgment and remand with instructions to dismiss as moot." *Bekier*, 248 F.2d at 1055-6. The child's return to Israel therefore rendered the *Bekier* appeal moot and the appeal was dismissed. *Id.* at 1056.

A majority of the United States federal circuits that have opined on the issue of mootness in the context of a Hague Convention case, where the child at issue has exited the United States during the pendency of an appeal of a district court's order, have agreed with the Eleventh Circuit, holding that the appeal in such circumstances is rendered moot. *See, e.g.*, *Walsh v. Walsh*, 221 F.3d 204, 214 (1st Cir. 2000); *Nicholson v. Pappalardo*, 605 F.3d 100, 106-7 (1st Cir. 2010); *March v. Levine*, 249 F.3d 462, 468 (6th Cir. 2001).

The Father argues in his Petition for Writ of Certiorari that an appeal of a Hague Convention return order should not be considered moot upon a child's exit from the United States. This Court has clearly articulated, however, that an appellate court has "no authority 'to give opinions on moot questions or abstract propositions, or to declare principles or

rules of law which cannot affect the matter in issue in the case before [the Court].'" *Bekier*, 248 F.3d at 1054 (quoting *Church of Scientology v. U.S.*, 506 U.S. 9 (1992). A court in the United States would be declaring a principle or rule of law which cannot affect the matter in issue if it were to rule on an appeal where the child has already been returned to another country from the United States. An appeal of a Hague Convention return order where a child has already departed the United States therefore must be considered moot.

Any concern with respect to preserving a party's appellate rights can be addressed by the issuance of a stay of the return order in appropriate cases where the party seeking the stay meet the requirements set forth by this court for the issuance of a stay. *See Hilton v. Braunskill,* 107 S.Ct. 2113, 2120 (1987); *see also Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986); *Ruiz v. Estelle,* 650 F.2d 555, 565 (5th Cir. 1981).

CONCLUSION

For the foregoing reasons, Ms. Chafin does not oppose a Writ of Certiorari being granted in this matter.

Respectfully submitted,

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