No. 15-2983

In the

United States Court of Appeals

for the

Seventh Circuit

RAUL SALAZAR GARCIA,

Petitioner-Appellee,

– v. –

EMELY GALVAN PINELO,

Respondent-Appellant.

On appeal from a final judgment of the
United States District Court for the Northern District of Illinois
Case No. 1:14-cv-09644, Hon. Edmond E. Chang

BRIEF AND CIRCUIT RULE 30(a) APPENDIX FOR RESPONDENT-APPELLANT

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INTRODUCTION

This case will decide where D.S.—a bright, thirteen-year-old boy who wishes to remain with his mother in the United States—will spend the rest of his childhood. D.S. has been in the sole custody of his mother, Respondent-Appellant Emely Galvan Pinelo, since he was born; the two have never lived with D.S.'s father, Petitioner-Appellee Raul Salazar Garcia. In 2013, with Salazar's approval, D.S. emigrated with Galvan from Mexico to Chicago. D.S. thrived in his new home, improving his English and studying math and science with the goal of one day becoming a cardiologist.

Near the end of the 2013-14 school year, however, Salazar came to Chicago—ostensibly for a visit with D.S.—and surprised Galvan by hastily attempting to take D.S. back to Mexico. After Galvan resisted this peremptory maneuver, Salazar returned to Mexico and initiated legal proceedings here in the United States to force the return of D.S. pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"). In proceedings below, the district court granted Salazar's petition under the Convention and ordered D.S. returned to Mexico.

That ruling must be reversed, for two reasons. *First*, Salazar failed to meet his burden of proving that he has "rights of custody" protected by the Convention. By the district court's own admission, the scant evidence Salazar submitted regarding Mexican law was either ambiguous or unhelpful. The district court erred by ordering D.S. returned to Mexico on the basis of such a facially

inadequate evidentiary showing. Compounding that error, moreover, the district court drew the wrong legal conclusion from the limited evidence before it. That evidence demonstrates that Salazar does not have "rights of custody" under the Convention and is not entitled to force the return of D.S. to Mexico.

Second, the district court wrongly refused to consider the most crucial evidence of all: D.S.'s firmly-stated desire not to return to Mexico. The court felt that it could not take D.S.'s own wishes into account because doing so would have negative repercussions in other Hague Convention cases, but that concern was misplaced. Thus, even if Salazar has rights of custody (and we demonstrate below that he does not), the district court erred when it declined to hold that those rights were outweighed by D.S.'s preference to remain in the United States and denied Salazar's petition.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Circuit Rule 34(f), Respondent-Appellant Emely Galvan Pinelo respectfully requests oral argument. This appeal presents important and novel issues of United States and Mexican law, and oral argument on these issues would "significantly aid[]" the decisional process. *See* Fed. R. App. P. 34(a)(2)(C).

JURISDICTION

The district court had subject matter jurisdiction under the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9003(a), and 28 U.S.C. § 1331. The district court entered final judgment on August 28, 2015, and Gal-

van timely filed her notice of appeal on September 11, 2015. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in holding that Salazar proved by a preponderance of the evidence that under Mexican law, he has "rights of custody" within the meaning of the Hague Convention.

2. Whether the district court erred by rejecting Galvan's mature-child defense on the ground that permitting the defense would not further the aims of the Convention.

STATEMENT OF THE CASE

A. Factual background

Emely Galvan Pinelo and Raul Salazar Garcia dated for about nine months in Monterrey, Mexico, beginning in mid-2001. First Am. Compl., Ex. F 2 (Dist. Ct. Dkt. 30). They never lived together and did not marry. First Am. Compl. ¶ 6, p.2. Shortly after the two ended their relationship, Galvan discovered that she was pregnant, and she subsequently gave birth to a son, D.S., in October 2002. SA 2.

In March 2006, Galvan and Salazar appeared before a court in Monterrey to have Salazar's paternity of D.S. formally acknowledged. At that time, they also reached an agreement on custody, which the court entered as a judicial order. The court's order granted custody of D.S. to Galvan, set certain hours as weekly

visitation times for Salazar, and obliged Salazar to pay child support to Galvan. SA 44-45.

In late 2012, Salazar assisted Galvan in obtaining a passport and tourist visa allowing D.S. to travel to the United States. Galvan sought the travel documents because she wanted to take D.S. to Texas to visit relatives and Disney World or Disneyland. SA 69-70; Evidentiary Hr'g Tr. 14-16 (Dist. Ct. Dkt. 94). Galvan also became engaged that fall to Rogelio Hernandez, a U.S. citizen who had emigrated to the United States from Monterrey and lived in Chicago. Galvan and Hernandez were married on July 5, 2013. SA 68-69.

By late July 2013, Galvan had decided that she wanted to move with D.S. to Chicago, where D.S. would have better educational opportunities. SA 70-71. Galvan and D.S. met with Salazar at a Starbucks in Monterrey on July 30, 2013, to discuss this possibility, and they all agreed that D.S. would go to live in the United States for one year. SA 3. According to Galvan, the parties decided that they would settle D.S.'s permanent residence together at the end of that year; Salazar's understanding, in contrast, was that D.S. alone would decide whether he stayed in the United States once the year was up. SA 3-4.

In August, Galvan and D.S. moved to Chicago, where D.S. matriculated at a math and science elementary school that Galvan had chosen for him before they left Mexico. SA 72-73, 81. D.S. made impressive progress during the school year. Though he spoke little English when he first arrived, his language skills quickly improved, and within a few months he spoke English comfortably at

school and at home. SA 105; Evidentiary Hr'g Tr. 80-81. By the end of the year, he had progressed from below average performance to above average performance for his grade level in math and reading. App. 3. D.S. also made a number of new friends, including a girlfriend, and participated in several clubs and sports teams. *Id.*

Over the course of the year, D.S. kept in touch with Salazar on Skype and Facebook. In their conversations, D.S. told Salazar that he missed Mexico and wanted to return. SA 4. He repeatedly told Galvan, however, that he wanted to stay in Chicago. *Id.*

In July 2014, Salazar traveled to Chicago to visit D.S. Unbeknownst to Galvan, Salazar intended to take D.S. back to Mexico immediately, and he had brought a plane ticket for D.S. with him. *Id.* Galvan learned of Salazar's intentions for the first time when the three met at a Starbucks in Chicago on July 21—less than 24 hours before the flight Salazar had booked was scheduled to depart for Mexico. SA 5; Evidentiary Hr'g Tr. 49-52. At that meeting, D.S. told Galvan that he wanted to go back to Mexico. Galvan was "surprised" by this revelation, given that D.S. had never indicated any such desire to her before, and she felt that Salazar had violated their earlier agreement by preemptively arranging to take D.S. back to Mexico without her knowledge. SA 113; Evidentiary Hr'g Tr. 138. Galvan refused to consent to D.S.'s leaving the United States until she, D.S., and Salazar had "weigh[ed] the pros and cons." *Id.* at 127.

Salazar eventually left the meeting, taking D.S. with him. SA 5. Galvan called the police, who got in touch with Salazar by phone and instructed him to return D.S. to Galvan's custody, which he did. SA 5; Evidentiary Hr'g Tr. 31-32. Salazar returned to Mexico the next day, without D.S.

B. Procedural background

1. District court proceedings

After he returned to Mexico, Salazar filed a petition with the Mexican Central Authority seeking D.S.'s return. The Mexican Central Authority forwarded the petition to the U.S. Department of State, which filed the petition with the district court in December 2014. SA 5.

By the time of his first interview with a court-appointed guardian *ad litem* in March 2015, D.S. no longer expressed a preference to return to Mexico; instead, he explained that he saw "good and bad to both scenarios" and wanted the district court to decide. Guardian Ad Litem Report 1-2 (Ex. G to Resp't's Resp. to Pet'r's Rule 56.1 Statement of Undisputed Facts (Dist. Ct. Dkt. 65)). Less than two months later, D.S. told the guardian *ad litem* that his position had changed again; he now wanted to stay in the United States through the eighth grade and try to get into a good high school in Chicago. *Id.* at 2-3. D.S. sent Salazar a message on Facebook informing him of his desire to stay in the United States, explaining that he "want[ed] to have a better future" and thus had chosen to stay in Chicago to continue his studies. Resp't's Resp. to Pet'r's Rule 56.1 Statement of Undisputed Facts 12.

In June 2015, the district court examined D.S. *in camera* about his preference to remain with Galvan in Chicago. First In Camera Hearing Tr. 1 (Ex. E to Resp't's Resp. to Pet'r's Rule 56.1 Statement of Undisputed Facts). D.S. acknowledged to the court that during the 2013-14 school year, he wanted to go back to Mexico because he missed his friends and family there. *Id.* at 12. But D.S. explained that after talking with his mother and thinking through the potential benefits of staying in the United States, he had changed his mind and decided that he wanted to remain with Galvan, though he was not definitively opposed to returning to Mexico. *Id.* at 21-25, 32.

Two months later, on August 7, 2015, Galvan asked the district court to hold a second *in camera* hearing with D.S., explaining that she had consulted with an immigration lawyer who had told her that D.S. was likely to have difficulty visiting her in the United States if he went back to Mexico because of his immigration status. Over Salazar's objection, the district court ordered the immigration lawyer to communicate this information to D.S. and granted Galvan's request for a second *in camera* hearing. SA 6-7; 8/5/15 Status Conference Tr. 3-6 (Dist. Ct. Dkt. 93).

At that second hearing, D.S. told the court that he now firmly objected to returning to Mexico. SA 95-96. Based on the immigration lawyer's advice, D.S. was concerned about his ability to visit with his mother if he went back to Mexico. SA 86-88. He also reiterated to the court that he thought his educational opportunities were better in the United States, because the teachers at his school

in Chicago were better and the American school system would give him a "better chance to study" to become a cardiologist, his desired career. SA 91-93. D.S. said that there were times that he missed Mexico, but he told the court again that, taking all of the pros and cons of each country into account, he objected to going back to Mexico. SA 96.

At the end of the hearing, the district court asked D.S. what the immigration lawyer had told him about the possibility of Galvan's obtaining a green card. D.S. replied that the lawyer had said that it would be difficult, despite her marriage to a U.S. citizen, because Galvan had overstayed her original visa. SA 97. The court nonetheless told D.S. to assume that Galvan could get a green card within six months and travel freely between the United States and Mexico and asked whether that would change D.S.'s mind. D.S. replied that it "probably would." SA 98.

On August 16, 2015, the district court granted Salazar's pending motion for summary judgment in part and denied it in part. As relevant here, the court granted summary judgment to Salazar regarding Galvan's affirmative defense based on D.S.'s objection to returning to Mexico. SA 34-35. The court denied summary judgment with respect to several elements of Salazar's petition, however, holding that an evidentiary hearing was needed in order to determine which country was D.S.'s "habitual residence" under the Convention and whether Salazar had "rights of custody" under Mexican law. SA 13.

2. The district court's opinion

A week after the evidentiary hearing, the district court issued an opinion granting Salazar's petition. The court determined that D.S.'s "habitual residence," for purposes of the Convention, was Mexico, because Galvan and Salazar had not mutually agreed that D.S. would abandon his residence in Mexico. App. 9. The court thus looked to Mexican law—specifically, the law of Nuevo Leon, the Mexican state where Monterrey is located—to determine whether Salazar had "rights of custody" that were infringed by Galvan's retention of D.S. in the United States. App. 12.

Salazar argued to the district court that although he lacked a right to physical custody of D.S., he had retained his right of *patria potestas*—a civil-law right that derives from Roman law, involving the exercise of "parental authority" for the "physical, mental, moral, and social protection of [a] minor child." *Id.* (quoting *Whallon v. Lynn*, 230 F.3d 450, 456-57 (1st Cir. 2000) (alteration omitted). Galvan rejoined that Salazar's right of *patria potestas*, if it ever existed, was extinguished by the 2006 Mexican court order giving her sole custody of D.S. and awarding only limited visitation rights to Salazar.

The district court agreed with Salazar, though it described the question as a "close call" and bemoaned the limited analysis of Mexican law made available by Salazar to inform its decision. App. 16. The court acknowledged that other federal courts had held that *patria potestas* "can be overridden" by a custody agreement or order between a child's parents. *See* App. 14-15 (citing *Gonzalez v.*

Gutierrez, 311 F.3d 942, 954 (9th Cir. 2002), *abrogated on other grounds by Abbott v. Abbott*, 560 U.S. 1, 22 (2010), and *Ibarra v. Quintanilla Garcia*, 476 F. Supp. 2d 630 (S.D. Tex. 2007)). It nonetheless held that the 2006 custody order had not affected Salazar's right of *patria potestas*, for two reasons: First, the order did not mention *patria potestas*, and the court was doubtful that an order could take away *patria potestas* without expressly mentioning it. Second, the order gave Salazar visitation rights, which the court believed "necessarily presume[d] that both parents [would] continue to have authority over [D.S.'s] place of residence." App. 18.

The court concluded that Galvan's retention of D.S. in the United States violated Salazar's right of *patria potestas* and thus was a "wrongful" retention under the Hague Convention. Accordingly, it ordered that D.S. be returned to Mexico. App. 23-24. Galvan moved that the district court's judgment be stayed pending appeal, and over Salazar's objection, the court granted a stay. *See* Stay Order (Dist. Ct. Dkt. 86). In granting the stay, the court reiterated that the question whether Salazar had custody rights under Mexican law was a "close call" and "not free from doubt." *Id.* at 2.

SUMMARY OF THE ARGUMENT

I. The International Child Abduction Remedies Act, which implements the Hague Convention in the United States, requires a petitioner seeking the return of a child to another country to prove by a preponderance of the evidence that he possesses "rights of custody" under the laws of the child's country of ha-

bitual residence. Salazar failed to present sufficient evidence to satisfy that burden of proof. The few pieces of evidence Salazar submitted were ambiguous and did not indicate whether he had custody rights under Mexican law. But the district court held that because a question of foreign law was not an issue of fact, Salazar's failure to meet his burden of proof did not require dismissal of his petition; rather, the court could simply take its best guess as to whether Salazar had custody rights in Mexico.

This conclusion was incorrect. When a plaintiff has the burden to prove he has rights under foreign law and fails to do so, the court can conduct its own investigation into foreign law, but the burden remains on the plaintiff. If the evidence before the court is inconclusive after the court's own research is complete, the plaintiff cannot obtain relief under foreign law. Thus, the district court should have dismissed Salazar's Hague Convention petition without reaching the merits of his claim to custody rights.

In any event, Salazar lacks custody rights under Mexican law. The Civil Code of Nuevo Leon—the Mexican state that the district court held was D.S.'s habitual residence—provides that when the parents of a child are unmarried and do not live together, like Salazar and Galvan, their parental rights are defined by the terms of whatever agreement they reach regarding custody of the child. Salazar and Galvan's custody agreement gave sole custody of D.S. to Galvan and awarded only limited visitation rights to Salazar. The agreement did not specify that Salazar had or would retain any right of parental authority, or

patria potestas. Salazar therefore has no "rights of custody" under the Convention, and the district court should have denied his petition.

II. The district court also erred in its analysis of the Convention's "mature-child exception," which provides a defense to the return remedy when the child objects to going back to another country and is sufficiently mature to deserve input in the decision.

The court acknowledged both that D.S. was quite mature and that he objected to returning to Mexico. But the court believed that applying the exception in this case would improperly "reward" Galvan for having retained D.S. in the United States without consent. The court determined that D.S.'s reason for wanting to stay was that his mother would have trouble visiting him in Mexico and concluded that this problem was caused by Galvan's retention of D.S.

This reasoning was flawed in two respects. *First*, D.S.'s objection to returning to Mexico was not based solely on Galvan's immigration-based travel restrictions; he also had several other reasons for wanting to stay in the United States, including a desire to continue attending American schools. The district court thus committed clear error by ignoring these other factors and focusing single-mindedly on whether D.S.'s concern about Galvan's ability to travel was a proper ground for invoking the mature-child defense.

Second, even if Galvan's and D.S.'s inability to travel freely between the United States and Mexico *were* the only reason D.S. wanted to remain in the United States, the district court should have honored D.S.'s wishes and applied

the mature-child exception. Galvan did not intentionally create these travel restrictions as a stratagem to keep D.S. in the United States; rather, the immigration difficulties facing Galvan and D.S. are the product of Galvan's inability to pay for their applications for permanent resident status. Thus, applying the mature-child exception in this case will not reward Galvan for any violation of the Convention. On the contrary, failing to do so unfairly punishes her for her indigency.

STANDARD OF REVIEW

I. A district court's determination of foreign law is "treated as a ruling on a question of law" that this Court reviews de novo. Fed. R. Civ. P. 44.1; *see, e.g.*, *Pittway Corp. v. United States*, 88 F.3d 501, 504 (7th Cir. 1996). In a case arising under ICARA and the Hague Convention, this Court "review[s] the district court's findings of fact for clear error and review[s] the court's application of the law to those facts as well as its interpretation of the Convention *de novo*." *Koch v. Koch*, 450 F.3d 703, 710 (7th Cir. 2006).

II. A district court's decision to order the return of a child notwithstanding the fact that a respondent has established that one of the Convention's exceptions to return applies is reviewed for an abuse of discretion. *See, e.g.*, *England v. England*, 234 F.3d 268, 270-71 (5th Cir. 2000); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996).

ARGUMENT

A petitioner seeking the return of a child pursuant to the Hague Convention and ICARA must show by a preponderance of the evidence that the child was "wrongfully removed or retained within the meaning of the Convention." 22 U.S.C. § 9003(e)(1)(A). If the petitioner makes this prima facie showing, the court may nonetheless refuse to order the return of the child if the respondent shows by a preponderance of the evidence that one of the affirmative defenses in article 12 or 13 of the Convention applies. *Id.* § 9003(e)(2)(B).

In this case, the district court erred at both stages of the analysis. First, it held that Salazar had proved that Galvan's retention of D.S. in the United States was "wrongful," despite Salazar's failure to marshal *any* evidence or argument establishing that he has rights of custody regarding D.S. under Mexican law. And second, it improperly rejected Galvan's most important affirmative defense—namely, that D.S., a mature and intelligent child, objected to being returned to Mexico. Either error independently requires reversal of the judgment below.

I. THE DISTRICT COURT ERRED IN HOLDING THAT SALAZAR HAS "CUSTODY RIGHTS" OVER D.S.

ICARA places the burden on a petitioner to prove by a preponderance of the evidence that a child was "wrongfully" removed or retained under the Hague Convention. A respondent's removal or retention of a child is "wrongful" under the Convention when (1) it is "in breach of rights of custody attributed to a per-

son[] . . . under the law of the State in which the child was habitually resident immediately before the removal or retention," and (2) "at the time of removal or retention those rights were actually exercised." Hague Convention on the Civil Aspects of International Child Abduction art. 3, Oct. 24, 1980, T.I.A.S. No. 11670.

Salazar did not meet his burden in this case, because he did not show that he has "rights of custody" under the laws of Mexico.[1] Indeed, Salazar failed to produce a single piece of evidence establishing that he has such rights. That failure alone should have been fatal to Salazar's case, but the district court excused it and attempted to ascertain whether Salazar has custody rights using the scant evidence that Salazar did provide. This was error; the district court should have held that Salazar's evidentiary showing was insufficient under ICARA and dismissed his petition.

Even if the evidence before the district court was sufficient to allow for a merits determination, moreover, the district court misinterpreted that evidence. On the best reading of the Civil Code of Nuevo Leon—the Mexican law that applies in this case—Salazar does not have any right of *patria potestas*. Thus, he is not entitled to force the return of D.S. to Mexico.

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[1] Galvan does not appeal the district court's determination that Mexico, rather than the United States, was D.S.'s habitual residence at the time of the allegedly wrongful removal.

A. The district court failed to hold Salazar to his burden of proving that he has rights of custody as defined by the Convention.

ICARA and the Convention require Salazar to prove that, under Mexican law, he has "rights of custody" pertaining to D.S. 22 U.S.C. § 9003(e)(1)(A); Convention art. 3(a). Salazar does not have physical custody of D.S., however, and his visitation rights under the 2006 Mexican custody order are considered "rights of access" under the Convention, rather than "rights of custody." *See* Convention art. 5 (distinguishing between "rights of access" and "rights of custody"); *see also* App. 12 ("[T]here is no return remedy under the Convention for a violation of a petitioner's right of *access*." (citing *Abbott v. Abbott*, 560 U.S. 1, 9 (2010)).

Salazar's claim to have rights of custody is therefore predicated solely on the Mexican doctrine of *patria potestas*. The doctrine is derived from ancient Roman law and refers in modern civil-law systems to the right to exercise "parental authority" over a child. App. 12 (internal quotation marks omitted). It constitutes a right of custody within the meaning of the Convention. *Altamiranda Vale v. Avila*, 538 F.3d 581, 586 (7th Cir. 2008) (holding that right of *patria potestas* under Venezuelan law is a right of custody).

The district court assumed (without explanation) that Salazar automatically received rights of *patria potestas* when D.S. was born. The court accordingly limited its inquiry to the question whether the 2006 custody order "extinguished those rights." App. 15. On that question, the district court noted that

the parties had not "provided much information on Mexican law" and the court's own research had "turned up little." App. 16. Indeed, the available evidence on Mexican law was limited to just three items: (1) a translated excerpt from the Civil Code of Nuevo Leon; (2) an Article 15 letter from the Mexican Central Authority[2]; and (3) a law review article discussing parental rights generally under Mexican law. None of this evidence established that Salazar had rights of *patria potestas*. The court thus explained that the Civil Code "does not provide a clear answer" on the issue, stated that the Article 15 letter "was of no help" because it was too general, and declined even to cite the law review article. *Id.*

In light of the paucity of both evidence and argument before it, the district court "considered concluding that Salazar had not met his burden" of proving that he had custody rights. *Id.* But it held that because Federal Rule of Civil Procedure 44.1 provides that a determination of foreign law is "treated as a ruling on a question of law," Salazar's rights under Mexican law were "not an issue of fact on which a traditional burden should mean that [he] loses." App. 16-17 (citing Fed. R. Civ. P. 44.1 and *Twohy v. First Nat'l Bank of Chi.*, 758 F.2d 1185, 1192-94 (7th Cir. 1985)). Rather, the court held, the question of Salazar's custody rights was one that the court was required to "answer . . . as best [it] can," without regard for the burden of proof. App. 17.

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[2] Article 15 of the Convention allows a petitioner to "obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention." Convention art. 15.

The district court's decision to overlook Salazar's burden of proof was erroneous. In general, a party who seeks to rely on foreign law in an American court bears the burden of producing evidence establishing the relevant foreign legal principles and rule. *See, e.g.*, *In re Griffin Trading Co.*, 683 F.3d 819, 823-24 (7th Cir. 2012); *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1006 (5th Cir. 1990) ("If the [plaintiff] wanted to rely on Abu Dhabi law, it was obligated to present to the district court clear proof of the relevant Abu Dhabi legal principles."). If the party fails to prove the content of foreign law and the court cannot otherwise divine that content, the court will usually apply the law of the forum. *E.g.*, *Banque Libanaise*, 915 F.2d at 1006 (approving district court's decision to apply Texas law in lieu of unknown Abu Dhabi law).

There is no reason why a Hague Convention petitioner who seeks to apply the custody law of another country should be treated more leniently than any other party invoking foreign law. To the contrary, it is especially important to hold petitioners to the burden of proving foreign law in Hague Convention cases, because a petitioner's possession of custody rights under foreign law is an indispensable element of a claim for the return of a child. *See* Convention art. 3(a). And it is a self-evident prerequisite to the invocation of foreign law that the law's proponent must *establish what it means*.

Nothing in Rule 44.1 or this Court's precedents supports the district court's holding that it could ignore Salazar's burden of establishing the relevant principles under Mexican law. To be sure, Rule 44.1 enables courts to *assist*

plaintiffs who seek to invoke foreign law in meeting their burden of proving it. The Rule allows (but does not require) the court to do its own research on foreign law, permits the court to consider materials that would normally be inadmissible under the Federal Rules of Evidence (Fed. R. Civ. P. 44.1), and provides that a district court's determination of foreign law is treated as a legal ruling, "so that appellate review" can be plenary and not "narrowly confined by the 'clearly erroneous' standard of Rule 52(a)." *Id.*, 1966 cmt. These liberal procedures maximize the chance that courts will be able to determine and apply foreign law where appropriate.

But nothing in the Rule suggests that when the available evidence on foreign law is inconclusive, a court should ignore the burden of proof and simply make its best guess as to what the foreign law is. To the contrary, "[w]hile it is true that an appellate court is free [under Rule 44.1] to review questions of foreign law on appeal, this argument does not, however, negate the [plaintiff's] burden of proof of the foreign law at trial." *Banque Libanaise*, 915 F.2d at 1006; *see also Esso Std. Oil S.A. v. S.S. Gasbras Sul*, 387 F.2d 573, 581 (2d Cir. 1967) (explaining that even after Rule 44.1, a plaintiff "still has the task of persuasion that it has a good cause of action" under foreign law). The district court's contrary conclusion, if affirmed, would reduce a petitioner's invocation of foreign law to little more than guesswork.

Twohy does not support the district court's decision to overlook Salazar's burden of proof. There, a shareholder of a Spanish corporation sued an American

bank for breach of contract, fraud, misrepresentation, and libel. *Twohy*, 758 F.2d at 1187. The bank moved to dismiss the case, arguing that under Spanish law, a shareholder did not have standing to sue on a contract on behalf of the corporation. *Id.* The district court agreed and dismissed the case. *Id.* at 1188-89. On appeal, this Court explained that the plaintiff shareholder had not adequately proved that he had standing under Spanish law, but it held that the dismissal could not be affirmed solely on that basis because Rule 44.1 enabled "both trial and appellate courts" to "research and analyze foreign law independently" from the parties' own presentations. *Id.* at 1193. This Court thus performed its own analysis of Spanish law, which definitively confirmed the district court's conclusion that the plaintiff lacked standing under Spanish law. *Id.* at 1194 ("[W]e are convinced that Spanish law does not permit plaintiff Twohy's action.").

Twohy stands for the proposition that in light of Rule 44.1, a court in this Circuit should not dismiss a plaintiff's case *solely* on the ground that he has not clearly demonstrated the content of foreign law. Rather, the court should investigate the foreign-law issues further—by "request[ing] a more detailed presentation by counsel" or conducting its own "deeper inquiry" into the foreign law at issue—before the "plaintiff's complaint properly [can] be dismissed." *Id.* at 1193-94. That is just what the court did in this case. But *Twohy* did not hold that a court should disregard the plaintiff's burden of proof if (as here) the substance of foreign law remains a mystery *after* the court's independent investigation runs its course.

Thus, as the First Circuit has recognized, courts in Hague Convention cases must hold petitioners to their burden of proving that they have rights of custody under foreign law, even while applying the liberal evidentiary standards prescribed by the Convention and Rule 44.1. *See, e.g.*, *Whallon v. Lynn*, 230 F.3d 450, 459 (1st Cir. 2000) (noting that the district court had followed correct procedures, in that it "acknowledged that [the petitioner] had the burden of proof on th[e] issue [of wrongful removal], weighed the burden in light of the law and evidence presented, and found that the burden had been satisfied"). Given the wide variety of materials that suffice to prove foreign law under the Convention, courts will be able to make definitive determinations about foreign law in most Hague Convention cases. *See* Convention art. 8(f)-(g) (allowing petitions to be accompanied by affidavits explaining foreign law and "any other relevant document"). But when neither a petitioner's evidence nor the court's own research yields a definitive answer, the court may not order a child's return.

ICARA and the Hague Convention require more of Salazar than the inconclusive proof of Mexican law that he offered in this case. On that basis alone, the district court should have dismissed his petition.

B. Salazar does not have custody rights under Mexican law.

Even assuming that it was proper for the district court to ignore Salazar's burden of proof on the issue, the court erred in holding that he has "rights of custody" under Mexican law. The available evidence demonstrates that Salazar in fact does *not* have such rights.

We begin first with a point of clarification. The district court evidently believed that Galvan and Salazar's relationship was governed by Article 417, which provides that "[w]hen the parents of a child born out of wedlock that were living together, separate, they will both jointly retain . . . (*patria potestas*)." SA 38. But that was a straightforward oversight on the district court's part—Galvan and Salazar never lived together. As a consequence, Article 417 is inapplicable here.

Having made that basic error of fact, the district court overlooked the provision of the Civil Code of Nuevo Leon that speaks most directly to the rights of parents in Galvan's and Salazar's situation—Article 416. Article 416 provides that "[w]hen both parents have recognized a child born out of wedlock and they live together, they will jointly exert . . . (*patria potestas*)." SA 38 (emphasis added). "*If they do not live together*, what is established by articles 380 and 381 will apply to grant custody of the child." SA 38 (emphasis added). Articles 380 and 381, in turn, describe the process by which unwed parents should determine which of them has "custody," while saying nothing about *patria potestas*. SA 38 n.2.

Article 416's silence on whether a noncustodial parent who never lives with the other parent has *patria potestas* rights is telling, because when the drafters of the Nuevo Leon Code wanted to make clear that unwed parents have *patria potestas* rights, they did so expressly. For example, one paragraph later, Article 417 provides that "[w]hen the parents of a child born out of wedlock that

were living together, separate, they will both jointly retain . . . (*patria potestas*)." SA 38. The discrepancy between Article 416's discussion of unwed parents who do *not* live together and Article 417's treatment of unwed parents who *do* live together is clear: Unmarried parents governed by Article 416 who do not live together do not automatically enjoy *patria potestas*. Rather, they have the rights and obligations spelled out in the custody agreement they make at the acknowledgment of paternity. In this case, that means that Galvan has "custody" and Salazar has only visitation rights.

In fact, Article 416 indicates that Salazar never had *patria potestas* rights to begin with. It states that unwed parents who live together receive *patria potestas* but does not say the same about unwed parents who live apart. Thus, the question whether the 2006 custody order stripped Salazar of his *patria potestas* rights puts the cart before the horse—he never had such rights to be stripped.[3]

But assuming for the sake of argument that Salazar had *patria potestas* rights prior to the 2006 custody order, the order extinguished them. This conclusion accords with the holdings of other federal courts, which, as the district court acknowledged, have held that "*patria potestas* rights can be overridden" by a formal custody agreement between the parties. App. 14-15; *see also Gonzalez v.*

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[3] It is true that, in response to Salazar's Notice Pursuant to Fed. R. Civ. P. 44.1, we argued only that the 2006 custody order extinguished Salazar's rights, such as they were. Dist. Ct. Dkt. 75 at 3. This statement, however, did not waive the argument that Salazar never had *patria potestad* rights.

Gutierrez, 311 F.3d 942, 954 (9th Cir. 2002), *abrogated on other grounds by Abbott*, 560 U.S. at 1; *Ibarra v. Quintanilla Garcia*, 476 F. Supp. 2d 630, 635 (S.D. Tex. 2007).

Ibarra, which also involved a couple from Nuevo Leon, is particularly instructive. There, the court held that an agreement that expressly recognized the father's right of *patria potestas* had nonetheless extinguished his right of custody because it awarded custody to the mother. *Ibarra*, 476 F. Supp. 2d at 635. If the agreement in *Ibarra* stripped the father of *patria potestas*, *a fortiori* the custody agreement between Salazar and Galvan, which says nothing about *patria potestas*, should not be read to have preserved any "right of custody" Salazar enjoyed.

The district court concluded that a custody order could not take away a parent's right of *patria potestas* unless it mentioned *patria potestas* expressly, noting that Article 447 of the Civil Code "instructs that judges 'may *impose* the permitted limitations to paternal authority/responsibility (patria potestas)' by judicial order, not that those limitations will occur simply by entry of a custody order." App. 17-18 (emphasis added by district court). But Article 447 addresses a narrow set of extreme circumstances not present here—namely, situations in which a court is compelled to take away *patria potestas* rights "in order to protect the physical or psychological integrity" of a child. SA 40. The fact that an affirmative court order is required before a parent can be stripped of his *patria*

potestas rights involuntarily does not imply that a court must always expressly mention *patria potestas* in order for its order to affect a parent's rights.

The district court also reasoned that the 2006 custody order could not have been meant to affect Salazar's *patria potestas* rights because it granted Salazar visitation rights at particular times. In the court's view, the award of visitation to Salazar "necessarily presume[d] that both parents [would] continue to have authority over [D.S.'s] place of residence," because if Salazar did not retain such authority, Galvan could move far away and thereby "render the visitation rights meaningless." App. 18. The order's reference to visitation rights, however, cuts in exactly the opposite direction. Under Article 415 of the Civil Code, if Salazar had retained rights of *patria potestas* in the custody order, those rights would automatically have given him a "right to coexist (spend time) with [his] descendant[]," D.S. (SA 37), making it unnecessary for the order to confer visitation rights expressly. The better reading of that provision of the order is that it granted Salazar visitation because he had no right of *patria potestas* that would have entitled him to visitation independently.[4]

Under the Civil Code of Nuevo Leon, Salazar—who was never married to Galvan and never lived with either her or D.S.—lost whatever right of *patria potestas* he possessed when the court order granted custody of D.S. to Galvan

[4] In any event, the district court's assumption that the custody agreement must have presumed that Galvan and D.S. would continue living close to Salazar was unfounded: Salazar himself did not believe, when asked at his deposition, that any provision in the custody order prohibited Galvan and D.S. from moving to another country. SA 53-54.

and granted him only a limited right of visitation. For that reason, too, the judgment below must be reversed.

II. THE DISTRICT COURT SHOULD NOT HAVE ORDERED D.S. RETURNED IN ANY EVENT, BECAUSE D.S. OBJECTED TO GOING BACK TO MEXICO

There is yet another reason to reverse the judgment in this case: D.S. wanted to stay in the United States, where he could continue his education and remain close to his mother. There was no reason to deny D.S. that opportunity.

A. The Convention's mature-child exception clearly applied.

The Convention provides that even where a petitioner has shown that the removal or retention of a child was wrongful, a court may "refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." Convention art. 13. This "mature-child exception" clearly applies here. At his second in camera hearing before the district court, D.S. unequivocally stated several times that he objected to going back to Mexico. *See* SA 94-96. The district court found that there was "no doubt" that D.S.'s opposition was a "true objection" under the Convention. SA 28. The court also found that D.S. was a "bright," "thoughtful[]" child who "showed levels of empathy and diplomacy beyond those of" a child his age, concluding that there was "no question" that D.S. was "sufficiently mature to invoke the [mature-child] exception." SA 28. Galvan thus easily met her burden to show that the mature-child exception applies. *See* 22 U.S.C. § 9003(e)(2)(B).

B. The district court should have applied the mature-child exception in this case.

Despite its findings that D.S. qualified for the mature-child exception and objected to returning to Mexico, the district court declined to apply the exception, on the ground that doing so "would not further the aims of the Convention." SA 30 (citing *de Silva v. Pitts*, 481 F.3d 1279, 1286 (10th Cir. 2007)). The court deemed D.S.'s objection to be "premised almost entirely" on the fact his mother would have difficulty coming to see him in Mexico, a problem that it reasoned was "created by [her] wrongful retention" of D.S.[5] SA 30. Thus, it concluded, applying the mature-child exception would "reward" Galvan for improperly retaining D.S. and thereby "defeat the purposes of the Convention." SA 31 (quoting *Yang v. Tsui*, 499 F.3d 259, 280 (3d Cir. 2007)).

The district court's reasoning was faulty in two important respects. First, the court's finding that the travel difficulty D.S. mentioned was the "entire[]" basis for his objection to returning to Mexico was clearly erroneous; D.S. had other reasons for objecting as well, and the court should have given them due weight in its analysis. Second, applying the mature-child exception would not have "rewarded" Galvan for retaining D.S.

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[5] The district court relatedly noted that Galvan's travel restrictions were also caused by "her own conduct in violating the immigration law of the United States" by overstaying her B-2 visa. SA 31. But this observation, even if true, is irrelevant to the question whether applying the exception here furthers the aims of the Convention. The goals of the Convention are "to secure the prompt return of children wrongfully removed . . . or retained" and to ensure that a parent's rights of custody in one country are respected in another. *See* Convention art. 1. The Convention is not concerned with the enforcement of U.S. immigration law.

1. D.S.'s objection to returning to Mexico was not based solely on Galvan's travel restrictions

The record does not support the district court's finding that D.S.'s objection was "premised almost entirely" on Galvan's travel restrictions. To the contrary, D.S. had several other significant reasons for wanting to remain in the United States, including: (1) the higher quality of American schools, (2) his concerns about safety in Mexico, (3) his desire to maintain his relationship with his new stepsister, and (4) his attachment to the friends and relationships he had developed in Chicago.

D.S.'s preference to pursue his studies in the United States was particularly important to him, as evidenced by his repeated statements to his parents and the district court that he wanted to stay in Chicago through the eighth grade and try to get in to a good high school. *See, e.g.*, First In Camera Hr'g Tr. 27; SA 91-93 (second in camera examination); Resp't's Opp'n to Pet'r's Mot. for Summ. J. 12 (Dist. Ct. Dkt. 66) (translation of April 29, 2015 Facebook message from D.S. to Salazar stating "I want to have a better future, I want to finish 8th grade [in Chicago]"). Indeed, in a list of pros and cons of staying in Chicago he sent to his guardian *ad litem* the day before his second in-camera examination, he mentioned his studies four times and his mother's inability to travel only once. *See* Resp't's Resp. to Pet'r's Rule 56.1 Statement of Undisputed Facts, Ex. K at 1.

The district court brushed these other bases for D.S.'s objection aside, citing the fact that D.S. told the court that if Galvan were to get a green card and become able to visit him in Mexico freely, he would "change [his] mind about going back." SA 98. But this statement by D.S. hardly proved that his objection hinged *entirely* on the question of Galvan's ability to travel; rather, it showed only that the issue was important enough to tip the scale in favor of returning to Mexico. By that measure, the issue of educational opportunity was also paramount, since D.S. said he would want to go back to Mexico if he could not get into a good high school in Chicago. *See* Guardian Ad Litem Report 2-3. It was clear error for the court to proceed on the assumption that D.S.'s objection to returning was solely attributable to Galvan's travel restrictions.

2. Applying the mature-child exception would not "reward" Galvan for retaining D.S. in any event

Even if the district court were correct that D.S.'s objection was "premised almost entirely" on Galvan's ability to travel, moreover, application of the mature-child exception would still be warranted.

In certain circumstances, application of the mature-child exception may well be inappropriate. For example, if a parent has outright absconded with a child, or traveled with a child to another country for a supposedly brief stay only to retain the child there without consent of the other parent for additional months or years, the exception generally should not apply. *See, e.g.*, *Yang*, 499 F.3d at 280 (observing that the exception ought not apply where father had tak-

en child from Canada to Pittsburgh for three weeks with mother's permission but then retained her without permission after that). A court should not be seen as encouraging misconduct.

But Galvan is no child abductor. She brought D.S. to the United States only after discussing the move with Salazar, who agreed that D.S. should live in the United States for at least a year. During that initial one-year stay, D.S.'s and Galvan's B-2 visas expired, which gave rise to the immigration issues D.S. and Galvan now face. The visas' expiration, which is the source of D.S.'s and Galvan's travel impediments, could not logically have been caused by Galvan's retention of D.S. beyond his first year in Chicago because it occurred *before* July 2014. *See* Decl. of Kalman Resnick ¶ 8, Ex. A to Resp't's Mot. for Stay (Dist. Ct. Dkt. 82). Nor was the expiration of the visas some strategic ploy on Galvan's part to keep D.S. in the United States; she had been looking into applying for lawful-permanent-resident status "ever since [they] arrived" and had gathered the necessary documents together, but she could not come up with the money required. SA 108. It was unfair, to say the least, for the district court to suggest that Galvan wrongfully or intentionally "create[d] the circumstances" that led to D.S.'s objection.

Applying the mature-child exception would not have not "rewarded" Galvan for retaining D.S. in Chicago without Salazar's consent. The district court accordingly should have honored D.S.'s wishes and allowed him to remain with his mother in the United States. It abused its discretion by failing to do so.

CONCLUSION

The decision of the district court should be reversed.

Dated: October 15, 2015

Respectfully submitted.

/s/ *Matthew Waring*

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CERTIFICATE OF COMPLIANCE WITH RULE 32

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Respondent-Appellant certifies that the foregoing Brief and Circuit Rule 30(a) Appendix for Respondent-Appellant:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 7,886 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5), the type style requirements of Rule 32(a)(6), and Circuit Rule 32(b) because it has been prepared using Microsoft Office Word 2007 and is set in 12.5-point Century Schoolbook font.

Dated: October 15, 2015 /s/ *Matthew Waring*

CIRCUIT RULE 30(d) CERTIFICATION

Pursuant to Circuit Rule 30(d), the undersigned counsel for Respondent-Appellant states that all the materials required by Circuit Rules 30(a) and 30(b) are respectively included in the Appendix bound with this brief and in the Separate Appendix filed concurrently with this brief.

Dated: October 15, 2015 /s/ *Matthew Waring*

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Brief and Circuit Rule 30(a) Appendix for Respondent-Appellant with the Clerk of the Court using the appellate CM/ECF system on October 15, 2015. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: October 15, 2015 /s/ *Matthew Waring*