No. 23-932

In the Supreme Court of the United States

MINNA-MARIE BRANDT,
Petitioner,
v.

DAMIAN CARACCIOLO,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's opposition attempts to obscure the far-reaching consequences of the lower court's decision and emphasizes why this Court should address the question presented. As the petition explains, the Fourth Circuit disrupted Hague Convention jurisprudence by adopting a novel approach to evaluating the wrongfulness element of a prima facie Hague Convention case. Under the lower court's decision, courts can consider factors beyond the parties' custody rights in their home country at the time of a wrongful retention. Pet. 9–11. This approach conflicts with the holdings of six other circuits, this Court's precedents, and the Hague Convention's text. Pet. 11–16.

Respondent does not dispute that the lower court's decision conflicts with other circuits' approach to evaluating wrongfulness under the Hague Convention; that the interpretation of this treaty is, as the Court recognized in *Monasky* and *Golan*, worthy of this Court's review; or that this case provides an opportunity to squarely resolve the question presented. At the same time, Respondent's efforts to support the merits of the lower court's decision also fail.

Ultimately, rather than diminishing the uncertainty the lower court's approach has injected into Hague Convention jurisprudence, Respondent's arguments further show that this Court should intervene.

I. Respondent does not address the circuit split between the Fourth Circuit and the other circuits.

The opposition fails to address the circuit split the petition describes. The petition explained that the Fourth Circuit's decision creates a conflict with other circuits' caselaw by adopting an approach that allows

courts to evaluate the wrongfulness element of a prima facie wrongful-retention case based on factors other than the parties' home-country custody rights at the time of the alleged wrongful retention. Pet. 9–11. The Court should grant the petition because the opposition makes no attempt to address this circuit split.

II. The lower court's departure from the Hague Convention's text is as worthy of review as were the lower courts' departures in *Monasky* and *Golan*.

The opposition does not dispute that *Monasky* and *Golan* show that this case is important enough for the Court to review. *Monasky* v. *Taglieri*, 140 S. Ct. 719, 728, 206 L. Ed. 2d 9 (2020); *Golan* v. *Saada*, 142 S. Ct. 1880, 213 L. Ed. 203 (2022). Although the opposition argues (incorrectly) that *Monasky* and *Golan* support the lower court's position, it fails to contend that this case is not important enough to warrant review. The Court should review this case because, as in *Monasky* and *Golan*, the lower court's decision departs from the Hague Convention's text.

a. The opposition misconstrues *Monasky* and *Golan*.

Respondent misunderstands *Monasky* and *Golan*. *Monasky* and *Golan* show that the Court considers adherence to the text of the Hague Convention so important that it has recently decided to review lower-court decisions interpreting the convention's text. *Monasky*, 140 S. Ct. at 730–31; *Golan*, 142 S. Ct. at 1893–96. Although Respondent acknowledges that *Monasky* and *Golan* applied the Hague Convention's plain text, the opposition claims that the lower court's approach "comports with the text of the Convention

and case law, especially in light of *the totality of circumstances, fact-driven inquiry informing a court's discretion* as shown in *Golan* and *Monasky*." Opp'n 18–20 (emphasis added). And under that broader inquiry, Respondent finds license for courts to depart from the Convention's text. Opp'n 20 (quoting *Monasky*, 140 S. Ct. at 726). But neither *Monasky* nor *Golan* suggests that courts can take such a freewheeling approach when evaluating wrongfulness under Article 3(a). These cases held that lower courts erred when reading extra-textual requirements into provisions other than Article 3. *Monasky*, 140 S. Ct. at 730–31; *Golan*, 142 S. Ct. at 1893–96. The Fourth Circuit's approach ignores *Monasky* and *Golan* because it adopts a totality-of-the-circumstances approach, when Article 3(a) requires courts to evaluate wrongfulness based only on parties' home-country custody rights at the time of an alleged wrongful retention. *Brandt* v. *Caracciolo*, No. 22-2320, 2023 WL 7015680, at *3 (4th Cir. Oct. 25, 2023). Thus, because the lower court's departure from the Hague Convention's text is as unacceptable as the departures in *Monasky* and *Golan*, this case is similarly worthy of review. The Court should therefore grant this petition.

b. Respondent's arguments that the Hague Convention's text supports the lower court's approach provide no basis for denying the petition.

Respondent's resort to Articles 13, 14, and 17 also shows why the Court should grant this petition. Respondent relies on these previsions to contend that the Hague Convention supports the lower court's approach and its interpretation of the convention's text. Opp'n 14–20. But Articles 13, 14, and 17 should be irrelevant

here but for Respondent's and the lower court's erroneous reliance on them. These provisions provide no basis for granting the petition.

First, Article 13 of the Hague Convention illustrates that the lower court's approach reads the Hague Convention's affirmative defenses out of the convention. As Respondent acknowledges, Article 13 enumerates affirmative defenses. Hague Convention art. 13; Opp'n 15. But Article 13 allows courts to consider the "circumstances" Respondent discusses only in the context of the affirmative defenses. Allowing courts to evaluate a petitioner's prima facie case based on circumstances that the Hague Convention expressly makes relevant to its affirmative defenses would contravene the Hague Convention by (1) eliminating the requirement in Article 3(a) that courts evaluate wrongfulness based on parties' home-country custody rights at the time of the retention and (2) reading the affirmative defenses out of the convention by incorporating them into the petitioner's prima facie case. Pet. 15–16. And the lower court's approach creates confusion by suggesting that courts should evaluate prima facie cases based on the circumstances the Hague Convention makes relevant only to its affirmative defenses. The Court should grant this petition to prevent that confusion.

Second, Respondent's reliance on Article 14 further underscores the need for review. Article 14 merely allows courts in signatory countries to judicially notice the laws and judicial and administrative decisions in parties' countries of origin when evaluating a prima facie case under Article 3. Hague Convention art. 14. But Article 14 does not purport to expand what courts may consider when evaluating a petitioner's prima

facie case beyond what Article 3 allows. As such, Article 14 provides no basis for denying this petition.

Third, Article 17 does not, as Respondent suggests, "forbid[] the court of a requested State to ground its decision on the sole fact that a decision relating to custody was given." Opp'n 16. Nor does it, as the lower courts posit, allow courts broadly to take into account the reasons for home-country orders when applying the Hague Convention. *Brandt*, 2023 WL 7015680, at *3. Rather, Article 17 only provides an example of something—"a decision relating to custody [that] has been given in or is entitled to recognition in the requested State"—that is insufficient by itself to refuse to return a child.[1] Article 17 plainly does not purport to allow courts to evaluate the wrongfulness of a retention based on anything other than parties' home-country custody rights at the time of the retention. And because the lower court's decision injects confusion into this country's Hague Convention jurisprudence by suggesting that Article 17 does allow for such broad considerations when evaluating wrongfulness, the Court should grant this petition.

Fourth, Respondent's argument based on Articles 13, 14, and 17 also rests on a false premise: Respondent argues that because some provisions in the Hague Convention allow courts to consider factors beyond parties' home-country custody rights, the Hague

[1] In full, Article 17 states, "The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention." Hague Convention art. 17.

Convention allows courts to consider such factors when evaluating the wrongfulness element of a prima facie case. Respondent indeed states that "the Convention provides explicit opportunities for a court to evaluate factors and interests other than the law of a child's country of residence, even where it finds wrongful retention." Opp'n 21. And the opposition continues, "The Convention text simply did not limit the Courts' consideration to only Swedish law as posited by Petitioner." Opp'n 22.

Yes, it did. The only element at issue is the wrongfulness element of a prima facie wrongful-retention case. Pet. 10–11. As the petition explains, the wrongfulness inquiry under Article 3(a) turns only on parents' home-country custody rights at the time of the alleged wrongful retention. Pet. 2, 11. Articles 13, 14, and 17 in no way purport to expand the wrongfulness inquiry beyond Article 3(a)'s terms. Article 13 pertains only to affirmative defenses. Hague Convention art. 13. Article 14 merely allows courts to take judicial notice of laws and judicial decisions of other countries in Hague Convention cases. *Id.* art. 14. And Article 17 provides a single discrete example of an event based on which a court does not have to refuse to return a child. *Id.* art. 17. Not one of these provisions states or implies that wrongfulness turns on anything other than home-country custody rights at the time of an alleged wrongful retention. Thus, Respondent's argument provides no support for the lower court's decision and no basis for denying the petition.

Rather, the lower court's acceptance of the above argument with respect to Article 17 further shows the need for review. The majority below applied this same flawed reasoning when it relied on Article 17 to

suggest that courts can rely on "a full panoply of circumstances" when evaluating wrongfulness. *Brandt*, 2023 WL 7015680, at *3. To resolve the confusion the Fourth Circuit's new approach creates, and to retether this country's Hague Convention jurisprudence to the text of the convention, the petition should be granted.

III. This case is a good vehicle for the Court to address the question presented.

This case presents a clear-cut issue for the Court to review, and Respondent does not dispute this. This petition concerns what the text of the Hague Convention allows courts to consider when evaluating the wrongfulness element of a wrongful-retention case under the Hague Convention. Pet. 9–16. This Court has held that lower courts must respect the text of the Hague Convention, and before the lower court's decision, lower courts had done so by evaluating wrongfulness based on the parties' home-country custody rights at the time of an alleged wrongful retention. *Monasky*, 140 S. Ct. at 730–31; *Golan*, 142 S. Ct. at 1893–96. The lower court departed from the text of the Convention, this Court's guidance on interpreting the Convention, and the uniform approach of other courts by deciding that courts can consider factors other than parties' home-country custody rights at the time of an alleged wrongful retention when evaluating wrongfulness. *Brandt* v. *Caracciolo*, No. 3:22-CV-00304-DSC, 2022 WL 17326114, at *4 (W.D.N.C. Nov. 29, 2022). The opposition provides no basis for concluding that this case is an inadequate vehicle for resolving the aforementioned conflict. Thus, the Court should grant this petition to reemphasize the importance of adherence to the Hague Convention's text and to promulgate

a uniform approach to evaluating wrongfulness under the Hague Convention.

IV. Respondent's arguments in support of the decision below are flawed. Brandt established a prima facie case.

The opposition's argument that Brandt failed to establish a prima facie case lacks merit—and relevance—for multiple reasons. Opp'n 4–8. According to Respondent, Brandt failed to establish a prima facie case because she failed to establish a date certain on which the wrongful retention began, and the opposition contends that the Court should deny the petition because of this alleged failure. Opp'n 7–8. Respondent is incorrect at least for the below reasons.

First, Respondent waived the argument that Brandt failed to establish a prima facie case by failing to establish a date certain on which the wrongful retention began. A party waives an argument by failing to make that argument in the lower court. *See Youakim* v. *Miller*, 425 U.S. 231, 234, 96 S. Ct. 1399, 1401, 47 L. Ed. 2d 701 (1976) (per curiam). Here, although Respondent argued below that Brandt failed to establish a prima facie case because she did not prove that she did not consent to Respondent's relocation of her children to the United States, Respondent did not argue that the Fourt Circuit should affirm the district court because Brandt failed to establish a date certain on which the wrongful retention began. *See generally* Appellee's Brief, *Brandt*, 2023 WL 7015680. Indeed, the majority below did not discuss any such argument. The Court should therefore conclude that Respondent waived this argument and decline to consider it.

Second, Respondent's new date argument sidesteps, rather than confronts, the issue Brandt is asking the Court to review. Rather than deciding Brandt's appeal based on Respondent's date argument, the lower court affirmed the district court because it accepted the argument that the district court rightfully considered factors other than the parties' Swedish-law custody rights as they existed when Respondent began wrongfully retaining Brandt's children in the United States. *Brandt*, 2023 WL 7015680, at *3–4. Brandt contends that the lower court's approach conflicts with other circuits' approach to wrongfulness, the text of the Hague Convention, and this Court's instructions that courts should respect the Convention's text. Pet. 9–16. And Brandt respectfully requests that the Court grant this petition to address such conflicts. Pet. 11, 16. Because Respondent's date argument has nothing to do with the conflicts the lower court's decision creates, the argument provides no basis for denying the petition.[2]

V. Respondent misconstrues Article 3(a) of the Hague Convention and the caselaw applying it.

The opposition reveals a fundamental misunderstanding of Hague Convention cases. For instance, although Respondent accuses Brandt of providing an incomplete recitation of facts, the additional facts Respondent discusses are relevant, if at all, only under the Fourth Circuit's incorrect approach to evaluating wrongfulness. They in no way elucidate the custody rights the parties had under Swedish law when

[2] Also, for the reasons stated in Brandt's petition, Respondent's date argument fails as a matter of fact. Pet. 5–6, 10, 13–14, 17.

Respondent began wrongfully retaining Brandt's children in the United States. Opp'n 1–3.

Respondent's misunderstanding runs even deeper. According to Respondent, lower courts evaluating wrongfulness need not limit themselves to the law of the children's country of residence when evaluating wrongfulness. Respondent indeed states that "[t]he Convention [*sic*] text simply did not limit the Courts' consideration to only Swedish law as posited by Petitioner." Opp'n 22. Respondent stated also that the lower courts properly considered the practical effects of returning the children to Sweden. *Id.* Neither the text of Article 3 nor any other authority supports this position that district courts have unbridled discretion to consider whatever they think are the "practical effects" of wrongfulness determinations. Nonetheless, the lower court adopted Respondent's approach even though neither the text of the Hague Convention nor any other authority supports this approach. *Brandt*, 2022 WL 17326114, at *3–4. The Court should grant this petition to keep this misunderstanding from spreading in the lower courts.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted.

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