No. 23-932

In The
Supreme Court of the United States

MINNA-MARIE BRANDT,

Petitioner,

v.

DAMIAN CARACCIOLO,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit correctly interpreted the text of the Hague Convention, and in so doing, appropriately used other circumstances in determining the parties' custody rights under the laws of that country at the time of an alleged wrongful retention.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

Respondent disagrees with Petitioner's incomplete recitation of facts and presents the following additional facts relevant and necessary to this Court's consideration of the question presented by Petitioner.

The relevant time frame in this matter regarding an alleged wrongful retention of the minor children is April 2021 through July 2021. Pet. 20a.

On December 30, 2020, the Oreboro Social Welfare Committee began a Social Care investigation into the safety of Petitioner's home and the children's welfare. Pet. 3a. The investigation by Sweden's Social Welfare Committee continued through at least March of 2022. Pet. 17a. Petitioner testified that the parties then discussed Respondent taking the children to the United States for a three-month trip. Pet. 145a. Respondent testified that the parties agreed the entire family would move to the United States and Respondent would obtain citizenship for the minor children. Opp'n 11a–12a; Pet. 90a, 94a. On April 16, 2021, Respondent and the children travelled to North Carolina, where they have remained. Pet. 3a. Respondent brought most of the children's clothing and toys, as well as the children's population registration certificates, which were provided to Respondent by Petitioner. *Id.*

On June 3, 2021, the Swedish Social Welfare Committee sent a letter to the parties stating that "[s]ocial services were planning to place the children in temporary care," but that the parties had "finally came to the agreement that the children could live with you

(Respondent) and your (Respondent's) family in the US for some time." Opp'n 2a. The letter went on to state that it was the opinion of social services that the minor children residing with Respondent in the United States "appears to be the best option for the children." *Id*. Further, the letter also stated, "it is concluded that there are several serious risk factors for the children in their situation in Sweden." *Id.* The letter was based in part on several conversations with the parties together and separately.

No later than June 29, 2021, Petitioner filed a custody action in the Swedish District Court resulting in an interim custody hearing. On July 6, 2021, as part of the ongoing custody dispute, the Swedish District Court entered an "interim decision" confirming the parties' joint custody. Pet. 115a. While acknowledging that the children were at that time with Respondent in the United States, the Court did not require Respondent to return the children to Sweden. Pet. 4a, 115a.

A report authored by the Swedish Social Welfare Committee on September 27, 2021, and considered by the North Carolina District Court, substantiated Respondent's testimony that he brought the children to the United States pursuant to an agreement between the parties with social services that "the best thing for the children would be for [Respondent] to go the United States with [the children] and that if the parties had not so agreed, foster care would have been considered." *Brandt v. Caracciolo*, 2023 U.S. App. LEXIS 28367 at *4 (4th Cir. Oct. 25, 2023); Pet. 5a, 17a, 108a.

The March 31, 2022, Swedish District Court Order awarded Respondent the sole custody of the children, and to Petitioner a right of contact in the form of weekly calls. Pet. 131a. The Swedish court stated in its assessment, *inter alia*, that "[Respondent] is in any case more suitable as a guardian than [Petitioner]" and that "[g]iven the conditions [the children] previously lived under, it would not be good for them to be uprooted and have to move again." Pet. 130a. Also "[w]ith regard to physical contact between [Petitioner] and the children, the district court believes that in view of the uncertainty factors that still exist regarding her abuse and the relationship she now lives in, it is too early to decide on this." Pet. 131a.

Petitioner appealed the March 31, 2022, custody order but was denied. Pet. 18a. Her attempts to hold Respondent in contempt for violating the July 6, 2021, interim decision and the March 31, 2022, custody order were denied. *Id.* Petitioner never attempted to modify the order. Opp'n 9a.

During the evidentiary hearing before the District Court on November 10, 2022, Petitioner testified that the parties had not agreed on a specific departure or return date of the children and that "it was up to [Respondent] to decide [the departure and return dates] himself." *Brandt*, 2023 U.S. App. LEXIS 28367 at *5; Opp'n 5a; Pet. 5a. The District Court made findings consistent with Petitioner's testimony.

REASONS FOR DENYING THE PETITION

I. Petitioner Failed to Make a Prima Facie Case of Wrongful Retention.

A. Petitioner failed to establish a wrongful retention by a preponderance of the evidence as required by the Hague Convention.

Far from being an easy case as asserted by Petitioner, the facts are atypical for a child abduction proceeding. *Brandt*, 2023 U.S. App. LEXIS 28367 at *12; Pet. 11a. Per Article 3 of the Convention and 22 U.S.C. §9003(e)(1)(A), Petitioner bore the burden to show by a preponderance of the evidence that the children were wrongfully removed or retained. Hague Convention, Art. 3; 22 U.S.C. §9003(e)(1)(A); Pet. 26a, 49a. Petitioner's overly simple three-step analysis disregards Petitioner's factual burden and the District Court's conclusion that Petitioner simply failed to meet that burden. Petitioner's incorrect assertion that the panel majority adopted a "new approach" fails to acknowledge the Convention's text and the application of that text as well as relevant case law.

1. Establishing a date of retention is a required element to prove wrongful retention.

Article 3 of the Hague Convention states, "The . . . retention of a child is to be considered wrongful where . . . (b) at the time of . . . retention those rights were actually exercised, either jointly or alone. . . ." Hague

Convention, Art. 3; Pet. 26a. (emphasis added). This requirement has been confirmed by all twelve Federal Circuit Courts.[1] Under the Hague Convention, wrongful retention occurs when one parent "retains the child abroad against the petitioning parent's will." *White v. White*, 718 F.3d 300, 304, n.3 (4th Cir. 2013). Without an established date of retention an applicant for Hague Convention relief cannot establish if there was a retention at all, let alone the wrongfulness of the alleged retention.

2. Petitioner failed to establish a date of retention.

Petitioner incorrectly asserts that the District Court and Fourth Circuit Court of Appeals evaluated the alleged wrongful retention based on factors other than the parties' home country custody rights at the time of the allegedly wrongful retention. Pet. 2. Petitioner further argues the ungrounded position that the lower courts applied what they thought *should* be Petitioner's rights under Swedish law. Pet. 10. This

[1] *Kufner v. Kufner*, 519 F.3d 33, 39 (1st Cir. 2008); *Royal Borough of Kensington Chelsea*, 2023 U.S. App. LEXIS 25141 at *5 (2d Cir. Sept. 22, 2023); *Baxter v. Baxter*, 423 F.3d 363, 367 (3d Cir. 2005); *Miller v. Miller*, 240 F.3d 392, 398 n.8 (4th Cir. 2001); *Larbie v. Larbie*, 690 F.3d 295, 307 (5th Cir. 2012); *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996) ("*Friedrich II*"); *Garcia v. Pinelo*, 808 F.3d 1158, 1162 (7th Cir. 2015); *Custodio v. Samillan*, 842 F.3d 1084, 1088 (8th Cir. 2016); *Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir. 2001); *West v. Dobrev*, 735 F.3d 921, 929 n.7 (10th Cir. 2013); *Palencia v. Perez*, 921 F.3d 1333, 1338 (11th Cir. 2019); *Abou-Haidar v. Sanin Vazquez*, 945 F.3d 1208, 1215, 444 U.S. App. D.C. 482, 489 (D.C. Cir. 2019).

position misstates what the District Court and Fourth Circuit Court of Appeals evaluated and found, as well as disregards ICARA's requirement that Petitioner bears the burden to establish wrongful retention by a preponderance of the evidence. 22 U.S.C. § 9003(e)(1)(A); Pet. 49a.

The Hague Convention is "designed to restore the 'factual' status quo which is *unilaterally altered*" when a parent wrongfully removes or retains a child. *Karkkainen v. Kovalchuk*, 445 F.3d 280, 286 (3d Cir. 2006) (quoting *Feder v. Evans-Feder*, 63 F.3d 217, 221 (3d. Cir. 1995) (emphasis added)); *Smedley v. Smedley*, 772 F.3d 184, 186 (4th Cir. 2014); Hague Convention, Art. 1; Pet. 25a. The Third Circuit has held that the date of wrongful retention is the "date beyond which the noncustodial parent no longer consents to the child's continued habitation with the custodial parent. . . ." *Abou-Haidar v. Sanin Vazquez*, 945 F.3d 1208, 1216, 444 U.S. App. D.C. 482, 490 (D.C. Cir. 2019) (quoting *Blackledge v. Blackledge*, 866 F.3d 169, 179 (3d Cir. 2017)). A parent's actions that "serve to identify such date" can be communicated formally or informally. *Id.* However, per Article 13 of the Hague Convention's plain and unambiguous text, "consent before the removal and retention or subsequent acquiescence extinguishes the right of return." *Gonzalez-Caballero v. Mena*, 251 F.3d 789, 794 (9th Cir. 2001); Hague Convention, Art. 13; Pet. 31a. The consent does not have to be formal but can be "evidenced by the petitioner's statements or conduct." *Darin v. Olivero-Huffman*, 746 F.3d 1, 15 (1st Cir. 2014).

Petitioner claims that Respondent "unilaterally" changed the children's residence, despite the District Court's finding that it was the intent of both parties that the children should live with Respondent in the United States, or otherwise face being put into foster care in Sweden. *Brandt v. Caracciolo*, 2022 U.S. Dist. LEXIS 214172 at *8; Pet. 22a. The Court further found that Respondent did not remove the children to seek a more sympathetic forum or to disrupt the status quo, and due to the involvement of Swedish Social Welfare, Respondent "became the primary physical custodian of the children." *Id.* at *7–8; Pet. 21a.

In making findings, the District Court relied on Petitioner's own testimony that she "consented to the children taking an indeterminate trip to the United States to live with [Respondent]." *Brandt*, 2023 U.S. App. LEXIS 28367 at *5. Petitioner further testified that she agreed that the children should come to the United States with Respondent. *Id.*; Opp'n 2a. Petitioner's true intent was clear based upon her agreement and consent, informal as they may be.

The parties had conflicting testimony about a date of return, and Petitioner was unable to establish an agreed upon date in which the children would be returned. By her own admission, at the time of any alleged retention, Respondent had the authority to determine if and when the children would be returned to Sweden. Pet. 10a. In neither the Swedish interim custody order nor the final custody order did the Swedish court find that Respondent's retention of the minor children was wrongful, nor did the orders require

Respondent to return the children to Sweden. *Brandt*, 2023 U.S. App. LEXIS 28367 at *3–4; Pet. 115a–119a, 120a–132a. Moreover, it was only *after* the Swedish court granted Respondent sole custody of the children that Petitioner filed and followed through with a petition to the Hague for the return of the minor children to Sweden.

As concluded by the panel majority, quoting *White* ("And since a primary purpose of the Hague Convention is to 'preserve the [pre-removal or pre-retention] status quo'"), "the children indefinitely staying with the joint custodial father, in the United States, was the status quo." *Brandt*, 2023 U.S. App. LEXIS 28367 at *11–12 (quoting *White*, 718 F.3d at 306 (quoting *Miller v. Miller*, 240 F.3d 392, 398 (4th Cir. 2001))). The Fourth Circuit also noted the District Court's reliance on Petitioner's own testimony, that she consented to the children taking an indeterminate trip to the United States to live with Respondent, affirming the District Court's conclusion that Petitioner failed to meet her burden of proof to establish a wrongful retention ("Appellant bore the burden of proving that Appellee wrongfully retained the children. She failed to do so."). *Brandt*, 2023 U.S. App. LEXIS 28367 at *11.

There was no specific date agreed upon by the parties in which Respondent would return the children to Sweden, and no date established after which Respondent refused to return the children to Sweden. As a result, Petitioner failed to establish a date in which the children were wrongfully retained.

3. When Petitioner failed to establish a date of wrongful retention by a preponderance of the evidence, her claim was properly denied.

When it is concluded that a petitioner has failed to establish by a preponderance of the evidence, as required by 22 U.S.C. § 9003(e)(1)(A) that there is a wrongful retention, the "Abduction Convention cannot be successfully invoked" and the review of the petition is effectively ended. *Jenkins v. Jenkins*, 569 F.3d 549, 552 and 556 (6th Cir. 2009). The District Court's denial of Petitioner's petition and the Fourth Circuit's subsequent affirmation were proper and ended the matter.

4. The Court of Appeals did not require Petitioner to prove she did not consent to Respondent relocating the children to the United States permanently.

Petitioner's statement that "[t]he majority appears to have believed that Brandt had to prove that she did not consent" disregards Article 12 of The Hague Convention. Pet. 7. Article 12 requires return if there has been wrongful removal or retention. Hague Convention, Art. 12; Pet. 30a. Article 13 then clarifies that in such a situation, the requested State is not bound to order the return if the person opposing return establishes the affirmative defense of consent to the removal or retention. Hague Convention, Art. 13; Pet. 31a.

In this case, Petitioner failed to show a wrongful removal or retention and her case failed. At no time did the District Court, nor the Fourth Circuit, require her to disprove consent, nor was a finding of consent even necessary. The panel majority correctly placed the issue of Petitioner's consent in the proper context when it stated, "[i]n reaching its conclusion that Appellant ha[s] failed to meet her burden to demonstrate wrongful retention, the district court relied on Appellant's own testimony that she, as a joint custodian, had consented to the children taking an indeterminate trip to the United States to live with [Respondent]." *Brandt*, 2023 U.S. App. LEXIS 28367 at *11. Petitioner's consent found at trial was not an affirmative defense to a properly established prima facie case; it was evidence that Petitioner failed to prove a wrongful removal or retention. Although she testified the parties had an agreement on return, Petitioner's own testimony, the testimony of Respondent, as well as other evidence considered, rebutted this assertion, and thus, Petitioner could not establish a wrongful retention. Petitioner's statement that "[t]he Fourth Circuit's improper burden-shifting warrants reversal" is incorrect, in that the Court's decision was not based on burden-shifting at all.

5. The panel did not incentivize people to thwart home-country custody proceedings.

Petitioner asserts that the majority's decision incentivizes people to thwart home-country custody

proceedings by bringing children to the United States, and that "the majority below should have viewed this case as a "normal wrongful detention case." Pet. 16. Petitioner further claims the panel majority's approach "licenses United States courts to settle foreign custody disputes." *Id.* at 17.

a. This was not a "normal" wrongful retention case.

Petitioner cites the Court's statement in *Slight v. Noonkester* describing how "normal" wrongful detention cases "usually happen." *Slight v. Noonkester*, No. CV 13-158-BLG-SPW, 2014 U.S. Dist. LEXIS 9133, 2014 WL 282642, at *14 (D. Mont. Jan. 24, 2014). Unlike the present case, that definition does not include the existence of home state custody litigation initiated prior to removal and subsequently completed in the home state, nor the existence of social welfare committee decisions and reports, nor conflicting testimony of parties on whether removal was temporary. This case varies considerably from the simple definition provided by Petitioner, and thus viewing it as "normal" would be improper under the definition cited by Petitioner.

The 1980 Explanatory Report on the HCCH Child Abduction Convention provides some guidance on typical, or "normal" cases. "It frequently happens that the person retaining the child tries to obtain a judicial or administrative decision in the State of refuge, which would legalize the factual situation which he has just

brought about." 1980 Conférence de La Haye de droit international privé, L'enlèvement des faits, E. Pérez-Vera, Explanatory Report in 3 Actes et documents de la Quatorzième session, p. 429, ¶ 14.

The Seventh Circuit has noted that "[t]he Convention aims 'to deter parents from absconding with their children and crossing international borders in the hopes of obtaining a favorable custody determination in a friendlier jurisdiction.'" *Redmond v. Redmond*, 724 F.3d 729, 737 (7th Cir. 2013) (quoting *Walker v. Walker*, 701 F.3d 1110, 1116 (7th Cir. 2012)). The Ninth Circuit was even more to the point, stating that "[t]he central purpose of the Convention is to prevent forum shopping in custody battles." *Reyes Valenzuela v. Michel*, 736 F.3d 1173, 1176 (9th Cir. 2013); Pet. 16. The District Court spoke to this when citing *Miller v. Miller*, quoting *Friedrich I* stating, "[t]he primary purpose of the Hague Convention is 'to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court.'" *Brandt*, 2022 U.S. Dist. LEXIS 214172 at *5 (quoting *Miller v. Miller,*240 F.3d 392, 398 (4th Cir. 2001) (quoting *Friedrich v. Friedrich*, 938 F.2d 1396, 1400 (6th Cir. 1993) ("*Friedrich I*")).

In addition to forum shopping, the Explanatory Report pointed to another common scenario, " . . . if he is uncertain about the way in which the decisions will go, he is just as likely to opt for inaction, leaving it up to the dispossessed party to take the initiative." Pérez-Vera 429, ¶14. The *Slight* court provided an example of this by discussing the obtaining of a "chasing order" by

a party in the home state after children are removed. *Slight*, 2014 U.S. Dist. LEXIS 9133 at *14.

In the case at hand, neither of these typical scenarios were present. Petitioner filed her custody claim in Sweden prior to removal and did not obtain a chasing order. As Respondent continued to litigate the custody case in Sweden and never sought custody in the United States, there was no issue of forum shopping. The District Court correctly stated that "Respondent had no need to remove the children from Sweden and seek a more sympathetic court in order to obtain custody. Initially, through the involvement of Swedish Social Welfare, he became the primary physical custodian of the children." *Brandt*, 2022 U.S. Dist. LEXIS 214172 at *7.

b. Home-country custody proceedings were not thwarted by the lower court's decisions in this matter.

As stated by this Court in *Monasky*, "The Convention's return requirement is a 'provisional' remedy that fixes the forum for custody proceedings." *Monasky*, 140 S. Ct. 719, 723, 206 L. Ed. 2d 9, 16. In the matter at hand, the forum deciding the custody issue was already fixed prior to removal and remained so. The proper forum for the custody issue was never challenged.

As the present case involved no chasing order, no forum shopping, and a custody case that proceeded to

completion in the home state, Petitioner's argument that the majority panel's decision incentivizes people to bring children here to gain the upper hand in foreign custody proceedings fails.

c. The panel did not settle a foreign custody dispute nor license other courts to do so.

Far from settling a foreign custody dispute, the panel merely affirmed the District Courts conclusion that Petitioner failed to meet her burden of proof. The Swedish custody dispute, initiated by Petitioner, was settled in Sweden. For this reason, Petitioner's argument that the lower court licensed other courts to settle foreign custody disputes has no merit.

II. The Fourth Circuit's Opinion Comports with the Text of the Hague Convention and Cases of This Court and Other Circuits.

A. In applying the Convention's text and case law, the District Court was not precluded from taking into account facts and circumstances surrounding the March 31, 2022, Custody Order from the Swedish Court, as well as that Court's reasons for its decision that were related to custody.

Plaintiff incorrectly suggests that the lower courts could only consider The Swedish Children and Parent's Code in determining whether an alleged retention of

the children was wrongful. Contrary to Petitioner's position, multiple articles of the Hague Convention, as well as case law, allow for the consideration of numerous factors over a dry and limited application of The Swedish Children and Parent's Code.

Article 13 of the Convention states that "[i]n considering the circumstances referred to in this Article, judicial and administrative authorities **shall** take into account the information relating to the social background of the child. . . ." Hague Convention, Art. 13; Pet. 31a (emphasis added). The District Court held that the custody orders as well as The Social Welfare Committee's report were "compelling evidence" on the properness of the children's removal and retention. *Brandt*, 2022 U.S. Dist. LEXIS 214172 at *9. The panel majority found that "[h]ere, the parties both presented evidence that a Swedish custody dispute and child welfare investigation was ongoing during the time period preceding the purported retention." *Brandt*, 2023 U.S. App. LEXIS 28367 at *11. Further, of the circumstances referred to in Article 13, the establishment of consent to retention is an affirmative defense. Hague Convention, Art. 13; Pet. 31a. Petitioner's consent in this matter was established even though the case was decided on the ground that Petitioner failed to meet her burden of proof.

The Explanatory Report further states that " . . . the very nature of these exceptions [Articles 13 and 20] give judges a discretion – and does not impose upon them a duty – to refuse to return a child in certain circumstances." Pérez-Vera 460, ¶113. "Such information,

emanating from either the Central Authority or any other competent authority, may be particularly valuable in allowing the requested authorities to determine the existence of those circumstances which underlie the exceptions contained in the first two paragraphs of this article." *Id.* at 461, ¶117. Article 13 and the Explanatory Report emphasize the ability of a court to examine other circumstances and facts and to use its discretion in evaluating the affirmative defense of consent to both removal and retention, as well as the appropriateness of an ordered return.

Article 14 of the Convention states that "[j]udicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial and administrative decisions, formally recognized or not in the State of the habitual residence of the child." Hague Convention, Art. 14; Pet. 32a. The Explanatory Report adds "[t]here is no need to stress the practical importance this rule may have in leading to the speedy decisions which are fundamental to the working of the Convention." Pérez-Vera 463, ¶119. As clarified by the majority's opinion, the United States is the "requested State" in this case, and Sweden was the habitual residence of the children. *Brandt*, 2023 U.S. App. LEXIS 28367 at *9 n.7.

Article 17 forbids the court of a requested State to ground its decision on the sole fact that a decision relating to custody was given, but further states that the court "may take account of the reasons for that decision in applying this Convention." Hague Convention, Art. 17; Pet. 33a. The Explanatory Report adds that

"[t]he solution contained in this article accords perfectly with the object of the Convention, which is to discourage potential abductors . . . ", and "[m]oreover, since the decision on the return of the child is not concerned with the merits of custody rights, the reasons for the decision which may be taken into consideration are limited to those which concern 'the application of the Convention.'" Pérez-Vera 464, ¶123.

Addressing Petitioner's trial briefs, the District Court specifically noted that "[t]he March 2022 custody order is not dispositive as a matter of law on the issue of wrongful retention. . . . But the Court may consider that order as evidence." *Brandt*, 2022 U.S. Dist. LEXIS 214172 at *9. The District Court took further note that "each party agrees that the Court should consider certain factual findings in that order." *Id.* Petitioner wanted the Court to approve certain factual findings in the Swedish custody orders, and implicitly agreed the District Court could, and should adopt findings from that order. She cannot now argue that the Swedish custody orders could not be considered as evidence.

The District Court further found, based on the evidence and testimony presented, that the parties agreed the children would go to the United States with Respondent, that it would not be good for the children to be uprooted and moved again, that the parties disagreed as to the duration of the children's stay in the United States, and that no retention date was established. The District Court did not rely solely on the Swedish's Court's March 2022 Order to make its

decision. The court also reviewed the Swedish interim custody order, documents from Swedish Social Welfare, the Social Welfare letter, and the parties' testimony in determining whether Respondent's retention of the minor children was wrongful and whether Petitioner established her case by a preponderance of the evidence.

The majority's opinion confirmed the appropriateness of the District Court's findings in light of Article 17 and further noted the lack of precedent keeping courts from considering the "full panoply of circumstances surrounding the alleged retention." *Brandt*, 2023 U.S. App. LEXIS 28367 at *9.

Petitioner's reliance on *Golan* and *Monasky* is misplaced, in that Petitioner ignores the plain text of Articles 13, 14 and 17 of the Hague Convention, with which the court's complied. In *Golan*, the court considered the "grave risk" affirmative defense wherein a court has discretion to determine whether to deny return. *Golan v. Saada*, 142 S. Ct. 1880, 213 L. Ed. 203 (2022). The *Golan* court acknowledged the holding in *Abbott* that, "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text." *Id.* at 1891, 213 L. Ed. at 216 (quoting *Abbott v. Abbott*, 560 U.S. 1, 10, 130 S. Ct. 1983, 176 L. Ed. 2d. 789). This Court noted that "nothing in the Convention's text either forbids or requires consideration of ameliorative measures in exercising this discretion." *Id.* at 1892, 213 L. Ed. at 216. In overruling the Second Circuit, the Court noted that the lower court imposed a "categorical requirement" to consider all ameliorative measures, which was

inconsistent with the test and other express requirements of the Hague Convention. *Id.* at 1893, 213 L. Ed. at 217. No such categorical requirements were presented by Petitioner in this case.

In *Monasky*, this Court noted that the language in the Hague Convention does not define the term "habitual residence" and that the inquiry into the question of habitual residence begins with the Hague Convention's text "and the context in which the written words are used." *Monasky*, 140 S. Ct. at 726, 206 L. Ed. at 19. The Court characterized the inquiry into the question of habitual residence as fact-driven, and that it must be "sensitive to the unique circumstances of the case and informed common sense." *Id.* at 727, *Id.* (quoting *Redmond*, 724 F.3d at 744). Further, the Court noted that "no single fact is dispositive across all cases." *Id.*, 206 L. Ed. at 20. In *Monasky*, this Court rejected the argument there must be an actual agreement between the parties about where a child will reside in determining the habitual residence, and that "a child's habitual residence depends on a totality of circumstances specific to the case." *Id.* at 723, 206 L. Ed. at 15. The Court noted that an actual agreement requirement is not in the Convention's text, and that the Convention's Explanatory Report refers to a child's habitual residence in fact-focused terms. *Id.* at 726, 206 L. Ed. at 19. This is akin to the Court's rejection of a "categorical requirement" not stated in the Hague Convention's text as discussed in *Golan*. *Golan*, 142 S. Ct. at 1892, 213 L. Ed. at 216.

In the present case, neither the District Court nor the Fourth Circuit imposed a requirement that a court must base, or even consider in its decision, circumstances other than Swedish law, nor did either court find that it could *not* do so. This 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*. Petitioner's insistence that per *Monasky* a court must adhere only to the Convention's text is undercut by the Court's actual application of "a fact-sensitive inquiry, not a categorical one." *Monasky*, 140 S. Ct. at 726, 206 L. Ed. at 19. Nothing in *Golan* or *Monasky* suggest that a Court is limited to the Convention text of the Swedish Parent's Code without regard to other circumstances, or sources, as set forth in Articles 13, 14 and 17 of the Convention. Petitioner's extreme narrowing of how a court may review a Hague petition is off the mark and merely hampers a District Court's exercise of discretion.

III. The District Court Properly Considered the Practical Impact of a Custody Order Issued After an Alleged Wrongful Retention.

The March 2022 custody order was the result of ongoing custody litigation initiated by Petitioner in June of 2021 and prior to the alleged date of wrongful retention. As acknowledged by the Fourth Circuit's dissent in this case, the order directly related to the effects of an ordered return "does not mean the March 31, 2022 order has no bearing on what happens after

the children are returned to Sweden." *Brandt*, 2023 U.S. App. LEXIS at *16. The District Court, Fourth Circuit and Petitioner herself acknowledged that even with a return to Sweden, it would not be improper for Respondent to then take the children and immediately board a plane back to the United States based on Respondent being granted sole custody of the minor children. *Id.* at 16–17; *Brandt*, 2022 U.S. Dist. LEXIS 214172 at *8; Opp'n 9a.

Contrary to Petitioner's arguments, 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. For example, Article 12 allows a court to evaluate how settled a child is in their new environment. Hague Convention, Art. 12; Pet. 31a. Article 13 allows a court to take into account the information relating to the social background of the child. Hague Convention, Art. 13; *Id.* Article 17 explicitly allows a court to take into account of the reasons for a custody decision entitled to recognition in the requested State in applying the Convention. Hague Convention, Art. 17; Pet. 33a.

Further, as stated by this Court in the context of the one-year period set forth in Article 12, " . . . opening the door to consideration of the child's attachment to the new country does not mean closing the door to evaluating all other interests of the child and the nonabducting parent." *Lozano v. Alvarez*, 572 U.S. 1, 19, 134 S. Ct. 1224, 1237, 188 L. Ed. 2d. 200, 217 (2014). Moreover, "[n]othing in Article 12 prohibits courts from

taking other factors into account." *Id.* at 20. The Convention text simply did not limit the Courts' consideration to only Swedish law as posited by Petitioner.

In *Golan*, this Court further clarified that "[r]eturn of the child is, however, a general rule, and there are exceptions," and that " . . . return is merely a 'provisional' remedy that fixes the forum for custody proceedings." *Golan*, 142 S. Ct. at 1888, 213 L. Ed. 2d at 212. While the maintenance of a bright-line rule has simplicity, it ignores the very real practical effects related to a court's decision and eliminates what Article 13 explicitly allows a Court to consider, thus unduly limiting the trial judge's discretion referenced in the Explanatory Report. Pérez-Vera 460, ¶113.

The March 31, 2022, order very clearly stated what would happen upon a return of the children if they were placed in Petitioner's custody, and that order was therefore particularly relevant to the issue of the children's return. Consideration of that order and the practical effects of a return was not an abuse of the Court's discretion.

CONCLUSION

For the aforementioned reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

APPENDIX A

[LOGO]

Laxá, 21-06-03

Dear Mr Caracciolo,

Attached is the investigation/assessment that has been carried but regarding you children S[redacted] and J[redacted]. I have also sent it to their mother Minna-Mari. It is in Swedish and I hope you can understand parts of it or alternatively seek help to have it translated. I will here summarize the general content. The information is gathered through several conversations that I have had with you and Minna-Mari, together and separetly. I have also had conversations with S[redacted] and observed both children. Furthermore, I have obtained information from the childrens pre-school teachers and BVC (childrens nurse). I have also received information from several reports that I received during the corse of the investigation (such as police and health care professionals) The information has resulted in a number of identified risk factors and protectiv factors for the children.

Risk factors:

* violence and conflicts between parents/caregivers and between parents and others
* Minna-Mari has a problem with substance abuse
* both parents have different degrees of mental health problems
* financial difficulties/Minna-Mari is unemployed and has no other income
* the family has no stable accomondation in Sweden

Protective factors:
* pre-school/day care is working well for both children
* existing social/family network in both Sweden and the US
* Damian has employment in the US and thus financial stability
* the family has accomondation in the US

Considering the above risk and protective factors it is concluded that there are several serious risk factors for the children in their situation in Sweden. It was clear to me that you and Minna-Mari were not able to come to an agreement about how to make the necessary changes to ensure that the children were safe. Therefore, social services were planning to place the children in temporary care. You, Damian and Minna-Mari finally came to the agreement that the children could live with you and your family in the US for some time. The social service is of the opinion that it appears to be the best option for the children, given the situation as it was in Sweden with ongoing arguments and violence that the children had been exposed to, in addition to the other risk factors.

The social services' investigation is now closed, as it is only allowed to be carried out for a maximum of four months according to the Swedish law (Socialtjänstlagen). A

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

MINNA-MARIE BRANDT, Petitioner, vs. DAMIAN CARACCIOLO, Respondent.	)	DOCKET NO. 3:22-CV-304

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE DAVID S. CAYER
UNITED STATES MAGISTRATE JUDGE
THURSDAY, NOVEMBER 10, 2022 AT 9:30 A.M.

APPEARANCES:

On Behalf of the Petitioner:

NATALIA L. TALBOT, ESQ.
KELLY A. CAMERON, ESQ.
Waldrep Wall Babcock & Bailey PLLC
70 Knollwood Street, Suite 600
Charlotte, North Carolina 27103

On Behalf of the Respondent:

JAMES L. EPPERSON, ESQ.
Epperson Law, PLLC
13657 Providence Road
Weddington, North Carolina 28104

Minna-Marie Brandt – Appearing virtually via Teams

JILLIAN M. TURNER, RMR, CRR, CRC
Official U.S. District Court Reporter
United States District Court
Charlotte, North Carolina

* * *

[17] M. BRANDT – DIRECT

remain there until the beginning of July; is that correct?

A. Yes. Yes, that is correct.

Q. But just to clarify, you did not have exact departure and return dates?

A. No, we had not. It was up to Damian to decide that himself.

Q. What is your understanding of when Mr. Caracciolo left for the U.S. with the children? What date?

A. The 7th.

Q. The 7th of what month?

A. Of April 2021.

Q. 2021. Okay.

A. Yes.

Q. And do you know where he brought them in the U.S.?

A. I – I – I believe he took them to his parents', the children's grandparents in North Carolina.

Q. It's your understanding that they were living with him and his parents or the children's grandparents in North Carolina?

A. Yes.

Q. Okay. And who are the children's grandparents?

A. Louis Caracciolo and Wendy Caracciolo.

Q. What was your understanding of who was providing daily care for the children while they were in the U.S.?

A. That is Wendy.

* * *

[23] M. BRANDT – DIRECT

Q. So if the children return, you said you will file.

When they return, will you have custody of the children?

A. No. No. No.

Q. And why is that?

A. Because Damian – because we have already had custody – a custody battle, and Damian was granted custody because the children cannot be forced back here through Swedish law.

Q. So you said –

MR. EPPERSON: I'm going to object, Your Honor.

THE COURT: Sustained.

BY MS. TALBOT:

Q. So you said that if the children returned you will file. Can you explain what you mean by that? What are you going to file?

A. The Swedish law is that during –

MR. EPPERSON: Objection.

THE WITNESS: – a custody battle –

THE COURT: Sustained.

THE WITNESS: – a child can live –

THE COURT: I'll sustain the objection.

Hold on until the next question, ma'am.

THE WITNESS: Okay.

BY MS. TALBOT:

Q. Ms. Brandt, what is your intent to file? What do you plan to file?

A. A custody order.

Q. Do you mean a petition or a custody order?

A. Oh, yeah, a petition.

Q. Okay. A petition for what?

A. For custody.

Q. Okay.

MS. TALBOT: Your Honor, if I may have a moment.

THE COURT: Yes, ma'am.

MS. TALBOT: Thank you.

Your Honor, I have no further questions at this time.

THE COURT: Mr. Epperson.

MR. EPPERSON: Thank you.

CROSS-EXAMINATION

BY MR. EPPERSON:

Q. Ms. Brandt, I'm James Epperson.

Before today, you and I have never met. Is that fair to say?

A. Yes, it is.

Q. If I – I apologize. If you can't hear me correctly or if I – if I say something that you don't understand, just let me know. Okay?

A. Yes, I will.

Q. All right. And you met my client approximately 2015; is that correct?

* * *

[31] M. BRANDT – CROSS

waiting.

Q. All right. And you've never asked the Court in Sweden to modify its order, have you?

A. I don't understand what that means. I'm sorry.

Q. So you have a permanent custody order, but have you petitioned the Court in Sweden to modify their order in any way?

A. I – I don't – I can't answer that. I know I made a petition against the actual court order that on March, but they responded I would have to wait until I had the Hague Convention ready and done. But I have not gone against it or tried to change it in any way. I have got Damian, though, into enforcement of the custody order because it provides him sole custody and it provides the children with the right to see and talk to me. Damian has only chosen the good part is and leave the lesser out.

Q. So that –

A. That is what I was trying to enforce.

Q. Is it your testimony that you filed a contempt case in asking the Swedish court to punish my client for not giving you your videos?

A. I – I – I don't know the exact words for it, but it would be an enforcement to actually make him follow it.

Q. Okay. And you filed – you filled out a petition with the Hague Convention on or about July 21st of 2021; is that

* * *

[50] D- CARACCIOLO – DIRECT

A. Yes.

Q. Okay. And what happened to that appeal?

A. It got denied, and she had to pay for my lawyer because it was a waste of everybody's time.

Q. Okay. And did you, in fact, get a copy of the Hauge petition?

A. Yes, I did. I was served.

Q. How were you served?

A. Somebody showed up on my front door and mostly told me I was served.

Q. Okay. When were you served?

A. I would say around May this year.

Q. Of what year?

A. Of this year.

Q. Okay. Is that after she filed the documents here in the United States in North Carolina?

A. I can't really remember.

Q. All right. Do you recall ever getting a petition under the Hague Convention in the year 2021?

A. Yes.

Q. Okay. Tell me, when did you get that document?

A. That was – I think it was around S.'s birthday. So it was either September, very early September or before that.

Q. Was there an agreement that you-all – that you would apply for citizenship for the children here in the [51] United States?

A. Yes.

Q. What was the agreement with mother?

A. That is the main reason why I went back the last time.

Q. When did you go back to the last time?

A. That was in – I went there for Christmas.

Q. Of what year?

A. Of 2020. Because she sent my mom pictures of the documents that we needed to go to the Embassy with.

Q. Okay.

A. Because she was agreeing.

Q. And that was part of the overall agreement to move the whole family to the United States?

A. Yes.

Q. Had the children ever visited the United States before you moved them here?

A. Yes.

Q. Okay. When was the first time?

A. When S. was about three months. 2016.

Q. When was the last time? Before you did your move to the United States in April of '21.

A. The last time that they came?

Q. Uhm-hum.

A. When S. was about three months, yeah. No. She was maybe six months – or no. Maybe close to a year. I can't

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