No. 20-1034

In the Supreme Court of the United States

NARKIS ALIZA GOLAN, PETITIONER

v.

ISACCO JACKY SAADA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING VACATUR

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
FREDERICK LIU
MELISSA N. PATTERSON
Assistants to the Solicitor General
SHARON SWINGLE
LAURA E. MYRON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

RICHARD C. VISEK
Acting Legal Adviser
Department of State
Washington, D.C. 20520

QUESTION PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction generally requires that, upon petition, children wrongfully removed from their country of habitual residence be returned promptly, allowing the merits of custody disputes to be adjudicated in that country. Article 13(b) of the Convention provides an exception to that requirement where it is established that there is a grave risk that returning the child would expose him to physical or psychological harm or otherwise place the child in an intolerable situation. The question presented is:

Whether, after finding that returning a child would expose him to a grave risk of harm, a district court is required to consider whether ameliorative measures would facilitate return before reaching a decision on a petition to return.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement:
  A. Legal background 2
  B. Facts and procedural history 4
Summary of argument 10
Argument:
  Neither the Convention nor ICARA requires consideration of ameliorative measures upon a finding that return poses a grave risk of harm 12
  A. The court of appeals erred in requiring courts to consider ameliorative measures in every case involving a finding of grave risk 13
    1. The text of the Convention and ICARA does not require courts to consider ameliorative measures 14
    2. A discretionary approach to ameliorative measures accords with the longstanding view of the State Department, which finds support in international understandings of the Convention 17
  B. A court's discretion to consider ameliorative measures should be guided by the principles of the Convention, not by inflexible rules 24
  C. The case should be remanded to allow the lower courts to properly exercise their discretion in the first instance 32
Conclusion 34
Appendix A — Treaty provisions 1a
Appendix B — Statutory provisions 19a

TABLE OF AUTHORITIES

Cases: Page

Abbott v. *Abbott*, 560 U.S. 1 (2010) 2, 14, 17
Acosta v. *Acosta*, 725 F.3d 868 (8th Cir. 2013) 26
Arthur & Sec'y, [2017] FamCAFC 111 (Austl.) 24
Blondin v. *Dubois*:
189 F.3d 240 (2d Cir. 1999) 6, 15
238 F.3d 153 (2d Cir. 2001) 6, 13, 29
Chafin v. *Chafin*, 568 U.S. 165 (2013) 28
E, *In re*, [2011] UKSC 27 (H.L.) (U.K.) 23, 24
Gall v. *United States*, 552 U.S. 38 (2007) 25
Lozano v. *Alvarez*, 572 U.S. 1 (2014) 16
Martin v. *Franklin Capital Corp.*,
546 U.S. 132 (2005) 24, 25
Monasky v. *Taglieri*, 140 S. Ct. 719 (2020) 16, 29, 30, 33
Mount Lemmon Fire Dist. v. *Guido*,
139 S. Ct. 22 (2018) 14
Simcox v. *Simcox*,
511 F.3d 594 (6th Cir. 2007) 25, 26, 27, 31
United States v. *Burr*,
25 F. Cas. 30 (C.C. Va. 1807) 25
Walsh v. *Walsh*, 221 F.3d 204 (1st Cir. 2000) 27

Treaties, statutes, and rules:

Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, *done* Oct. 19, 1996, 2204 U.N.T.S. 95 (entered into force Jan. 1, 2002):
Art. 23, 2204 U.N.T.S. 104 23
Art. 28, 2204 U.N.T.S. 105 23

Treaties, statutes, and rules—Continued: Page

Hague Convention on the Civil Aspects of International Child Abduction, *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (entered into force for the United States July 1, 1988) 2, 1a

Pmbl., 1343 U.N.T.S. 98 .... 30, 1a

Art. 1(a), 1343 U.N.T.S. 98 .... 2, 2a

Art. 3, 1343 U.N.T.S. 98-99 .... 2, 3a

Art. 7, 1343 U.N.T.S. 99 .... 1, 4a

Art. 11, 1343 U.N.T.S. 100 .... 2, 3, 11, 25, 28, 6a

Art. 12, 1343 U.N.T.S. 100 .... 2, 3, 5, 14, 7a

Art. 13, 1343 U.N.T.S. 101 .... 3, 10, 11, 14, 15, 25, 7a

Art. 13(b), 1343 U.N.T.S. 101 .... *passim*, 8a

Art. 16, 1343 U.N.T.S. 101 .... 3, 11, 18, 30, 9a

Art. 18, 1343 U.N.T.S. 101 .... 23, 9a

Art. 19, 1343 U.N.T.S. 101 .... 3, 11, 18, 25, 30, 10a

Art. 20, 1343 U.N.T.S. 101 .... 3, 10a

Art. 22, 1343 U.N.T.S. 102 .... 28, 30, 10a

Art. 23, 1343 U.N.T.S. 102 .... 28, 11a

Art. 29, 1343 U.N.T.S. 103 .... 23, 12a

Art. 30, 1343 U.N.T.S. 103 .... 28, 13a

Art. 34, 1343 U.N.T.S. 103 .... 22, 23, 14a

International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (22 U.S.C. 9001 *et seq.*) 4

22 U.S.C. 9001(a)(4) 4, 19a

22 U.S.C. 9001(b)(4) 4, 30, 20a

22 U.S.C. 9003 .... 16, 22a

22 U.S.C. 9003(b) 4, 22a

22 U.S.C. 9003(d) 4, 22a

22 U.S.C. 9003(e)(1)(A) 16, 23a

22 U.S.C. 9003(e)(2)(A) 4, 16, 23, 25, 23a

Statutes and rules—Continued: Page

Sean and David Goldman International Child Abduction Prevention and Return Act of 2014, Pub. L. No. 113-150, 128 Stat. 1807 (22 U.S.C. 9101 *et seq.*):

§ 2(a)(1), 128 Stat. 1807 28

§ 2(b), 128 Stat. 1809 28

22 U.S.C. 9121(b)(1) 28

22 U.S.C. 9122(d) 28

22 U.S.C. 9122(e) 28

Fed. R. Civ. P. 60(b) 9

Council Regulation 2201/2003, 2003 O.J. (L 338) 6 (EU):

Art. 11(4) 22

Art. 60(e) 22

Miscellaneous:

Hague Conf. on Private Int'l Law:

Conclusions and Recommendations of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 (Nov. 2006), https://assets.hcch.net/upload/concl28sc5_e.pdf 21

Direct Judicial Communications (2013), https://assets.hcch.net/docs/62d073ca-eda0-494e-af66-2ddd368b7379.pdf 26

1980 Child Abduction Convention: Guide to Good Practice: Part VI, Article 13(1)(b) (2020), https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf 21, 22, 23, 26, 27, 30

Miscellaneous—Continued: Page

Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, U.S. Dep't of State, to Michael Nicholls, Lord Chancellor's Dep't, Child Abduction, United Kingdom (Aug. 10, 1995) 18

Elisa Pérez-Vera, *Explanatory Report* (Permanent Bureau trans. 1982), https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf 2

Public Notice 957: Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494 (Mar. 26, 1986) 3, 15, 17, 27, 29

Kathleen Ruckman, *Undertakings As Convention Practice: The United States Perspective*, The Judges' Newsletter (Hague Conf. on Private Int'l Law, London, England) Vol. XI (2006), https://assets.hcch.net/docs/b3f445a5-81a8-4ee8-bc42-720c6f31d031.pdf 20, 21, 30

U.S. Dep't of State, *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction* (Apr. 2007), https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/AnnualReports/2007%20Annual%20Report.pdf 19, 31

U.S. Dep't of State, *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction* (Apr. 2010), https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/AnnualReports/2010%20Annual%20Report.pdf 20, 21, 30

In the Supreme Court of the United States

No. 20-1034

NARKIS ALIZA GOLAN, PETITIONER

v.

ISACCO JACKY SAADA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR

INTEREST OF THE UNITED STATES

This case arises under the Hague Convention on the Civil Aspects of International Child Abduction and concerns a district court's consideration of possible ameliorative measures upon finding a grave risk that returning a child to his country of habitual residence would expose him to physical or psychological harm. The United States is a party to the Convention and the Department of State is the designated Central Authority that coordinates with other contracting states and assists in the Convention's implementation in the United States, including, when appropriate and in accordance with the Convention (art. 7), facilitating the return of children wrongfully removed from the United States. Accordingly, the United States has a substantial interest in the

proper interpretation and application of the Convention. At the Court's invitation, the United States filed an amicus brief in this case at the petition stage.

STATEMENT

A. Legal Background

1. The Hague Convention on the Civil Aspects of International Child Abduction (Convention), *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (entered into force for the United States July 1, 1988), "was adopted in 1980 in response to the problem of international child abductions during domestic disputes." *Abbott* v. *Abbott*, 560 U.S. 1, 8 (2010). Among the Convention's purposes is "[t]o secure the prompt return of children wrongfully removed to or retained in any Contracting State." Art. 1(a). A removal or retention is "wrongful" if (a) it breaches existing custody rights "under the law of the State in which the child was habitually resident immediately before the removal or retention," and (b) those rights "were actually exercised" at "the time of removal or retention" or "would have been so exercised but for the removal or retention." Convention art. 3.

If the court of a contracting state where the child is present determines that the child has been wrongfully removed or retained, it generally must order return of the child to the country of habitual residence "forthwith." Convention art. 12; see Convention art. 11. The return remedy reflects the principle that "the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence," *Abbott*, 560 U.S. at 20, and that an abducting parent should not benefit from unilaterally attempting to change the forum, Elisa Pérez-Vera, *Explanatory Report* ¶¶ 16, 19 (Permanent Bureau trans.

1982), https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf.

Consistent with that principle, the Convention specifies that "[a] decision * * * concerning the return of the child shall not be taken to be a determination on the merits of any custody issue." Art. 19. And once the judicial or administrative authorities of a contracting state have received notice of a wrongful removal or retention of a child to that state, the Convention bars the authorities from deciding "the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application * * * is not lodged within a reasonable time." Art. 16. The Convention emphasizes the need for prompt decisions, providing that "[t]he judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children." Art. 11.

The Convention's return requirement, however, is not absolute. The Convention recognizes various exceptions to the requirement. See arts. 12, 13, 20. As relevant here, Article 13(b) provides that a court "is not bound to order the return of the child if the person, institution or other body which opposes [the child's] return establishes that * * * [t]here is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Convention art. 13(b). Although a court "need not order a child returned if there is [such] a grave risk," the court "retain[s] the discretion to order the child returned." *Public Notice 957: Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10,494, 10,509-10,510 (Mar. 26, 1986). As explained below, that includes the discretion to order the child returned with ameliorative measures

put in place to protect the child from the grave risk. See pp. 24-31, *infra*.

2. To implement the Convention, Congress enacted the International Child Abduction Remedies Act (ICARA), Pub. L. No. 100-300, 102 Stat. 437 (22 U.S.C. 9001 *et seq.*), which establishes procedures for requesting return of a child wrongfully removed to or retained in the United States. ICARA authorizes "[a]ny person" seeking return of a child under the Convention to file a petition in state or federal court. 22 U.S.C. 9003(b). The court "shall decide the case in accordance with the Convention." 22 U.S.C. 9003(d). Congress specified that "[t]he Convention" and ICARA "empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims." 22 U.S.C. 9001(b)(4).

Absent a finding that an exception applies, a child determined to have been wrongfully removed or retained must be "promptly returned" to the country of habitual residence. 22 U.S.C. 9001(a)(4). ICARA provides that a party "who opposes the return of the child has the burden of establishing" by "clear and convincing evidence" that the grave-risk exception set forth in Article 13(b) of the Convention applies. 22 U.S.C. 9003(e)(2)(A).

B. Facts And Procedural History

1. In August 2015, petitioner, a United States citizen, married respondent, an Italian citizen. Pet. App. 28a. Their only child, B.A.S., was born in Milan the following June. *Ibid.* The parties' relationship was "violent and contentious almost from the beginning." *Ibid.* (citation omitted). Respondent "physically, psychologically, emotionally and verbally abused" petitioner. *Ibid.* (citation omitted); see *id.* at 48a-64a (recounting evidence regarding their relationship). "Among other things,"

respondent "called [petitioner] names, slapped her, pushed her, pulled her hair, threw a glass bottle in her direction, and * * * threatened to kill her." *Id.* at 28a-29a. Many of those incidents occurred in B.A.S.'s presence, *id.* at 29a, but respondent "does not have a history of directly abusing B.A.S.," *id.* at 10a n.3.

In July 2018, petitioner and B.A.S., who was then two years old, traveled to the United States to attend a wedding. Pet. App. 29a. After the wedding, petitioner did not return to Milan. *Ibid.* Instead, she moved with B.A.S. into a confidential domestic-violence shelter in New York. *Ibid.*

2. In September 2018, respondent filed a petition for B.A.S.'s return in the United States District Court for the Eastern District of New York, invoking that court's jurisdiction under ICARA. D. Ct. Doc. 1, at 2 (Sept. 20, 2018). Respondent alleged that petitioner had wrongfully retained B.A.S. in the United States, in breach of respondent's custody rights in Italy, the child's country of habitual residence. *Id.* at 1, 4. Respondent sought an order directing that B.A.S. be returned to Italy under Article 12 of the Convention. *Id.* at 8.

a. In March 2019, following a nine-day bench trial, the district court granted respondent's petition for B.A.S.'s return. Pet. App. 41a-85a. The court first found that Italy was B.A.S.'s country of habitual residence and that petitioner had wrongfully retained B.A.S. in the United States. *Id.* at 72a-77a. The court then determined that petitioner had "met her burden" of establishing "one of the affirmative defenses to wrongful retention"—that "returning B.A.S. to Italy would expose him to physical or psychological harm." *Id.* at 77a. The court found "no dispute that [respondent] was violent—physically, psychologically, emotionally, and

verbally—to [petitioner]," and "that B.A.S. was present for much of it." *Id.* at 79a. The court noted the parties' experts' agreement that "exposure to [respondent's] undisputed violence toward" petitioner "posed a significant risk of harm to B.A.S." *Id.* at 66a. The court found the evidence "equally clear" that respondent "has to date not demonstrated a capacity to change his behavior." *Id.* at 80a.

The district court then considered whether there were any "ameliorative measures" that the parties or Italian authorities could undertake to reduce the grave risk that would arise from B.A.S.'s repatriation. Pet. App. 81a (citation omitted). Quoting circuit precedent, the court stated that, "before a court may deny repatriation on the ground that a grave risk of harm exists under Article 13(b), it must examine the full range of options that might make possible the safe return of a child to the home country." *Ibid.* (quoting *Blondin* v. *Dubois*, 238 F.3d 153, 163 n.11 (2d Cir. 2001)). The court thus understood circuit precedent to require consideration of "whether there [we]re any measures that could protect B.A.S. 'while still honoring the important treaty commitment to allow custodial determinations to be made—if at all possible—by the court of the child's home country.'" *Ibid.* (quoting *Blondin* v. *Dubois*, 189 F.3d 240, 248 (2d Cir. 1999)).

The district court examined the "ameliorative measures" that had been proposed. Pet. App. 81a. Respondent had agreed to provide petitioner with $30,000 for expenses until the Italian courts addressed financial support and other issues, to stay away from petitioner until the Italian courts resolved the underlying custody dispute, to pursue dismissal of criminal charges against petitioner related to the abduction of B.A.S., to begin

cognitive behavioral therapy, and to waive any right to legal fees or expenses related to his suit under the Convention. *Id.* at 82a-84a. The court found that those "proposed undertakings sufficiently ameliorate the grave risk of harm to B.A.S. upon his repatriation to Italy," and the court therefore ordered B.A.S.'s return. *Id.* at 83a.

b. In July 2019, the court of appeals affirmed in part and vacated in part. Pet. App. 26a-40a. The court agreed that Italy was B.A.S.'s habitual residence, but held that the district court had "erred in granting [the] petition because the most important protective measures it imposed are unenforceable and not otherwise accompanied by sufficient guarantees of performance." *Id.* at 27a-28a. The court of appeals pointed in particular to "several conditions that, under the circumstances, are essential to mitigating the grave risk of harm B.A.S. faces—namely, promises by [respondent] to stay away from [petitioner] after she and B.A.S. return to Italy and to visit B.A.S. only with [petitioner's] consent." *Id.* at 35a.

Having deemed "insufficient" the undertakings that the district court had approved, the court of appeals "remand[ed] for further proceedings concerning the availability of alternative measures." Pet. App. 35a. The court of appeals identified several options that the district court could consider on remand, including "requir[ing] one or both of the parties" to "apply" for an order of protection or supervised visitation from the Italian courts, "revis[ing] certain of the undertakings" to make "them directly enforceable," and requesting the aid of the Department of State, "'which can communicate directly with' the government of Italy to ascertain whether it is willing and able to enforce certain protective measures." *Id.* at 38a-39a (citation omitted).

3. On remand, the district court, over the course of nine months, conducted "an extensive examination of the measures available to ensure B.A.S.'s safe return to Italy." Pet. App. 12a. With the assistance of the State Department, the court contacted one of the U.S. members of the International Hague Network of Judges. *Ibid.*; see p. 26, *infra* (discussing the Hague Network). That judge assisted the court in contacting Italian authorities regarding the possible return of B.A.S. and enforcement by Italian courts of an order containing various ameliorative measures. Pet. App. 12a; see D. Ct. Doc. 73, at 3 (Aug. 2, 2019). "The district court then instructed the parties to petition the Italian courts for such an order" and "[t]he parties complied." Pet. App. 4a; see D. Ct. Doc. 89, at 2 (Nov. 15, 2019).

In December 2019, the Italian court overseeing the parties' underlying custody dispute issued an "order imposing various measures to facilitate B.A.S.'s Italian repatriation." Pet. App. 17a. "The order included, among other directives, a protective order against [respondent] and an order directing Italian social services to oversee his parenting classes and behavioral and psychoeducational therapy." *Ibid.* Aside from those particular measures corresponding to the district court's instructions to the parties, the Italian court further required that visits between respondent and B.A.S. be supervised and that B.A.S. be placed under the supervision of a social service agency in Milan, rather than petitioner (although B.A.S. would reside with petitioner), while petitioner's parenting was also assessed. C.A. App. 564-566. "Separately," in January 2020, "an Italian criminal court dismissed charges that [respondent] initiated against [petitioner] in connection with B.A.S.'s removal from Italy." Pet. App. 17a.

In May 2020, the district court again granted respondent's petition for B.A.S.'s return. Pet. App. 11a-25a. The court found the "order of protection put in place by the Italian court"—which "lasts one year beginning when [petitioner] and B.A.S. return to Italy" and "prohibits [respondent] from going near [petitioner] or B.A.S.," *id.* at 19a & n.9—"sufficient to ameliorate the grave risk of harm resulting from [the parties'] violent relationship," *id.* at 20a. The court rejected petitioner's contention that respondent could not be trusted to comply with any court order, *id.* at 20a-21a, and expressed confidence in the Italian legal system's ability to "resolve the parties' multiple disputes, address the family's history[,] and ensure B.A.S.'s safety and well-being," *id.* at 13a. The court further concluded that a $150,000 payment by respondent to petitioner for "a year of expenses" would ensure her "financial independence from [respondent]" "pending the Italian custody proceeding." *Id.* at 22a-23a. In light of those "ameliorative measures," the court ordered B.A.S.'s return to Italy. *Id.* at 25a.

4. In October 2020, the court of appeals affirmed. Pet. App. 1a-10a. The court concluded that the $150,000 payment, to be made prior to B.A.S.'s return, was enforceable by the district court, and that the Italian court order was supported by sufficient guarantees of performance. *Id.* at 8a. The court of appeals therefore upheld the district court's determination that "there existed sufficiently guaranteed ameliorative measures that would remedy the grave risk of harm to B.A.S. upon his return to Italy." *Id.* at 9a.

5. The court of appeals denied rehearing en banc. Pet. App. 86a. Petitioner subsequently filed a motion under Federal Rule of Civil Procedure 60(b), arguing

that newly discovered evidence "cast doubt on [respondent's] willingness to abide by Italian court orders." 2021 WL 4824129, at *2. The district court denied the motion, D. Ct. Doc. 130 (Mar. 29, 2021), and the court of appeals affirmed, 2021 WL 4824129 (Oct. 18, 2021). The court of appeals has stayed the order of return pending this Court's review. 21-876 C.A. Doc. 73 (Apr. 21, 2021).

SUMMARY OF ARGUMENT

Neither the Hague Convention on the Civil Aspects of International Child Abduction nor its implementing legislation requires a court to consider possible ameliorative measures upon finding under Article 13(b) that there is a grave risk that returning a child to his country of habitual residence would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Rather, the Convention and ICARA leave consideration of possible ameliorative measures to a court's discretion.

A. The court of appeals erred in construing the Convention to require a court to consider possible ameliorative measures in every case involving a finding of grave risk. Nothing in the Convention or its implementing legislation supports such a categorical requirement. Rather, Article 13(b) of the Convention provides simply that a court "is not bound to order the return of the child" upon a finding of grave risk, without referring to ameliorative measures, let alone mandating their consideration. Art. 13. Nor does ICARA impose any such mandate.

The court of appeals' categorical rule is also at odds with the State Department's longstanding view of the Convention. The Department has long taken the position that consideration of ameliorative measures may be

appropriate in individual cases but is not required across the board. Indeed, the Department has stated that ameliorative measures are not necessary to the Convention's general operation and has emphasized that such measures should be limited in scope to avoid intruding on custody matters reserved to the country of habitual residence. The Department's views find support in reports published by the Hague Conference on Private International Law.

B. Rather than requiring courts to consider ameliorative measures in every case involving a finding of grave risk, the Convention and ICARA leave the consideration of such measures to a court's discretion. A court's exercise of that discretion should be guided by principles drawn from the Convention. Those principles include not only that wrongfully removed or retained children are generally to be returned to their country of habitual residence, but also that children should be protected against grave risk, that return petitions should be adjudicated expeditiously, and that such adjudications should not venture into the merits of the underlying custody dispute. See, *e.g.*, Convention arts. 11, 13, 19.

Those principles place limits on a court's ordering of ameliorative measures. Because the Convention requires courts to "act expeditiously in proceedings for the return of children," art. 11, courts should not permit the consideration of ameliorative measures to unduly prolong the proceedings. And because the Convention prohibits courts from resolving any underlying custody dispute in adjudicating a return petition, arts. 16, 19, ameliorative measures should be limited in time and scope to facilitating the child's prompt return. Thus, the duration of such ameliorative measures should not extend

beyond the point at which the court of the country of habitual residence can exercise full control over the underlying custody dispute after the child's return by, for instance, ordering further protective measures. Nor should the scope of ameliorative measures encroach on substantive issues relating to custody properly left to the court of the country of habitual residence.

C. Having found that returning B.A.S. to Italy would expose him to a grave risk of harm, the lower courts proceeded on the view that they were rigidly required to exhaust all possible measures to try to find a path to return. That view was mistaken. Upon a finding of grave risk, courts have the discretion, as explained above, to decide whether to order or deny return, without invariably considering ameliorative measures in making that decision. The judgment below should be vacated and the case remanded to allow the lower courts to exercise that discretion in the first instance in light of all relevant circumstances, including the order issued by the Italian court.

ARGUMENT

NEITHER THE CONVENTION NOR ICARA REQUIRES CONSIDERATION OF AMELIORATIVE MEASURES UPON A FINDING THAT RETURN POSES A GRAVE RISK OF HARM

Under Article 13(b) of the Convention, a court "is not bound to order" a child's return to his country of habitual residence if there is a "grave risk" that the return would "expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Art. 13(b). The question in this case is whether, upon finding such a grave risk, a court must invariably consider measures that might ameliorate that risk before deciding whether the child should be returned.

The answer is no. Neither the Convention nor its implementing legislation requires consideration of ameliorative measures in cases involving a finding of grave risk. Rather, the Convention and ICARA leave to a court's discretion whether to consider ameliorative measures, and the scope of such an inquiry, based on the circumstances of each case. That discretion should be guided by principles drawn from the Convention, not by an inflexible rule that lacks textual support, conflicts with the State Department's longstanding views, and could distort courts' ability to decide cases in conformity with the Convention's manifold purposes.

A. The Court Of Appeals Erred In Requiring Courts To Consider Ameliorative Measures In Every Case Involving A Finding Of Grave Risk

The district court followed Second Circuit precedent holding that a court "must examine the full range of options that might make possible the [child's] safe return" before deciding whether the child should be returned. Pet. App. 81a (quoting *Blondin* v. *Dubois*, 238 F.3d 153, 163 n.11 (2d Cir. 2001) (*Blondin II*)); see *id.* at 7a (defending that "rule" on the ground that it "'honors the important treaty commitment to allow custodial determinations to be made—if at all possible—by the court of the child's home country'") (brackets and citation omitted). No such requirement, however, appears in the Convention or ICARA. Nor has the State Department understood the Convention to impose such a rigid requirement. The court of appeals therefore erred in requiring courts to consider a full range of possible ameliorative measures in every case involving a finding of grave risk.

1. The text of the Convention and ICARA does not require courts to consider ameliorative measures

a. "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Abbott* v. *Abbott*, 560 U.S. 1, 10 (2010) (citation omitted). When "a child has been wrongfully removed or retained," the Convention generally requires a court to "order the return of the child" to his country of habitual residence. Art. 12. Article 13(b) of the Convention, however, provides that a court "is not bound to order the return of the child" if the party opposing return "establishes that * * * [t]here is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Art. 13(b). The Convention does not specifically mention consideration of ameliorative measures if the court finds a grave risk. Rather, by providing that a court "is not bound" to order return upon such a finding, Article 13(b) simply lifts the Convention's return requirement, leaving a court with discretion to determine whether to grant or deny return. Art. 13.

The text of the very next sentence of Article 13 reinforces that conclusion. It states that "[t]he judicial or administrative authority *may also 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 [the child's] views." Convention art. 13 (emphasis added). The word "also" indicates that a finding of grave risk is likewise a ground on which a court "may * * * refuse" to order the child's return. *Ibid.*; see *Mount Lemmon Fire Dist.* v. *Guido*, 139 S. Ct. 22, 25 (2018) (explaining that "'also'" means "'in addition; besides' and 'likewise; too'") (citation omitted). And by providing that a court

may refuse to order the child's return upon a finding of grave risk, Article 13(b) simply means that return is no longer mandatory, leaving a court free to exercise its judgment to grant or deny return based on the circumstances of the particular case.

Notably, although the last sentence of Article 13 provides some guidance regarding the Article 13 inquiry, it does not specify that courts must take possible ameliorative measures into account. Rather, it states only that, "[i]n considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." Convention art. 13. Thus, while courts are obliged to consider information such as "home studies and other social background reports" if the relevant authorities choose to provide them, 51 Fed. Reg. at 10,513, in order to facilitate "a balanced record upon which to determine whether the child is to be returned," *id.* at 10,510, the Convention does not provide that courts invariably must "'develop a thorough record' on potential ameliorative measures" and take into account "'the [full] range of [such] remedies,'" as the court of appeals required. Pet. App. 35a-36a (quoting *Blondin* v. *Dubois*, 189 F.3d 240, 249 (2d Cir. 1999)) (first set of brackets in original).

To be sure, Article 13(b) permits a court, in the exercise of its discretion, to order the return of a child despite a grave-risk finding where the court determines that remedy is appropriate. In deciding whether to order return, the court may take into account existing or potential ameliorative measures that might reduce the grave risk of harm. See pp. 24-31, *infra*. But there is no

requirement that a court must always consider such measures, much less itself investigate the full range of possible measures. "[T]he Convention does not pursue" its goal of deterring international child abduction through its return remedy "at any cost," and the court of appeals' categorical rule effectively "rewrite[s] the treaty" as if it did. *Lozano* v. *Alvarez*, 572 U.S. 1, 16-17 (2014); see *Monasky* v. *Taglieri*, 140 S. Ct. 719, 728 (2020) (rejecting atextual imposition of "categorical requirements for establishing a child's habitual residence").

b. Nor do the statutory provisions that Congress enacted to implement the Convention mandate consideration of ameliorative measures upon a finding of grave risk. Consistent with the Convention, ICARA outlines the procedures by which a party can seek the return of a child and a party can oppose that request. 22 U.S.C. 9003. A party seeking return must prove 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). An opposing party may raise one of the Convention's specified exceptions in an attempt to prevent the return, and such a party must prove the grave-risk exception by clear and convincing evidence. 22 U.S.C. 9003(e)(2)(A).

ICARA, like the Convention, does not mention consideration of ameliorative measures or otherwise impose specific requirements for a court to follow in deciding whether to deny or grant return after finding that the respondent has established a grave risk under Article 13(b). Rather, ICARA, again like the Convention, leaves such matters to the court's discretion, guided by the Convention's terms and purposes, which include facilitating the return of wrongfully removed or retained

children, protecting children against grave risk, providing for custody to be resolved by the authorities in the child's country of habitual residence, and proceeding expeditiously.

2. A discretionary approach to ameliorative measures accords with the longstanding view of the State Department, which finds support in international understandings of the Convention

a. Recognizing courts' discretion regarding ameliorative measures is also consistent with the State Department's interpretation of the Convention. See, *e.g.*, *Abbott*, 560 U.S. at 15 (Executive Branch's interpretation of the Convention is entitled to "great weight") (citation omitted). The Department has long held the view that consideration of ameliorative measures can be appropriate under the Convention, but it has never treated such consideration as a requirement under Article 13(b) across the board.

The State Department's authoritative legal analysis of the Convention, issued soon after the Convention's adoption, contemplates that denial of a return under Article 13(b) may be proper even absent consideration of ameliorative measures. See 51 Fed. Reg. at 10,510. The Department explained that "a court in its discretion need not order a child returned" where the requisite grave risk exists or return would "otherwise place the child in an intolerable situation." *Ibid.* "An example of an 'intolerable situation,'" the Department observed, "is one in which a custodial parent sexually abuses the child." *Ibid.* "If the other parent removes or retains the child to safeguard [the child] against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition." *Ibid.* The Department's analysis makes

no mention of a requirement to first consider possible ameliorative measures in such circumstances.

The State Department's view on ameliorative measures under the Convention as a general matter was further described in a 1995 letter to an official of the United Kingdom. U.S. Cert. Amicus Br. App. 1a-20a (Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, U.S. Dep't of State, to Michael Nicholls, Lord Chancellor's Dep't, Child Abduction Unit, United Kingdom (Aug. 10, 1995)). The Brown Letter explained that, "[w]hile undertakings are not necessary to operation of the Convention, there are good arguments that their use can be consistent with the Convention." *Id.* at 2a. Thus, the letter explained that undertakings can "facilitate Article 12's objective of ensuring the return of abducted children 'forthwith,'" *ibid.*, and, as relevant here, that they can minimize the use of non-return orders under Article 13(b), *id.* at 2a, 15a-16a.

The Brown Letter also emphasized, however, that "undertakings should be limited in scope and further the Convention's goal of ensuring the prompt return of the child to the jurisdiction of habitual residence," and that "[u]ndertakings that do more than this would appear questionable under the Convention, particularly when they address in great detail issues of custody, visitation, and maintenance." U.S. Cert. Amicus Br. App. 2a (noting that Articles 16 and 19 of the Convention contemplate that "substantive issues relating to custody" are to be resolved in the courts of the child's habitual residence). Thus, the Brown Letter criticized undertakings entered by a British court, to be followed in the United States after a child was returned, that "went well beyond what was necessary to ensure the prompt return of the child" by directing that "the left-behind

father would provide the mother and their three children a motor vehicle," school expenses, weekly maintenance payments of $200, and medical and dental insurance. *Id.* at 3a-4a. The State Department elaborated that, in its judgment, those undertakings were "too broad," *id.* at 6a, failing to give "appropriate respect" to the Convention's premise that return proceedings should "not attempt to address the underlying [custody] dispute" that should have been reserved to U.S. courts, *id.* at 4a. The analysis attached to the Brown Letter further stated that "[i]f the requested state court is presented with unequivocal evidence that return would cause the child a 'grave risk' of physical or psychological harm, * * * then it would seem less appropriate for the court to enter extensive undertakings than to deny the return request." *Id.* at 16a.

The State Department additionally has addressed reliance on ameliorative measures in annual reports regarding the Convention. In those reports, the State Department stated that it "supports the limited use of undertakings where they: (1) are appropriate in scope; (2) facilitate the Article 12 objective of return of the child 'forthwith;' (3) help to minimize the issuance of non-return orders based on Article 13; and (4) respect the jurisdictional nature of the Convention by not encroaching on substantive issues relating to custody and maintenance properly left to the court of the habitual residence." U.S. Dep't of State, *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction* 17 (Apr. 2007) (*2007 Annual Report*).[1] But the Department also cautioned against

[1] The State Department's annual reports from 2009 and 2010 reiterated those criteria. These reports are available at https://travel.state.

"routine[]" incorporation of ameliorative measures into return orders, instead "urg[ing] its Convention partners not to include undertakings in their return orders and to consider instead taking advantage of the Hague Judicial Network to resolve concerns" that U.S. authorities would "not adequately protect the child or returning parent." U.S. Dep't of State, *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction* 36-37 (Apr. 2010) (*2010 Annual Report*).

Likewise, in a 2006 newsletter for judges published by the Hague Permanent Bureau, a State Department official stated that, while consideration of ameliorative measures is "not necessary to the proper operation of the Convention," the State Department supported the "limited use" of ameliorative measures where tailored to support the prompt return of an abducted child. Kathleen Ruckman, *Undertakings As Convention Practice: The United States Perspective*, The Judges' Newsletter (Hague Conf. on Private Int'l Law, London, England) Vol. XI, at 46 (2006) (*Judges' Newsletter*), https://assets.hcch.net/docs/b3f445a5-81a8-4ee8-bc42-720c6f31d031.pdf. The article indicated that courts have discretion whether to consider such measures when adjudicating a return petition, and cautioned against undertakings that are "excessive," "cause significant delays in return of children," or "usurp the function of the court of the habitual residence," noting that such conditions would contravene "Convention purposes." *Id.* at 46-48.[2]

---

gov/content/travel/en/International-Parental-Child-Abduction/for-providers/legal-reports-and-data/reported-cases.html.

[2] That article and some of the State Department's annual reports cast doubt on the propriety of certain ameliorative measures, such as payment of travel fees and a requirement that the left-behind

b. The State Department's views find support in international understandings of the Convention. A Special Commission on the Practical Operation of the Convention attended by 62 state parties to the Convention reported in 2006 that "[c]ourts in many jurisdictions" use ameliorative measures under a variety of labels, but did not articulate any requirement that consideration of such measures was necessary across the board. Hague Conf. on Private Int'l Law, *Conclusions and Recommendations of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980*, at 11 (Nov. 2006), https://assets.hcch.net/upload/concl28sc5_e.pdf. To the contrary, the report cautioned that such measures must be "limited in scope and duration, addressing short-term issues," in order to be "in keeping with the spirit of the" Convention." *Ibid.*

In addition, a guide prepared by the Hague Conference on Private International Law, which was developed specifically to "promote, at the global level, the proper and consistent application of the grave risk exception," contemplates the exercise of discretion under Article 13(b) with respect to ameliorative measures. Hague Conf. on Private Int'l Law, *1980 Child Abduction Convention: Guide to Good Practice: Part VI, Article*

---

parent seek dismissal of criminal charges and temporary ex parte custody orders. See, *e.g.*, *Judges' Newsletter* 47; *2010 Annual Report* 37. The Department now believes that courts in their discretion may order such measures in appropriate cases. But although ameliorative measures can be appropriate to address a grave-risk finding, the Department's longstanding view is that consideration of such measures is discretionary and that such measures imposed by the court in the requested state must not intrude upon the custody determination reserved to the country of habitual residence. See *Judges' Newsletter* 46-49; *2010 Annual Report* 36-37.

13(1)(b) ¶ 3 (2020) (*Guide*), https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf. The *Guide* states that "[t]he examination of the grave risk exception should then also include, *if considered necessary and appropriate*, consideration of the availability of adequate and effective measures of protection in the State of habitual residence." *Guide* ¶ 36 (emphasis added). Although the *Guide* lists evaluation of ameliorative measures as a necessary step in its section describing the grave-risk exception "in practice," *Guide* ¶¶ 41, 61, the *Guide* states, as just noted, that the Convention contemplates such consideration as courts may deem "necessary and appropriate," *Guide* ¶ 36.

c. Many contracting states that restrict a court's discretion to deny return upon a finding of grave risk ground that restriction in a source of law outside the Convention. European Union member states (other than Denmark) follow a regulation known as Brussels IIa, which provides that "[a] court cannot refuse to return a child" to another member state "on the basis of Article 13b" of the Convention "if it is established that adequate arrangements have been made to secure the protection of the child after his or her return." Council Regulation 2201/2003, art. 11(4), 2003 O.J. (L 338) 6 (EU) (Brussels IIa). That regulation—which applies only when both the country of habitual residence and the returning country are European Union member states—does not suggest that the Convention itself imposes such a restriction. To the contrary, the regulation expressly provides that, "[i]n relations between Member States," the regulation "shall take precedence over" the Convention on "matters governed by" the regulation. *Id.* art. 60(e). And Article 34 of the Convention makes clear that contracting states may enter into "international instrument[s]"

like Brussels IIa, which impose greater restrictions on a court's discretion to deny return than the Convention itself. Art. 34; see Convention arts. 18, 29 (likewise making clear that the Convention does not limit a court's power to order return under other laws).

Moreover, Brussels IIa acts in concert with another Hague convention, which is in force in European Union member states, that generally enables measures ordered by one member state to be enforced in another member state after a child's return. See Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children arts. 23, 28, *done* Oct. 19, 1996, 2204 U.N.T.S. 95, 104-105 (entered into force Jan. 1, 2002); *Guide* ¶ 48. Accordingly, the provisions of Brussels IIa are less likely to engender time-consuming inquiries that delay proceedings or lead to unwelcome intrusions into the responsibilities of the state of habitual residence.

d. In his brief in opposition, respondent argued that the United Kingdom Supreme Court has "mandated consideration of protective measures before denying return petitions." Br. in Opp. 25; see *In re E*, [2011] UKSC 27, ¶ 36 (H.L.) (U.K.). But the Convention does not preclude contracting states from implementing Article 13(b) in different ways. As explained above, Article 13(b) simply gives courts discretion to deny return upon a finding of grave risk. See pp. 14-16, *supra*. It does not specify how courts should exercise that discretion. Thus, just as the Convention leaves contracting states free to require a party opposing return to demonstrate grave risk by clear and convincing evidence (as the United States does, see 22 U.S.C. 9003(e)(2)(A)) or by a mere preponderance (as the United Kingdom does, see

In re E, [2011] UKSC 27, ¶ 39), so too the Convention leaves contracting states free to require, or to not require, consideration of ameliorative measures. See, *e.g.*, *Arthur & Sec'y*, [2017] FamCAFC 111 ¶ 69(1)(c) (Austl.) (implementing Article 13(b) through a regulation providing that "[i]f a court is satisfied that it is desirable to do so, the court may" include in a return order "a condition that the court considers to be appropriate to give effect to the Convention").

In the United States, Congress has not chosen to require consideration of ameliorative measures; ICARA, the implementing legislation that Congress enacted, imposes no such requirement. See pp. 16-17, *supra*. Instead, ICARA, like the Convention itself, leaves the consideration of ameliorative measures to a court's discretion. This Court should respect Congress's enactment and reject the court of appeals' contrary rule, which would impose a mandatory-consideration requirement that appears in neither the Convention nor ICARA.

B. A Court's Discretion To Consider Ameliorative Measures Should Be Guided By The Principles Of The Convention, Not By Inflexible Rules

While the Convention and ICARA leave to a court's discretion whether to consider ameliorative measures upon a finding of grave risk, that discretion is not without limits. Under Article 13(b), when a court makes such a finding, the relevant question becomes whether there are countervailing factors that would nevertheless render return appropriate. Although that determination is committed to the court's discretion, "[d]iscretion is not whim." *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 139 (2005). A "motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Ibid.*

(quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d) (Marshall, C.J.)) (brackets omitted).

Here, those principles are found in "'the large objectives'" of the Convention, "which embrace certain 'equitable considerations.'" *Martin*, 546 U.S. at 139-140 (citation omitted). Those large objectives include not only that wrongfully removed or retained children are generally to be returned to their country of habitual residence, but also that children should be protected against grave risk, that return petitions should be adjudicated expeditiously, and that such adjudications should not venture into the merits of the underlying custody dispute, which are generally reserved to the child's country of habitual residence. See, *e.g.*, Convention arts. 11, 13, 19. Those principles should guide both the procedural and the substantive aspects of a court's exercise of discretion in conducting the "intensely fact-bound" inquiry into whether a child's return is appropriate in the face of a grave risk of harm. *Simcox* v. *Simcox*, 511 F.3d 594, 608 (6th Cir. 2007); cf. *Gall* v. *United States*, 552 U.S. 38, 51 (2007) (distinguishing between procedural and substantive aspects of a court's exercise of discretion in sentencing).

1. Consider first the *procedural* aspects of a court's discretion. When the party who opposes the child's return establishes by clear and convincing evidence that there is a grave risk that return would expose the child to physical or psychological harm, 22 U.S.C. 9003(e)(2)(A), the court is "not bound to order the return of the child," Convention art. 13, but instead has the discretion to decide whether to order the child returned, as well as the discretion to decide whether to consider possible ameliorative measures. At that stage, the party opposing the child's return has already carried that party's statutory

burden, and the party seeking return should then generally be expected to demonstrate the efficacy of ameliorative measures, particularly when that party is more likely to have relevant information about whether a particular measure would work. See *Simcox*, 511 F.3d at 606 (stating that "the petitioner proffering the undertaking bears the burden of proof"); *Acosta* v. *Acosta*, 725 F.3d 868, 877 (8th Cir. 2013) (same); cf. Pet. App. 14a (noting that Second Circuit precedent is "not clear" as to which party bears the "burden to establish the 'appropriateness and efficacy of any proposed undertakings'") (citation omitted).

Neither the Convention nor ICARA, however, limits a court to only those ameliorative measures proposed by the parties. In particular cases, a court may find it appropriate to identify certain ameliorative measures and to ask whether the parties have considered them. Or a court may find it appropriate to facilitate certain ameliorative measures by, for instance, engaging in direct communication with foreign judges. Hague Conf. on Private Int'l Law, *Direct Judicial Communications* 7 (2013), https://assets.hcch.net/docs/62d073ca-eda0-494e-af66-2ddd368b7379.pdf. Such communication may "result in considerable time savings and better use of available resources," *ibid.*, as when it provides a court with information about obtaining a protective order in the country of habitual residence. A court may then use that information in instructing the parties to seek such an order, which could "be put in place in advance of the return of the child" and last until the court overseeing the underlying custody dispute in the country of habitual residence "is able to determine what, if any, protective measures are appropriate for the child." *Guide* ¶ 44.

Contrary to the court of appeals' inflexible rule, the appropriate level of consideration of ameliorative measures may vary from case to case. In some cases, a particular ameliorative measure may be so obvious or easily achieved that a court identifies and facilitates it sua sponte. See, *e.g.*, Pet. Br. 38 (providing example of giving a child "preventative medications" where the grave risk arises from "an outbreak of a contagious disease" in the country of habitual residence). In other cases, more extensive consideration may be appropriate to determine whether a particular measure is "available and readily accessible," *Guide* ¶ 44, or has been (or could promptly be) ordered by a court in the country of habitual residence. And in still other cases, a court may find it appropriate to dispense with any consideration of ameliorative measures altogether. For example, there may be cases in which a child faces a risk so "unequivocal" that "it would seem less appropriate for the court to enter extensive undertakings than to deny the return request." U.S. Cert. Amicus Br. App. 16a; see, *e.g.*, *Simcox*, 511 F.3d at 608 (providing example of a "serially abusive petitioner"). There may be cases in which a child faces a harm so "'intolerable'" that a court may simply "deny the petition." 51 Fed. Reg. at 10,510; see, *e.g.*, *ibid.* (providing example of a "custodial parent" who "sexually abuses the child"); *Simcox*, 511 F.3d at 608 (providing example of "death threats"). Or there may be cases in which potential ameliorative measures may have so "little chance of working" that considering them would be unnecessary and would only cause delay. *Walsh* v. *Walsh*, 221 F.3d 204, 221 (1st Cir. 2000); see, *e.g.*, *ibid.* (providing example of a left-behind parent with a "history of violating orders issued by any court").

In all events, courts should not allow the consideration of ameliorative measures to unduly prolong the proceedings. The Convention requires courts to "act expeditiously in proceedings for the return of children." Art. 11. And it contains provisions to simplify proceedings consistent with that mandate. See Convention art. 30 (making documents submitted "in accordance with" the Convention "admissible in the courts" of contracting states, thereby avoiding potentially lengthy authentication processes); Convention art. 22 (precluding a security or bond requirement); Convention art. 23 (limiting formality requirements). The need for expedition exists regardless of the outcome of the proceedings, because even when return is ultimately denied, "[e]xpedition will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child." *Chafin* v. *Chafin*, 568 U.S. 165, 180 (2013).

Since ratifying the Convention, Congress has underscored the importance of resolving return-petition proceedings quickly. In the Sean and David Goldman International Child Abduction Prevention and Return Act of 2014, Congress made clear that "the United States should set a strong example for other Convention countries in the * * * prompt resolution of cases involving children abducted abroad and brought to the United States." Pub. L. No. 113-150, § 2(b), 128 Stat. 1809 (expressing the sense of Congress). Congress also created various mechanisms to address other countries' failure to resolve petitions to return U.S. children within 12 months. See 22 U.S.C. 9121(b)(1), 9122(d) and (e); see also § 2(a)(1), 128 Stat. 1807 (noting that the legislation was precipitated by a child's "abduct[ion] from the United States in 2004 and separat[ion] from his father

* * * who spent nearly 6 years battling for the return of his son").

Thus, although courts have discretion to consider ameliorative measures, they should avoid exercising that discretion in a way that undermines the expeditious handling of proceedings. If, as the court of appeals held, courts invariably "must examine the full range of options that might make possible the safe return of a child," Pet. App. 7a (quoting *Blondin II*, 238 F.3d at 163 n.11), Article 13(b) cases could routinely take an undue amount of time to resolve. In this case, for example, after the court of appeals found the initial protective measures inadequate, the district court took over nine months to conduct the type of inquiry the court of appeals directed, pursuing an "extensive examination" that included "multiple conferences and * * * status reports and briefs on the status of the case in Italy." *Id.* at 12a.

2. Consider next the *substance* of a court's exercise of discretion upon a finding of grave harm. Although a court "retain[s] the discretion to order the child returned," 51 Fed. Reg. at 10,509, the exercise of that discretion cannot be arbitrary; it calls for the application of sound judgment. Cf. *Monasky*, 140 S. Ct. at 727 (explaining that because determining a child's habitual residence under the Convention is "a fact-driven inquiry, courts must be 'sensitive to the unique circumstances of the case and informed by common sense' ") (citation omitted). A court should focus on the question whether, given the totality of the circumstances before it, and in light of all the Convention's purposes, return is nonetheless appropriate. In answering that question, the court may, in its discretion, consider possible ameliorative measures, as described above.

In determining the content and scope of ameliorative measures, a court should ensure not only that they are effective in ameliorating the grave risk to the child, but also that they do not usurp the role of the court that will oversee the underlying custody determination. See *Judges' Newsletter* 46 (explaining that "excessive undertakings may quickly cross the line and work against Convention purposes"); *2010 Annual Report* 37 (warning against "undertakings in which the foreign court effectively usurps the role of the court of the country of habitual residence by * * * setting custodial conditions"). "It is the Convention's core premise that 'the interests of children . . . in matters relating to their custody' are best served when custody decisions are made in the child's country of 'habitual residence.'" *Monasky*, 140 S. Ct. at 723 (quoting Convention Pmbl.). The Convention and ICARA thus prohibit courts from resolving any underlying custody dispute in adjudicating a return petition. See Convention arts. 16, 19; 22 U.S.C. 9001(b)(4) (empowering courts "to determine only rights under the Convention and not the merits of any underlying child custody claims").

To avoid crossing into the underlying custody dispute, a court should ensure that any ameliorative measures that it imposes, or that it regards as necessary for the court in the country of habitual residence to adopt, are limited in time and scope. With respect to time, such measures may be obtained in advance of the child's return, but they should not extend in duration beyond when the country of habitual residence can exercise full control over the custody dispute and order any protective measures it concludes are necessary. *Guide* ¶ 44. And with respect to scope, ameliorative measures should not "encroach[] on substantive issues relating to

custody * * * properly left to the court of the habitual residence." *2007 Annual Report* 17.

Whether particular measures ordered or contemplated by the U.S. court are appropriately limited in time and scope will depend on the circumstances of each case.[3] In this respect, too, the court of appeals' inflexible rule would threaten the sound exercise of judicial discretion. By directing courts to evaluate all possible ameliorative measures after every grave-risk finding without any time- or scope-based limit, the rule would risk embroiling courts in issues more properly left to other countries' custody proceedings.

3. In short, in deciding whether to order a child's return upon a finding of grave risk, a court should exercise sound judgment. In its discretion, the court may consider the possibility of ameliorative measures. Such measures are most appropriate where they ameliorate the grave risk to the child, are capable of being secured expeditiously, and are limited in time and scope to protect the child until the country of habitual residence has a full opportunity to exercise responsibility over custodial and related protective matters. Where such measures do not serve the objectives of the Convention, however, it may be "less appropriate for the court to enter extensive undertakings than to deny the return request." U.S. Cert. Amicus Br. App. 16a.

---

[3] To the extent petitioner suggests (Br. 36-42) that the domestic-violence context warrants a presumption that ameliorative measures will be ineffective or inappropriate, that suggestion is incorrect. As in any case involving grave risk under Article 13(b), matters involving domestic violence can require an "intensely fact-bound" inquiry, *Simcox*, 511 F.3d at 608, in which courts should exercise their discretion in light of the Convention's purposes.

C. The Case Should Be Remanded To Allow The Lower Courts To Properly Exercise Their Discretion In The First Instance

The courts below proceeded on the view that the Convention requires "custodial determinations to be made—if at all possible—by the court of the child's home country," and that a U.S. court therefore "must examine the full range of options that might make possible the [child's] safe return" "before [it] may deny repatriation on the ground that a grave risk of harm exists under Article 13(b)." Pet. App. 81a (citations omitted); see *id.* at 7a, 14a, 35a-36a.

That view was mistaken. When there is a finding of grave risk, the Convention does not rigidly require courts to exhaust all possible measures to try to find a path to return. Rather, upon such a finding, courts have the discretion, as explained above, to decide whether to order or deny return, without invariably considering ameliorative measures in making that decision. See pp. 24-31, *supra*.

The lower courts did not engage in that discretionary inquiry, and it is not clear what sort of inquiry the district court would have pursued in the absence of the court of appeals' mandatory-consideration rule. In these circumstances, it would be appropriate for the Court to vacate the judgment below and remand the case so as to allow the lower courts to conduct that inquiry under the correct legal standard. Of course, circumstances have changed since the district court first found that returning B.A.S. to Italy would expose him to a grave risk of harm. Pet. App. 80a. Since that initial finding, the Italian court overseeing the parties' underlying custody dispute has issued a protective order that would last for one year after B.A.S.'s return and adopted other measures

addressing the parties' circumstances. See p. 8, *supra*. On remand, the lower courts would have the opportunity to consider those measures—and any other relevant circumstances—in exercising the discretion that the Convention and ICARA leave to them.

It is true that a remand would further prolong the proceedings in this case. And in a prior decision concerning the Convention, this Court departed from its "[o]rdinar[y]" course of giving "the lower courts an opportunity to apply" the correct legal standard "in the first instance," noting that "[a] remand would consume time when swift resolution is the Convention's objective." *Monasky*, 140 S. Ct. at 731. In *Monasky*, the issue on which this Court declined to disturb the decision below was whether Italy was the child's country of habitual residence. See *ibid.* That is a non-discretionary determination—*i.e.*, a mixed question of law and fact—and the Court found "[n]othing in the record" to suggest that the district court "would appraise the facts differently on remand." *Ibid.*; see *id.* at 730. Here, in contrast, whether to deny or to grant B.A.S.'s return is a matter of discretionary judgment vested in the first instance in the district court, and this Court typically does not assume that a court would exercise its discretion in the same way after this Court has clarified the applicable principles.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
FREDERICK LIU
MELISSA N. PATTERSON
Assistants to the Solicitor General
SHARON SWINGLE
LAURA E. MYRON
Attorneys

RICHARD C. VISEK
Acting Legal Adviser
Department of State

JANUARY 2022

APPENDIX A

CONVENTION[1] ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

---

[1] Came into force on 1 December 1983, i.e., the first day of the third month following the date of deposit with the Government of the Netherlands of the third instrument of ratification, acceptance, approval or accession, in accordance with article 43:

State	*Date of deposit of the instrument of ratification or approval* (AA)
Canada*	2 June 1983
(With a declaration under article 40 that the Convention shall be extended to the Provinces of Ontario, New Brunswick, British Columbia and Manitoba.)	
France*	16 September 1982 *AA*
(With a declaration under article 39 that the Convention shall be applicable to all the territories of the French Republic.)	
Portugal*	29 September 1983

Subsequently, the Convention came into force for the following State on the first day of the third month after the date of deposit with the Government of the Netherlands of its instrument of ratification, in accordance with article 43(1):

State	*Date of deposit of the instrument of ratification*
Switzerland*................................	11 October 1983
(With effect from 1 January 1984.)	

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions:

CHAPTER I. SCOPE OF THE CONVENTION

Article 1. The objects of the present Convention are:

a To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2. Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

---

* See p. 110 and 111 of this volume for the designations of central authorities and the texts of the declarations and reservations made upon ratification or approval.

Article 3. The removal or the retention of a child is to be considered wrongful where:

a It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a* above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4. The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5. For the purposes of this Convention:

a "Rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b "Rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II. CENTRAL AUTHORITIES

Article 6. A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7. Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures:

a To discover the whereabouts of a child who has been wrongfully removed or retained;

b To prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c To secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d To exchange, where desirable, information relating to the social background of the child;

e To provide information of a general character as to the law of their State in connection with the application of the Convention;

f To initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g Where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h To provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i To keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III. RETURN OF CHILDREN

Article 8. Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain:

a Information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b Where available, the date of birth of the child;

c The grounds on which the applicant's claim for return of the child is based;

d All available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by

e An authenticated copy of any relevant decision or agreement;

f A certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g Any other relevant document.

Article 9. If the Central Authority which receives an application referred to in article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10. The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11. The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12. Where a child has been wrongfully removed or retained in terms of article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13. Notwithstanding the provisions of the preceding article, the judicial or administrative author-

ity of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

a The person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b There is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also 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.

In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14. In ascertaining whether there has been a wrongful removal or retention within the meaning of article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15. The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant 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, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16. After receiving notice of a wrongful removal or retention of a child in the sense of article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17. 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.

Article 18. The provisions of this chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19. A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20. The return of the child under the provisions of article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV. RIGHTS OF ACCESS

Article 21. An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V. GENERAL PROVISIONS

Article 22. No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23. No legalization or similar formality may be required in the context of this Convention.

Article 24. Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25. Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26. Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27. When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28. A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29. This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the

meaning of article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30. Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31. In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units:

a Any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b Any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32. In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33. A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34. This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors,[1] as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35. This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36. Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI. FINAL CLAUSES

Article 37. The Convention shall be open for signature by the States which were Members of The Hague Conference on Private International Law at the time of its Fourteenth Session.

---

[1] United Nations, *Treaty Series,* vol. 658, p. 143.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38. Any other State may accede to the Convention. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39. Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take

effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41. Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42. Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of article 39 or 40, make one or both of the reservations provided for in article 24 and article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43. The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in articles 37 and 38.

Thereafter the Convention shall enter into force:

1 For each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 For any territory or territorial unit to which the Convention has been extended in conformity with article 39 or 40, on the first day of the third calendar month after the notification referred to in that article.

Article 44. The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it. If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at

least six months before the expiry of the five-year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45. The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with article 38, of the following:

1 The signatures and ratifications, acceptances and approvals referred to in article 37;

2 The accessions referred to in article 38;

3 The date on which the Convention enters into force in accordance with article 43;

4 The extensions referred to in article 39;

5 The declarations referred to in articles 38 and 40;

6 The reservations referred to in article 24 and article 26, third paragraph, and the withdrawals referred to in article 42;

7 The denunciations referred to in article 44.

APPENDIX B

1. 22 U.S.C. 9001 provides:

Findings and declarations

(a) Findings

The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their wellbeing.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes—

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

2. 22 U.S.C. 9002 provides:

Definitions

For the purposes of this chapter—

(1) the term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 653 of title 42;

(4) the term "petitioner" means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 9006(a) of this title.

3. 22 U.S.C. 9003 provides:

Judicial remedies

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case

The court in which an action is brought under subsection (b) shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence—

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter—

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United

States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

4. 22 U.S.C. 9004 provides:

Provisional remedies

(a) Authority of courts

In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 9003(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority

No court exercising jurisdiction of an action brought under section 9003(b) of this title may, under subsection (a) of this section, order a child removed from a person

having physical control of the child unless the applicable requirements of State law are satisfied.

5. 22 U.S.C. 9005 provides:

Admissibility of documents

With respect to any application to the United States Central Authority, or any petition to a court under section 9003 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

6. 22 U.S.C. 9006 provides:

United States Central Authority

(a) Designation

The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) Functions

The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this chapter.

(c) Regulatory authority

The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this chapter.

(d) Obtaining information from Parent Locator Service

The United States Central Authority may, to the extent authorized by the Social Security Act [42 U.S.C. 301 et seq.], obtain information from the Parent Locator Service.

(e) Grant authority

The United States Central Authority is authorized to make grants to, or enter into contracts or agreements with, any individual, corporation, other Federal, State, or local agency, or private entity or organization in the United States for purposes of accomplishing its responsibilities under the Convention and this chapter.

(f) Limited liability of private entities acting under the direction of the United States Central Authority

(1) Limitation on liability

Except as provided in paragraphs (2) and (3), a private entity or organization that receives a grant from or enters into a contract or agreement with the United States Central Authority under subsection (e) of this section for purposes of assisting the United States Central Authority in carrying out its responsibilities and functions under the Convention and this chapter, including any director, officer, employee, or agent of such entity or organization, shall not be liable in any civil action sounding in tort for damages

directly related to the performance of such responsibilities and functions as defined by the regulations issued under subsection (c) of this section that are in effect on October 1, 2004.

(2) Exception for intentional, reckless, or other misconduct

The limitation on liability under paragraph (1) shall not apply in any action in which the plaintiff proves that the private entity, organization, officer, employee, or agent described in paragraph (1), as the case may be, engaged in intentional misconduct or acted, or failed to act, with actual malice, with reckless disregard to a substantial risk of causing injury without legal justification, or for a purpose unrelated to the performance of responsibilities or functions under this chapter.

(3) Exception for ordinary business activities

The limitation on liability under paragraph (1) shall not apply to any alleged act or omission related to an ordinary business activity, such as an activity involving general administration or operations, the use of motor vehicles, or personnel management.

7. 22 U.S.C. 9007 provides:

Costs and fees

(a) Administrative costs

No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to

the administrative processing of applications submitted under the Convention.

(b) Costs incurred in civil actions

(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 9003 of this title shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 9003 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

8. 22 U.S.C. 9008 provides:

Collection, maintenance, and dissemination of information

(a) In general

In performing its functions under the Convention, the United States Central Authority may, under such

conditions as the Central Authority prescribes by regulation, but subject to subsection (c), receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority—

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this chapter.

(b) Requests for information

Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) Responsibility of government entities

Whenever any department, agency, or instrumentality of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a), the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to

determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which—

(1) would adversely affect the national security interests of the United States or the law enforcement interests of the United States or of any State; or

(2) would be prohibited by section 9 of title 13;

shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a).

(d) Information available from Parent Locator Service

To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) Recordkeeping

The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

9. 22 U.S.C. 9009 provides:

Office of Children's Issues

(a) Director requirements

The Secretary of State shall fill the position of Director of the Office of Children's Issues of the Department of State (in this section referred to as the "Office") with an individual of senior rank who can ensure long-term continuity in the management and policy matters of the Office and has a strong background in consular affairs.

(b) Case officer staffing

Effective April 1, 2000, there shall be assigned to the Office of Children's Issues of the Department of State a sufficient number of case officers to ensure that the average caseload for each officer does not exceed 75.

(c) Embassy contact

The Secretary of State shall designate in each United States diplomatic mission an employee who shall serve as the point of contact for matters relating to international abductions of children by parents. The Director of the Office shall regularly inform the designated employee of children of United States citizens abducted by parents to that country.

(d) Reports to parents

(1) In general

Except as provided in paragraph (2), beginning 6 months after November 29, 1999, and at least once every 6 months thereafter, the Secretary of State shall report to each parent who has requested assistance regarding an abducted child overseas. Each such report shall include information on the current status of the abducted child's case and the efforts by the Department of State to resolve the case.

(2) Exception

The requirement in paragraph (1) shall not apply in a case of an abducted child if—

(A) the case has been closed and the Secretary of State has reported the reason the case was closed to the parent who requested assistance; or

(B) the parent seeking assistance requests that such reports not be provided.

10. 22 U.S.C. 9010 provides:

Interagency coordinating group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority.

The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of title 5 for employees of agencies.

11. 22 U.S.C. 9011 provides:

Authorization of appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this chapter.