No. _____

In the
Supreme Court of the United States

PERSEPHONE JOHNSON SHON,
Petitioner,

v.

BOGDAN RADU,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction generally requires that children wrongfully removed or retained from their country of habitual residence be returned promptly so that custody disputes may be adjudicated in the requesting country. Article 13*b* of the Convention provides an exception to that requirement when there is a grave risk that returning the child would expose the child to physical or psychological harm or place the child in an intolerable situation.

The questions presented are:

1. After finding that a return would expose the child to grave risk, is a district court required to consider ameliorative measures?

2. If a district court considers ameliorative measures, which party has the burden to prove the ameliorative measures?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

STATEMENT OF RELATED PROCEEDINGS

The court of appeals' opinion is reported at 11 F.4th 1080 (9th Cir. 2021). The district court's opinion is unreported.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Persephone Johnson Shon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 11 F.4th 1080 (9th Cir. 2021). Pet. App. 1-18. The district court's opinion is unreported. Pet. App. 19-27.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2021. Pet. App. 1-18. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

Article 13 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention" or "the Convention"), Oct. 25, 1980, 1343 U.N.T.S. 89, and § 9003(e) of the treaty's enabling statute, the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9001 *et seq*., provide as follows:

Convention Article 13

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested States 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 the 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.

ICARA § 9003(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 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.

STATEMENT

The Convention is a text-based treaty. *Abbott v. Abbott*, 560 U.S. 1, 12 (2010). The decision below perpetuates the trend of lower courts writing in additional requirements not permitted by the text of the Convention, and writing out requirements

contained in the plain text of the Convention. The decision below does the former. It writes into the Convention alternative remedies (also known, *inter alia*, as ameliorative measures and undertakings), which ***must*** be considered in every case in which a court finds the Article 13*b* defense has been established, before a court declines to return a child based on the grave risk defense.[1] The non-text-based approach to treaty interpretation taken by the lower courts here is contrary to this Court's precedent in *Abbott v. Abbott*, *Chafin v. Chafin, Lozano v. Montoya Alvarez*, and *Monasky v. Taglieri*, all of which require a text-based interpretation of the Convention.

The United States Government supports review on this very issue in *Golan v. Saada*, No. 1034, which is currently pending on the Court's petition docket, and scheduled for conference on December 3, 2021. In *Golan*, the Second Circuit mandated the consideration of ameliorative measures in analyzing the respondent's article 13*b* grave risk defense. 903 F.3d 533 (2d Cir. 2019); *Saada v. Golan*, 833 F. App'x. 829 (2d Cir. 2020), *petition for cert. filed* (U.S. Jan. 26, 2021) (No. 1034).

The concept of ameliorative measures appears nowhere in the Convention. *See*, Brief of United States as Amicus Curiae at 9, *Golan v. Saada*, No. 1034 (U.S.

[1] The terms ameliorative measures, alternative remedies, and undertakings have developed in American Hague Convention jurisprudence to be used interchangeably, even though originally derived from the concept of undertakings in English family law (not from the text of the Convention). *See, e.g.*, *Simcox v. Simcox*, 511 F.3d 594, 605 (6th Cir. 2007); *Van de Sande v. Van de Sande*, 431 F.3d 567, 571-72 (7th Cir. 2005).

Oct. 27, 2021). Yet several circuits require a consideration of whether ameliorative measures would mitigate the grave risk of harm in returning a child to their habitual residence after a respondent meets their burden to establish grave risk by clear and convincing evidence. *Id*. at 20. The Government's position is that no such requirement exists in the treaty, and therefore an analysis of ameliorative measures is not required. It is not a part of the treaty's text. *Id*. at 8.

The Court should grant review to impose consistent, text-based interpretation and application of the Convention's Article 13*b* grave risk defense.

1. Petitioner Persephone Johnson Shon (the "Mother") and Respondent Bogdan Radu (the "Father") are the parents of two sons. Pet. App. 2. The parties were married in California in 2011. *Id*. The parties' older son, O.S.R., was born in the United States in 2013. *Id*. Their younger son, M.S.R., was born in Germany in 2016. *Id*. The Mother, Father, and both children are United States citizens. Pet. App. 2. None of the family members are German citizens. *Id*. The Father is also a Romanian citizen. *Id*.

Almost immediately after O.S.R.'s birth in 2013, the Father began a pattern of psychological abuse and coercive control of the Mother. Immediately after O.S.R.'s birth, the Father told the Mother it was her job and responsibility to care for O.S.R. without his help. Tr. 8/26/20, 80-81. He refused to care for O.S.R., other than occasionally changing diapers, even during periods in which the Mother was employed outside the home and he was not. *Id*. The Mother was forced to obtain a babysitter for O.S.R. while she worked, even

though the Father was home, because the Father refused to participate in the care of the child. Tr. 8/26/20, 80-84.

In December 2015, the Father obtained employment as a contractor with the United States Department of State in Germany. Pet. App. 2; Tr. 8/26/2020, 82-83. He relocated to Germany in mid-December 2015. *Id*. The Mother and O.S.R. joined the Father in Germany in March 2016. *Id*. Later in 2016 the parties' second son, M.S.R., was born in Germany. Pet. App. 2. The family lived together in a rented apartment in Germany. Pet. App. 2-3.

After the birth of the parties' second son in Germany, the Father's psychological abuse and coercive control of the Mother increased in intensity and frequency. The Father had an explosive temper and frequently yelled at the Mother and children, using "inappropriate, degrading, and/or derogatory language." Pet. App. 41.

One example from June 2016 is an incident involving some soured milk, very shortly after the younger son's birth, when the Father became violently enraged. Pet. App. 3, Tr. 8/26/2020, 89. The Mother had given the older son some milk in a child's cup. *Id*. The parties later realized the milk had soured. *Id*. The Father slammed his hand on the table, yelled at the Mother, threatened her, and claimed she had tried to poison their son. *Id*.

The Father also required the Mother to keep the parties' newborn son completely quiet at night so the Father could sleep. Tr. 8/26/2020, 89-90. The Mother

stayed up all night most nights, attempting to anticipate when the newborn might cry so that she could feed him before he cried and awoke the Father. *Id*. The Mother did so because she felt threatened and scared of the Father. *Id*. The Father constantly threatened the Mother and yelled and screamed at her, calling her a variety of profanities. The Father would say she was not a good mother and blamed her for anything that happened in the family that he did not like. Tr. 8/26/2020, 92. The Mother was "scared all the time." Tr. 8/26/2020, 92.

The Mother did not work outside the home in Germany. Tr. 8/26/2020, 96. The Father financially supported the family through his State Department contracting position until his contract ended in September 2017. *Id*. From September 2017 through the summer of 2019, the Father was unemployed. *Id*.

After the Father became unemployed, his abusive behaviors worsened. *Id*. After September 2017, the Mother would not leave the children home alone with the Father, even when she went out in the community to do volunteer work with a U.S. military breastfeeding support group, or to do necessary errands. Tr. 8/26/2020, 96-99. She did not trust the Father because he "would rage and get angry and mean and mad, and it would seem to happen all the time." Tr. 8/26/2020, 96-97. The Father appeared unable to control himself and his anger. Tr. 8/26/2020, 96. The Father's anger worsened the longer the family was in Germany. His furious outbursts started to happen in front of the children. *Id*. The Father's outbursts became physical. Tr. 8/26/2020, 97. He slammed the table, clenched his

fists, and his movements became "jerky" and forceful. *Id*. His behavior had become unbearable for the Mother. *Id*.

In October 2017, the Father's abusive behavior directly targeted the children, in addition to the Mother. Tr. 8/26/2020, 97-99. In one such incident, the Mother and children were in the family's kitchen while the Mother was making dinner. *Id*. The older son, just a toddler at the time, had a step stool out on the kitchen floor. *Id*. The Mother did not see it, tripped over it, landed forcefully on her knee, and spilled a plate of broccoli that had been in her hands. Pet. App. 3; Tr. 8/26/2020, 97-99. The Father stormed into the kitchen, screamed and yelled at the older child, and called him stupid for having left the stool out. *Id*. The child cowered, turned pale, held his ears, and his body became stiff. Pet. App. 3; Tr. 8/26/2020, 97-99. The younger child also witnessed the incident and vomited on himself. Tr. 8/26/2020, 97-99.

The Father's behavior continued to get worse. The Father raged over minor matters, such as a child putting shoes on backwards, the family being unable to find a parking spot, or a child wetting his pants. Tr. 8/26/20, 103-04. At one family dinner, the older child asked to serve himself sour cream. Tr. 8/26/20, 104. The Father instead put the sour cream on the child's plate. *Id*. The toddler became upset. The Father responded by saying to the child "f--- you. You don't have to do it yourself." *Id*. The Father screamed at the family and stormed out. *Id*.

By the time of the Christmas holidays in 2017, the Mother described the family's situation as ". . . walking

on eggshells all the time because we were -- basically, it was survival. We had to survive every hour of every day, and that's how I was living. I was trying to get through the day, trying to protect my children. And he was scary. He was scary." Tr. 8/26/20, 104.

At this point the Father's physical manifestations of his furious outbursts had also worsened and he had become increasingly violent. Tr. 8/26/20, 105. The Father hit O.S.R. He threw chairs and other household items, banged on doors and tables, and assaulted the Mother. *Id*.

During one particularly violent incident in May 2018, the children had been noisy in the bathroom during their bath time, when the Mother was bathing them and working on potty-training the younger son. Tr. 8/26/20, 105-06. The Father burst open the bathroom door, slapped the older child across the face, and berated the Mother and children. He called the Mother an "f---ing b----" in front of the children. Pet. App. 3; Tr. 8/26/20, 105-06.

By the summer of 2018, the Father's unemployment benefits in Germany ended. Tr. 8/26/20, 107-08. Neither party had a paying job. There were times when they did not have enough food. *Id*. The Father's abuse escalated even more. *Id*. The Mother tried to quell the escalating abuse by ". . . try[ing] so hard to do all of his demands, to do everything for the kids, for the house, to do all his ultimatums that he constantly gave me all the time. I tried everything." Tr. 8/26/20, 109. The abuse continued to escalate.

In another violent episode during potty-training for the younger child, the Father threatened to "knock the whole door down" when the Mother was in the bathroom with the younger child trying to get him to use the toilet. Tr. 8/26/20, 110-12. The Father again screamed and banged, terrifying the Mother and both children. *Id*. The Mother was eventually able to escape the bathroom, find the older child (who had been in the kitchen during the incident) and lock herself and the two children in her bedroom. *Id*. She packed a suitcase for herself and the children to leave the apartment, and found a place for them to go for a few days. *Id*. When the Father realized the Mother was leaving, he threatened to commit suicide. *Id*. The Mother managed to get out of the apartment with the children and stayed away for a few days before retuning. *Id*. When she arrived back at the apartment, the Father claimed he had no memory of the incident in the bathroom or of threatening suicide. *Id*. He demanded "make up sex." *Id*.

Throughout the rest of 2018 and 2019, the Father's abusive behavior continued to get worse. Tr. 8/26/20, 112-17. The Father sexually assaulted the Mother in March 2019. Pet. App. 4; Tr. 8/26/20, 109, 116. The Mother ". . . decided that she was not going to stay with [the Father]." Pet. App. 4.

In May 2019, the Mother was able to obtain one-way airline tickets for herself and the children to leave Germany for the United States. Tr. 8/26/20, 118-21. The Mother and children left Germany on June 9, 2019 for Arizona, and they have been in Arizona ever since. Tr. 8/26/20, 126-22.

2. The Father filed his Hague Convention petition in the district court seeking return of the children to Germany on June 8, 2020. Pet. App. 4, 21. The Mother admitted the Father's *prima facie* case in her Answer. Pet. App. 21-22. She conceded that Germany was the children's habitual residence on the date of removal, that the Father had rights of custody to the children under German law on the date of removal, and that the Father was exercising his German rights of custody on the date of removal. *Id*. The Mother asserted two of the Hague Convention's defenses: the well-settled and grave risk of harm defenses. *Id*. Only the grave risk defense is relevant here.

The district court held an evidentiary hearing over three non-consecutive days in July and August 2020. Both parties testified at the evidentiary hearing. Tr.7/29/20, 15-47; Tr. 8/26/20, 78-159; Tr. 8/27/20, 23-48. The Mother's three witnesses testified. Tr. 7/29/20 48-59; Tr. 8/26/20, 6-77. The Mother's mother and the Mother's German landlord corroborated the Mother's testimony with respect to the Father's abusive behavior. Tr. 7/29/20, 48-59; Tr. 8/26/20, 6-51.

The Mother's treating psychotherapist, Sherri Mikels-Romero, testified. Tr. 8/26/20, 55-78. Ms. Mikels-Romero testified that she had treated the Mother weekly since approximately September 2019. Tr. 8/26/20, 57. She further testified that the Mother ". . . has, and had, symptoms to meet the criteria for a diagnosis of posttraumatic stress disorder. And the things that she described to me and related from her history of her marital relationship with her husband explained the trauma and the effects and impact of the

trauma on her." Tr. 8/26/20, 57. Ms. Mikels-Romero explained the symptoms of posttraumatic stress disorder ("PTSD") exhibited by the Mother. Tr. 8/26/20, 58-61. She explained that the Mother's PTSD symptoms include dissociation when speaking about the details of the Father's domestic violence towards her, anxiety, trembling hands, blocked speech, intrusive thoughts of the traumatic events, hypervigilance, and an exaggerated startle response. *Id*.

The psychotherapist testified that she had also treated the parties' older son. Tr. 8/26/20, 64-68. She testified that O.S.R. exhibited some dissociative episodes, particularly when describing an incident where the Father had hit him. Tr. 8/26/20, 64-65. She testified that O.S.R. described the Father as someone who "was mostly being mean with his words," that the Father had called O.S.R. "stupid," and that the Father also yelled at his younger brother but O.S.R. felt like "he was getting more anger from his father and more of the bad names, bad words." Tr. 8/26/20, 65.

On the final day of the evidentiary hearing, before the Father's rebuttal testimony to the Mother's defenses case, the Father moved for judgment on the Mother's grave risk case. Tr. 8/27/20, 3-23. The Father argued that the Mother had not met her burden as a matter of law to prove her article 13*b* grave risk defense. *Id*. He argued that there was no evidence of physical or psychological abuse of the children. *Id*. He argued that the *Gaudin v. Remis* case required the lower court must ". . . consider alternative remedies by means of which the children could be transferred back

to [Germany] without risking psychological harm." Tr. 8/27/20, 4-5. The district court noted that it had read the *Gaudin* case and asked the Father ". . . what are you suggesting? What are the alternatives, alternative remedies?" Tr. 8/27/20, 5.

The Father's counsel responded that "[t]here is nothing stopping [the Mother] from travelling with the children to Germany, to filing something there, requesting custody . . ." Tr. 8/27/20, 5. The Father's counsel stated that the Father now ". . . lives 25 miles away from the apartment that he had lived in with the children." Tr. 8/27/20, 7. The district court inquired further, as follows:

> THE COURT: If I did find that there was a grave risk, what would be the alternative remedy available – other than similar to the *Gaudin* case? And I don't know if I read the whole – what they decided in that case, but I don't see how in this case the children would be able to be returned. And I guess [the Mother] can take them. But what's to prevent, once she arrives, I guess she would have to address it with the court there as to – I mean, what would be the alternative in order to avoid grave risk of psychological harm from the father?

Tr. 8/27/20, 8.

The Father's counsel, in response, suggested that "there could be undertakings." *Id*. The Father's counsel suggested that the Mother and children could stay with friends in Germany. Tr. 8/27/20, 9. The district court pressed the Father's counsel further:

> THE COURT: But the problem with that is the father would still have custody in that country, so what's to say that if – I mean, I can't issue an order saying the children are going to live with her and – until there is a custodial hearing in that court.

Id.

The Father's counsel then suggested that the district court could "reserve jurisdiction," order the Father "not to assume physical custody of the children, make a referral to German child protective services, or order the Mother to obtain a temporary order in Germany." Tr. 8/27/20, 9-10.

The district court then inquired of the Mother's counsel on the issue of alternative remedies. Tr. 8/27/20, 12-13. In framing its question to counsel, the lower court explained that it found the Mother's testimony on the Father's treatment of the children to be credible. Tr. 8/27/20, 12. The district court noted that it "struggled with . . . the alternative remedies . . . [and] what would be alternative remedies that I would have jurisdiction over or have supervisory powers over once the children go back." Tr. 8/27/20, 13. The Mother's counsel argued that the only remedy was for the district court to decline to return the children to Germany. Tr. 8/27/20, 20.

The district court took the Father's motion under advisement. Tr. 8/27/20, 23. The Father then continued with his rebuttal case to the Mother's article 13*b* case. Tr. 8/27/20, 23-48. Only the Father testified in his rebuttal case. *Id*. In his rebuttal case, the Father did

not testify, or present any other witnesses to testify, as to any aspect of the "undertakings" or "alternative remedies" submitted by his counsel in argument of her motion. *Id*. The Father's testimony was limited to partially denying the Mother's testimony with respect to the Father's behavior towards the Mother and children. *Id*.

The district court entered its Order with incorporated memorandum opinion on September 17, 2020. Pet. App. 19-27. In its Order, the district court held that the Mother had met her burden to establish the grave risk of psychological harm defense by clear and convincing evidence. Pet. App. 25. The district court explained as follows:

> The evidence presented at the evidentiary hearing—including testimony from [the Mother], Frick, and Johnson, as well as from [the Father] himself—supports a finding that [the Father] behaved in ways that could be characterized as psychologically or emotionally abusive.
>
> The record indicates that he had an explosive temper and that, when angry, he yelled at [the Mother] and the children and also used inappropriate, degrading, and/or derogatory language. [The Mother, her landlord, and her mother] each testified to being scared of [the Father].
>
> * * *
>
> The evidence is insufficient to show that O.S.R. and M.S.R. would be at grave risk of physical harm if returned to Germany. However, the

> Court finds that the children would be at grave risk of psychological harm if returned to Germany in the custody of [the Father].

Pet App. 24-25.

Instead of denying the return to Germany, the district court ordered that "[t]o mitigate this risk of psychological harm, the Court will order that O.S.R. and M.S.R. be returned to Germany in the custody of [the Mother] until a custody determination can be made by a German court of competent jurisdiction." Pet. App. 26. The district court did not provide any analysis of its decision to order the alternative remedy of return with the Mother. Pet. App. 19-27.

3. The Mother timely appealed to the circuit court. She argued that if alternative remedies are considered after a grave risk finding, any such remedies must be limited in scope, effective, and enforceable, and that alternative remedies do not mitigate domestic violence. Appellant's Br. 16-36, Nov. 13, 2020, ECF No. 14. The Mother further argued that the burden to prove the availability of enforceable alternative remedies sufficient to protect the children rests with the petitioner (the parent seeking the children's return)—not the respondent (the parent asserting the grave risk defense). *Id*. at 21-24. The Father did not file any cross-appeal. He therefore does not challenge the district court's grave risk finding. The district court temporarily stayed its Order for the return of the children to Germany with the Mother pending the final outcome of the case after appeal. Pet. App. 28-29, 39-43.

The circuit court vacated and remanded the district court's order. Pet. App. 18. The circuit court held that "[w]hile the district court's order is permissible under the Convention, we vacate and remand for the district court to reasonably ensure compliance with its alternative remedy in Germany." Pet. App. 2. The circuit court recognized in its Opinion that "[a]n alternative remedy is a judicial construct not found in the text of the Convention or ICARA." Pet. App. 8, n. 2. Yet it explained that under its controlling precedent on alternative remedies, "[i]f a court decides that the record supports an Article 13(b) defense, it ***must*** proceed to consider whether that risk can be minimized or eliminated through some alternative remedy." Pet. App. 8 (citing *Gaudin v. Remis*, 415 F.3d 1028, 1037 (9th Cir. 2005)) (emphasis added). The circuit court also relied on the Second Circuit's *Saada v. Golan* case for the proposition that district courts ". . . must determine whether there exist alternative ameliorative measures that are either enforceable by the district court or, if not directly enforceable, are supported by other sufficient guarantees of performance." Pet. App. 10 (citing *Saada v. Golan*, 930 F.3d 533, 541 (2d Cir. 2019)); *see also Saada v. Golan*, 833 F. App'x. 829 (2d Cir. 2020), *petition for cert. filed* (U.S. Jan. 26, 2021) (No. 1034).

The circuit court held that with the "governing framework outlined" it vacated and remanded the district court's alternative remedy order ". . . since the record does not adequately support whether the order of the children's return in [the Mother's] custody has a high likelihood of performance through supportive reinforcements." Pet. App. 14. Although the circuit

court remanded the case for further proceedings in the district court, the circuit court ". . . decline[d] to allocate a burden of proof on the reasonableness of an alternative remedy." Pet. App. 14-15. It explained contrary to its analysis on alternative remedies that "[w]e need not add judicial constraints absent from ICARA or the Convention." Pet. App. 15.

REASONS FOR GRANTING THE PETITION

A. The Text of the Convention Does Not Mandate Consideration of Ameliorative Measures.

The Convention is a text-based treaty. *Abbott*, 560 U.S. at 12. Courts must therefore "begin with the text of the treaty and the context in which the written words are used" in analyzing treaty claims. *Monasky v. Taglieri*, 140 S. Ct. 719, 726 (2020) (citing *Air France v. Saks*, 470 U.S. 392, 397 (1985) (internal quotations omitted)).

All four of the Hague Convention cases this Court has decided address the problems created by lower courts either writing in or writing out requirements of the treaty, rather than conducting a text-based interpretation. Previous substantive issues have been: *ne exeat* rights being written out of the Convention; mootness on appeal being written into the Convention; equitable tolling being written into the Convention; and certain categorical requirements for establishment of habitual residence being written into the Convention. *See Abbott*, 560 U.S. 1 (*ne exeat* rights as "rights of custody"); *Chafin v. Chafin*, 568 U.S. 165 (2013) (mootness); *Lozano v. Montoya Alvarez*, 572 U.S. 1

(2014) (equitable tolling); *Monasky*, 140 S. Ct. 719 (habitual residence).

In the present case, the Ninth Circuit has written into the treaty its judicial construct of mandatory ameliorative measures, even though the circuit court itself recognizes in its Opinion in this case that "[a]n alternative remedy is a judicial construct not found in the text of the Convention or ICARA." Pet. App. 8, n. 2. The concept of ameliorative measures appears nowhere in the Convention.

The United States Government supports review on this very issue in *Golan v. Saada*, No. 1034, which is currently pending on the Court's petition docket, and scheduled for conference on December 3, 2021. The petitioner in *Golan* seeks review on the very same issue presented in this case. In *Golan*, the Second Circuit has required the consideration of "ameliorative measures" in analyzing the respondent's article 13*b* grave risk defense. 903 F.3d 533 (2d Cir. 2019); *Saada v. Golan*, 833 F. App'x. 829 (2d Cir. 2020), *petition for cert. filed* (U.S. Jan. 26, 2021) (No. 1034). The United States Government has filed an *amicus* brief in support of the petition for writ of certiorari being granted. *Id*. at 8, 23. The United States explains that it is the long-held position of the United States that the concept of ameliorative measures appears nowhere in the Convention. *Id*. It advocates that an analysis of ameliorative measures is therefore discretionary—not mandatory—after an Article 13*b* grave risk finding because such an analysis is not mandated by the treaty's text. *Id*. at 8.

The circuit court's decision here perpetuates the trend of lower courts veering from the text of the Convention by writing in additional non-text-based requirements. Imposing a mandatory non-text-based analysis of ameliorative measures after a grave risk finding is not supported by the Convention and does not advance the purpose of the Convention. This Court should therefore grant certiorari to resolve this deviation from the plain text of the Convention.

B. The Circuits Are Divided on Whether Consideration of Ameliorative Measures is Mandatory or Discretionary.

The courts of appeals are in conflict on consideration of ameliorative measures after a grave risk finding. *See* Brief of United States as Amicus Curiae at 20, *Golan v. Saada*, No. 1034 (U.S. Oct. 27, 2021). The Second, Third, and Ninth Circuits require mandatory consideration of ameliorative measures before a district court may deny a petition for return based on an Article 13*b* grave risk finding. *See Saada*, 903 F.3d 533; *Saada*, 833 F. App'x. 829; *In re Adan*, 437 F.3d 381, 395 (3d Cir. 2006); *Gaudin*, 415 F.3d at 1035. In contrast, the First, Eighth, and Eleventh Circuits do not require district courts to consider ameliorative measures before denying a return based on an Article 13*b* grave risk finding. Rather, they consider an ameliorative measures analysis to be discretionary, not mandatory. *See Danaipour v. McLeary*, 386 F.3d 289, 303 (1st Cir. 2004) (rejecting argument that a district court must examine remedies available in country of habitual residence before properly finding Article 13*b* grave risk); *Acosta v.*

Acosta, 725 F.3d 868, 877 (8th Cir. 2013) (holding that once a district court makes an Article 13*b* grave risk finding, it has the discretion to refuse to order a return and placing the burden on the petitioning parent to proffer any undertakings); *Baran v. Beaty*, 526 F.3d 1340, 1346-52 (11th Cir. 2008) (explaining that a district court may consider evidence that a home country can protect an at-risk child, but neither the Convention nor ICARA require it to do so). The Sixth and Seventh Circuits have also addressed ameliorative measures, each recognizing abusive situations in which ameliorative measures may or may not be effective. But neither circuit has articulated whether an ameliorative measures analysis is mandatory or discretionary for a court to deny a return after an Article 13*b* grave risk finding. *See Simcox*, 511 F.3d at 608; *Van de Sande*, 431 F.3d at 571-72.

This conflict among the circuits results in the inconsistent application of the Convention within the United States and results in unfair and different outcomes by the circuits. In particular, the imposition of ameliorative measures results in survivors of domestic violence being treated differently between the circuits. For example, if the Mother here had family she could turn to for support in Georgia, or Pennsylvania, or Maine instead of in Arizona, a district court could have denied the return without consideration of ameliorative measures after if found the Article 13*b* grave risk.

The United States government acknowledges that the threat for such inconsistent treatment of similarly situated litigants is substantial. *See* Brief of United

States as Amicus Curiae at 22, *Golan v. Saada*, No. 1034 (U.S. Oct. 27, 2021). It recognizes that the United States is among the contracting states that receive the highest annual number of return applications. *Id*. (citation omitted). This case, as in *Golan*, therefore presents an appropriate vehicle to review this issue.

C. The Petitioner Bears the Burden of Proof in a Discretionary Ameliorative Measures Analysis.

Even in a discretionary analysis of ameliorative measures, the burden to prove the availability of enforceable measures sufficient to protect the children has been found to rest with the petitioner (the parent seeking the child's return)—not the respondent (the parent asserting the grave risk defense). *See, e.g. Danaipour I*, 286 F.3d at 21; *Simcox*, 511 F.3d at 605–06; *Van De Sande*, 431 F.3d at 571–72; *Sabogal v. Velarde*, 106 F. Supp. 3d 689, 710 (D. Md. 2015). After a respondent establishes an Article 13*b* grave risk, if there is to be any discretionary consideration of ameliorative measures, the burden shifts to the petitioner to establish sufficient reasonableness and enforceability of any such measures. *Id*.

The circuit court here ". . . decline[d] to allocate a burden of proof on the reasonableness of an alternative remedy." Pet. App. 14-15. It explained, contrary to its analysis on alternative remedies, that "[w]e need not add judicial constraints absent from ICARA or the Convention." Pet. App. 15. But other circuits that have considered the issue, hold that the burden of proof is on the petitioner. *Danaipour I*, 286 F.3d at 21; *Simcox*, 511 F.3d at 605–06; *Van De Sande*, 431 F.3d at

571–72; *Acosta*, 725 F.3d at 877; *Sabogal*, 106 F. Supp. at 710.

This case provides the opportunity for the Court to review the issue of the burden of proof in the context of imposing a consistent and complete Article 13*b* analytical framework for the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

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