No.

In the Supreme Court of the United States

NARKIS ALIZA GOLAN, PETITIONER

v.

ISACCO JACKY SAADA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction requires return of a child to his or her country of habitual residence unless, *inter alia*, there is a grave risk that his or her return would expose the child to physical or psychological harm. The question presented is:

Whether, upon finding that return to the country of habitual residence places a child at grave risk, a district court is required to consider ameliorative measures that would facilitate the return of the child notwithstanding the grave risk finding.

RELATED PROCEEDINGS

United States District Court (E.D.N.Y.):

Saada v. *Golan*, Civ. No. 18-5292 (May 5, 2020)

Saada v. *Golan*, Civ. No. 18-5292 (Mar. 22, 2019)

United States Court of Appeals (2nd Cir.):

Saada v. *Golan*, No. 20-1544 (Oct. 28, 2020)

Saada v. *Golan*, No. 19-820 (July 19, 2019)

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Petitioner Narkis Aliza Golan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–10a) is unreported. The earlier opinion of the court of appeals (App., *infra*, 26a–40a) is reported at 930 F.3d 533. The opinions of the district court (App., *infra*, 11a–25a, 41a–85a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2020. A petition for rehearing was denied on

January 14, 2021 (App., *infra*, 86a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY PROVISION INVOLVED

Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction, as implemented in the United States through the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. §§ 9001–9011, provides in relevant part:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority 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—
>
> * * *
>
> (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.

STATEMENT

This case presents a question of exceptional importance involving the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention") on which the federal courts of appeals and state courts are divided. When a child has been wrongfully removed from his or her country of habitual residence, the Hague Convention generally requires return of the child to that country. But the Hague Convention provides certain critical exceptions, including the one at issue here: return is not required where there is a grave risk that it would expose a child to physical or psychological harm. The court of appeals has required that, where there is a finding of grave risk, lower courts must then consider

ameliorative measures that would facilitate the return of the child to the country of habitual residence. That judicial construct is contrary to the decisions of other courts of appeals and has no basis in the plain text of the Hague Convention or its implementing legislation—which say nothing about ameliorative measures.

Petitioner Narkis Golan is an American mother who was the victim of severe and persistent domestic violence at the hands of her Italian husband, respondent Jacky Saada. Ms. Golan lived with her husband and son, B.A.S., in Italy until the summer of 2018, when Ms. Golan travelled to the United States with then two-year-old B.A.S. for a wedding. While she was in the United States, Mr. Saada threatened to kill Ms. Golan and deny her access to her son if she returned. Fearing for her life and her son, Ms. Golan remained in the United States with B.A.S., and sought refuge at a domestic violence shelter. Mr. Saada then filed a petition for return of B.A.S. under the Hague Convention in district court.

After a two-week trial, the district court found that return of B.A.S. to Italy would put him at grave risk in light of Mr. Saada's history of abuse. Despite that finding, Second Circuit case law required the district court to consider ameliorative measures that would allow the return of B.A.S. Following that precedent, the district court ordered return of B.A.S. to Italy subject to certain undertakings,[1] or promises, by Mr. Saada, such as promises to stay away from Ms. Golan and to attend therapy. Ms. Golan appealed, and the court of appeals found that the undertakings ordered by the district court lacked sufficient guarantees of performance. On remand, the district court imposed new ameliorative measures consisting primarily

[1] Courts often used the terms "ameliorative measures" and "undertakings" interchangeably.

of an order requiring the parties to secure a protective order from an Italian court and a $150,000 payment to Ms. Golan for her living and legal expenses. Ms. Golan again appealed, and the court of appeals affirmed.

The decision below perpetuates a conflict among the federal courts of appeals—as well as various state courts—as to whether, after a finding that return of a child would place the child at grave risk, the trial court must consider possible ameliorative measures to facilitate the return of a child. The Second Circuit, along with two other circuits, requires district courts to consider a full range of ameliorative measures that would permit return of the child. In contrast, the majority of circuits have indicated that, once a district court determines that there is a grave risk to the child, the court need not engage in an exercise of trying to fashion ameliorative measures, especially in a case involving domestic violence. These courts frequently relied on the U.S. State Department Guidance cautioning against the use of ameliorative measures when there is abuse—specifically, State Department Guidance provides that, when there is "unequivocal evidence that return would cause the child a 'grave risk' of physical or psychological harm," it would be "less appropriate for the court to enter extensive undertakings than to deny the return request." Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, U.S. Dep't of State, to Michael Nicholls, Lord C.'s Dep't, Child Abduction Unit, United Kingdom (Aug. 10, 1995). *See, e.g.*, *Van De Sande* v. *Van De Sande*, 431 F.3d 567, 572 (7th Cir. 2005); *Simcox* v. *Simcox*, 511 F.3d 594, 607 (6th Cir. 2007). State courts are similarly divided, with some mandating the consideration of ameliorative measures and others denying the child's return immediately upon a finding of grave risk.

The courts that have required the consideration of ameliorative measures have erred. That requirement has no basis in the text of the Hague Convention. And, as demonstrated in this case, it has led lower courts to wade into complex domestic violence situations and try to construct solutions, a task that the courts are ill-equipped to perform. The Second Circuit has recently strayed particularly far from the text and purpose of the Hague Convention: in the forty years since the United States ratified the Hague Convention, no circuit court had ordered the return of a child after a finding of grave risk until two recent cases—both out of the Second Circuit—as a result of its mandatory ameliorative measures framework.

This case is an excellent vehicle to address the question presented. The Court should grant review to resolve the inconsistency among the courts of appeals and make clear that district courts need not consider ameliorative measures after a parent has satisfied the burden of proving grave risk.

A. Background

The Hague Convention is a multilateral treaty created "to protect children internationally from the harmful effects of their wrongful removal or retention." Hague Convention, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (Mar. 26, 1986). Congress implemented the Convention through the International Child Abduction Remedies Act. *See* 22 U.S.C. §§ 9001–9011.

Under Article 12 of the Convention, the threshold inquiry is whether a child has been "wrongfully removed or retained," as defined under Article 3. If a court determines that the child's removal or retention was wrongful

under the laws of the State in which the child was "habitually resident" immediately prior to the removal or retention, the court must order the return of the child.

The Hague Convention's requirement of return is subject to several important exceptions. As is relevant here, Article 13(b) provides that a court "is not bound to order the return of the child" if the person opposing the child's return establishes that "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 explanatory report of Professor Elisa Pérez-Vera—the official Hague Conference Reporter and a primary source of interpretation for the Hague Convention—emphasizes that "the interest of the child in not being removed from its habitual residence * * * gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation." Explanatory Report of E. Pérez-Vera ¶ 29. Courts regularly rely on the explanatory report when interpreting the Hague Convention.

B. Facts and Procedural History

1. Petitioner Narkis Golan, a United States citizen, married respondent Isacco Jacky Saada, an Italian citizen, in 2015. They have one child, B.A.S., who was born in Italy in June 2016 and is a dual citizen of the United States and Italy.

When Mr. Saada and Ms. Golan lived in Italy, Mr. Saada physically and emotionally abused Ms. Golan on a regular basis. For example, Mr. Saada "bash[ed] [Ms. Golan's] face against the [car] dashboard," "slapped her to shut her up," and threatened that if she returned to Italy she would be "leaving in a pine box." App., *infra*, 52a, 62a–63a. On one occasion, Mr. Saada sexually assaulted a

pregnant Ms. Golan, and when they went to the hospital after the assault, Mr. Saada "grabbed [Ms. Golan] by her hair, pushed her down, and dragged her." *Id.* at 55a.

In July 2018, Ms. Golan and B.A.S. traveled to New York for Ms. Golan's brother's wedding. While she was away, Mr. Saada made multiple threats to her life, and threatened to take B.A.S. away upon her return. Fearing for her life and B.A.S.'s safety, Ms. Golan remained in the United States and entered into a domestic violence shelter. *Id.* at 29a, 63a–64a.

2. In September 2018, Mr. Saada filed a petition in the district court for the return of B.A.S. *Id.* at 42a. In January 2019, the court conducted a nine-day bench trial. *Ibid.* After the close of evidence, the district court ordered the parties to include in their post-trial briefing proposed undertakings that could ameliorate the grave risk to B.A.S. if the district court ordered his return. Ms. Golan did so under protest and has maintained throughout the case that no suite of undertakings would be sufficient to ameliorate the grave risk stemming from Mr. Saada's violent temper, inability to appreciate the consequences of his behavior or change it, and disregard for common decency and the law.

In its March 22, 2019 opinion, the district court concluded that Ms. Golan had met her heavy burden of demonstrating, by clear and convincing evidence, that "returning [B.A.S.] to Italy would subject [him] to a grave risk of harm." *Id.* at 80a. The district court concluded that Mr. Saada "was violent—physically, psychologically, emotionally, and verbally—to Ms. Golan," and that "B.A.S. was present for much of it." *Id.* at 79a. That abuse occurred "repeatedly throughout the course of the parties' relationship." *Ibid.*

The court credited the testimony of Ms. Golan's expert witness, Dr. Edward Tronick, a developmental and licensed clinical psychologist, and found that there was "[no] dispute that a child who is exposed to domestic violence, even though not the target of abuse, could face a grave risk of harm." *Id.* at 80a. Dr. Tronick further explained that "domestic violence disrupts a child's cognitive and social-emotional development, and affects the structure and organization of the child's brain." *Ibid.*

The court also found, and Mr. Saada's own expert agreed, that Mr. Saada suffers from uncontrollable anger and a failure to appreciate the impact of his behavior on his child, or the consequences of his actions more broadly. *Id.* at 66a–67a, 80a. As the court put it, "[t]he evidence ma[de] it * * * clear that Mr. Saada has to date not demonstrated a capacity to change his behavior." *Id.* at 80a.

Notwithstanding its grave risk finding, however, the district court ordered that B.A.S. be returned to Italy subject to a series of ten undertakings by Mr. Saada. *Id.* at 84a. Among those undertakings, Mr. Saada would be required to promise to stay away from Ms. Golan, dismiss the criminal charges he filed against her relating to her taking away of B.A.S., and begin cognitive therapy. *Ibid.*

3. Ms. Golan appealed the district court's order. The Second Circuit affirmed in part, vacated in part, and remanded the case for further proceedings. Relevant here, the court explained that, under Second Circuit precedent, a district court must consider "the [full] range of remedies that might allow both the return of the children to their home country and their protection from harm." *Id.* at 35a–36a (quoting *Blondin* v. *Dubois*, 189 F.3d 240, 249 (2d Cir. 1999)). According to the court, the Hague Convention "requires" courts to "place [their] trust" in the courts of

the country of habitual residence "to issue whatever orders may be necessary to safeguard children." *Id.* at 33a (quoting *Blondin*, 189 F.3d at 248). But the court held that "the most important protective measures [the district court] imposed [were] unenforceable and not otherwise accompanied by sufficient guarantees of performance." *Id.* at 27a–28a. As the court explained, the "[d]istrict [c]ourt's factual findings provide ample reason to doubt that Mr. Saada will comply with" the undertakings. *Id.* at 35a.

4. On remand, the district court ordered the parties to seek a protective order from the Italian court overseeing the parties' custody dispute. C.A. App. 512–514. The parties complied (again, under protest by Ms. Golan that the protective order is insufficient to mitigate the potential for harm), and the Italian court issued an order, to become effective if Ms. Golan enters Italy, that includes: (1) a protective order requiring that Mr. Saada stay away from B.A.S. and Ms. Golan; (2) an order requiring that Mr. Saada's visitation with B.A.S. be supervised; and (3) an order directing Italian social services to oversee Mr. Saada's parenting classes and behavioral and psychoeducational therapy. App., *infra*, 17a, 20a.

The district court again ordered that B.A.S. be returned to Italy, citing among other things the existence of the Italian court's protective order. The court also ordered Mr. Saada to pay Ms. Golan $150,000 to cover travel expenses and living costs, and to provide Ms. Golan with "financial independence," and "alleviate [Ms. Golan]'s asserted concerns about her vulnerability as a non-citizen with limited Italian language skills." *Id.* at 22a–23a. Notwithstanding its prior findings concerning Mr. Saada's violent temper, inability to understand the consequences of his actions, and inability to change, the district court concluded that the combination of the protective order and

the record made it "confident that the Italian legal system is able to enforce its orders." *Id.* at 21a. The district court stayed its decision pending the Second Circuit's resolution of the appeal. Order Staying May 5, 2020 Order Pending Appeal, *Saada* v. *Golan*, 1:18-cv-05292-AMD-SMG (May 12, 2020).

5. Ms. Golan again appealed, arguing that the ameliorative measures ordered by the district court lack sufficient guarantees of performance in light of the district court's prior findings concerning Mr. Saada, and that B.A.S. would be subject to grave risk if returned to Italy. The court of appeals affirmed in a summary order. The court again explained a district court must "examine the full range of options" of ameliorative measures. App., *infra*, 7a (quoting *Blondin* v. *Dubois*, 238 F.3d 153, 163 n.11 (2d Cir. 2001)). The court thus held that there was no clear error in the district court's finding that Mr. Saada was likely to comply with the Italian protective order, and that there were "sufficiently guaranteed ameliorative measures that would remedy the grave risk of harm to B.A.S." *Id.* at 9a.

6. Ms. Golan filed a petition for rehearing, which was denied on January 14, 2021.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Perpetuates a Conflict Among the Lower Courts

The decision below implicates a conflict among the federal courts of appeals—as well as various state courts—as to whether, after a finding that there is a grave risk that the return of a child would expose him or her to physical or psychological harm, a trial court must nevertheless consider possible ameliorative measures to facilitate the return of the child.

1. The First, Eighth, and Eleventh Circuits have indicated that, once a district court determines that there is a grave risk that the child will be exposed to harm, the court need not consider any ameliorative measures.

a. In *Danaipour* v. *McLarey*, 386 F.3d 289 (1st Cir. 2004), the First Circuit expressly declined to require the district court to consider ameliorative measures when determining whether the Article 13(b) grave risk exception applies. The respondent-mother moved with her two young daughters from Sweden, their country of habitual residence, to the United States. *Id.* at 292. After a trial, the district court denied the father's petition for return, finding that the younger daughter had been sexually abused by the father, and thus concluding that there would be a grave risk of harm to the children if returned to Sweden. *Ibid.*

The First Circuit rejected the father's argument that the district court must "examine[] the remedies available in the country of habitual residence" and held that the court's "finding of the existence of sexual abuse and that the return of the children to Sweden would result in a grave risk of psychological harm was adequate to satisfy the Article 13(b) exception, and no further inquiry into remedies available to the Swedish courts was required." *Id.* at 303–04. In so holding, the court explicitly "disagree[d]" with the Second Circuit's requirement that a district court consider the capacity of the courts in the country of habitual residence to ameliorate the risk to the child. *Id.* at 303 n.5.

b. In *Acosta* v. *Acosta*, 725 F.3d 868 (8th Cir. 2013), the Eighth Circuit affirmed the district court's decision denying the petition to return the children to Peru on a finding of grave risk without consideration of ameliorative measures. *Id.* at 877. The court rejected the petitioner-father's argument that the district court erred because

undertakings "would ameliorate any risk of harm." *Id.* at 876–77. The court held that "[o]nce a district court concludes that returning a child to his or her country of habitual residence would expose the child to a grave risk of harm, it has the discretion to refuse to do so." *Id.* at 877. It explained that "courts have been reluctant to rely on undertakings to protect the child" when "a grave risk of harm to a child exists as a result of a violent parent." *Ibid.* The court also rejected the father's argument that the children could be returned because services were available in Peru to protect children and battered women. *See ibid.* As the court explained, the existence of such services in the country of habitual residence "does not, by itself, establish that the children would receive sufficient protection if returned." *Ibid.*

c. In *Baran* v. *Beaty*, 526 F.3d 1340 (11th Cir. 2008), the Eleventh Circuit affirmed the district court's denial of the petition for return and held that the district court had no obligation to consider the petitioner's proposal of undertakings. *Id.* at 1351–52. The district court had found that returning the child to the petitioner-father—an Australian citizen who had abused the respondent-mother—would expose the child to a grave risk of harm. *Id.* at 1346. The Eleventh Circuit rejected the father's argument that the district court erred in refusing the father's request to propose undertakings. In so doing, the court acknowledged the confusion among the courts of appeals, explaining that that "the practice" of mandating consideration of undertakings "is far from uniform." *Id.* at 1349. It cautioned that, "[b]ecause the court granting or denying a petition for return lacks jurisdiction to enforce any undertakings it may order, even the most carefully crafted conditions of return may prove ineffective in protecting a child from risk of harm." *Id.* at 1350. As the court explained, "[w]hen grave risk of harm to a child exists as a

result of domestic abuse, * * * courts have been increasingly wary of ordering undertakings to safeguard the child." *Id.* at 1351 (citing *Simcox*, 511 F.3d at 606, and *Danaipour* v. *McLarey*, 286 F.3d 1, 26 (1st Cir. 2002)).

2. By contrast, the Second, Third, and Ninth Circuits require a district court to consider a full range of ameliorative measures that would permit return of the child, even when the court finds that there is a grave risk that a child's return would expose that child to physical or psychological harm.

a. In *Blondin* v. *Dubois*, 189 F.3d 240 (2d Cir. 1999), the Second Circuit held that a district court, when considering the grave risk exception under Article 13(b) of the Hague Convention, must take into account ameliorative measures. *Id.* at 248. The case involved a mother who left France with her children to escape the abusive father, who repeatedly beat her and threatened to take her and the children's lives. *Id.* at 243. Given the evidence of abuse, the district court determined that returning the children to France would place them at a grave risk of harm. *Id.* at 243.

On appeal, the Second Circuit affirmed the district court's finding on grave risk but nonetheless remanded the case to the district court for consideration of ameliorative measures that "might allow both the return of the children to their home country and their protection from harm, pending a custody award in due course by a French court with proper jurisdiction." *Id.* at 249–50 (emphasis omitted). The court reasoned that a United States court is "required to place [its] trust in the court of the [child's] home country to issue whatever orders may be necessary to safeguard children" in order to effectuate the Hague Convention's "commitment" to allow custodial determinations to be made by the court of the child's home country.

Id. at 248–49. The court of appeals relied on *Blondin* in both of the decisions below. *See* App., *infra*, 7a, 33a.

b. In *In re Adan*, 437 F.3d 381 (3d Cir. 2006), the Third Circuit relied on *Blondin* in stating that ameliorative measures "must" be considered in the grave-risk analysis. *Id.* at 395. There, the respondent-mother left Argentina with her daughter to escape her abusive boyfriend, who she alleged had sexually abused her daughter. *Id.* at 385–86. The district court nevertheless concluded that the respondent-mother failed to establish grave risk of harm and ordered the child to be returned to Argentina. *Id.* at 387–88.

On appeal, the Third Circuit vacated the district court's order and remanded the case for further fact finding. *Id.* at 398–99. In providing instructions for remand, the Third Circuit noted that, "in considering the Article 13(b) exception, a court must 'take into account any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child's repatriation.'" *Id.* at 395 (quoting *Blondin*, 189 F.3d at 248).

c. The Ninth Circuit in *Gaudin* v. *Remis*, 415 F.3d 1028 (9th Cir. 2005), likewise adopted the Second Circuit's approach. The district court had denied a petition under the Hague Convention after finding that the children in question would suffer a "grave risk of psychological harm" if returned to the mother. *Id.* at 1033. The Ninth Circuit reversed and held that "the district court erred in failing to consider alternative remedies by means of which the children could be transferred back to Canada without risking psychological harm." *Id.* at 1035 (citing *Blondin*, 189, F.3d at 249).

3. The Sixth and Seventh Circuits have taken yet another approach. While they have not expressly held that

courts need not consider ameliorative measures, they have cautioned against the use of ameliorative measures in cases involving domestic abuse and suggested that consideration of ameliorative measures is inappropriate in such cases.

a. In *Simcox* v. *Simcox*, 511 F.3d 594 (6th Cir. 2007), the Sixth Circuit cast doubt on the appropriateness of ameliorative measures in cases involving repeated domestic abuse. There, the district court had ordered the children to return to Mexico, finding that, while the petitioner-father's violent conduct placed the children at "serious risk," it did not rise to the level of grave risk of harm. *Id.* at 600. The Sixth Circuit reversed, finding that—"given the serious nature of the abuse, the extreme frequency with which it occurred, and the reasonable likelihood that it would occur again absent sufficient protection"—the children faced grave risk of harm in Mexico. *Id.* at 609.

Although the Sixth Circuit remanded the case to the district court to consider if there were sufficient "undertakings" that could ensure the safety of the children upon their return to Mexico, it suggested that consideration of undertakings is inappropriate under certain circumstances. *See id.* at 610. The court first cautioned that undertakings should be viewed with particular skepticism in cases involving domestic violence, explaining that "undertakings are most effective when the goal is to preserve the status quo of the parties prior to the wrongful removal" and are thus inappropriate when "the status quo was abusive." *Id.* at 607 (quoting *Van De Sande*, 431 F.3d at 572 (quoting *Danaipour*, 286 F.3d at 25)). The court then placed Hague Convention cases into three categories for the purpose of considering undertakings: (1) cases where the abuse is "relatively minor" and does not rise to the

level of grave risk, thus rendering undertakings irrelevant; (2) cases like *Simcox* "where the abuse is substantially more than minor, but is less obviously intolerable"; and (3) cases where the abuse is "so grave that undertakings must be dismissed out-of-hand." *Id.* at 607–08, 609–10. The court cautioned that, "[e]ven in [the] middle category, undertakings should be adopted only where the court satisfies itself that the parties are likely to obey them * * * [and] would be particularly inappropriate, for example, in cases where the petitioner has a history of ignoring court orders." *Id.* at 608.

b. In *Van De Sande* v. *Van De Sande*, 431 F.3d 567 (7th Cir. 2005)—a case that arose from a mother taking her children and leaving their abusive father in Belgium—the Seventh Circuit expressed similar skepticism towards the use of undertakings when the child faces a "grave risk of harm." *Id.* at 571. In its opinion reversing the district court's grant of summary judgment for the petitioner-father, the Seventh Circuit rejected the practice of assessing the ability of the country of habitual residence to protect the child. *Id.* at 571–72. The court noted that evaluating whether the country of habitual residence "both has and zealously enforces such laws[] disregards the language of the Convention and its implementing statute." *Id.* at 571. The court explained that the "rendering court must satisfy itself that the children will in fact, and not just in legal theory, be protected[.]" *Ibid.* Emphasizing that "the safety of children is paramount," the court cautioned that the balance "shift[s] against" undertakings in cases of child abuse. *Id.* at 572. The court noted that if a district 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." *Ibid.* (quoting U.S. State Dep't Guidance).

4. Lastly, the state courts, which also have jurisdiction over Hague Convention petitions under ICARA, 22 U.S.C. § 9003(a), have adopted similarly conflicting approaches toward the court's role after a finding that return would subject the child to grave risk.

a. Appellate courts in Florida, Illinois, New York, and Washington have indicated that once a trial court has found that a child would be subject to grave risk if returned to the country of habitual residence, the court need not consider ameliorative measures. Courts in those States have affirmed denials of Hague Convention petitions upon finding grave risk, without consideration of potential ameliorative measures. *See, e.g.*, *Wigley* v. *Hares*, 82 So. 3d 932 (Fla. Dist. Ct. App. 2011); *In re M.V.U.*, No. 1-19-1762, 2020 WL 7074636 (Ill. App. Ct. Dec. 3, 2020); *Oliver A.* v. *Diana Pina B.*, 151 A.D.3d 485 (N.Y. App. Div. 2017); *In re Custody of A.T.*, 451 P.3d 1132 (Wash. Ct. App. 2019).

b. In contrast, appellate courts in California and Connecticut have held, relying on *Blondin*, that a trial court must consider ameliorative measures that could mitigate the grave risk before deciding a return petition. *See Maurizio R.* v. *L.C.*, 135 Cal. Rptr. 3d 93, 111 (Cal. Ct. App. 2011); *In re Marriage of Forrest & Eaddy,* 51 Cal. Rptr. 3d 172, 179 (Cal. Ct. App. 2006) (noting that, even if there was grave risk of harm, the court cannot deny the petition without considering "alternative remedies that it could implement to avoid or minimize the risk of harm" (citing *Blondin*, 189 F.3d at 248–50, and *Gaudin*, 415 F.3d at 1036)); *Turner* v. *Frowein*, 752 A.2d 955, 972 (Conn. 2000) (remanding the case for failure to consider undertakings as the court is "persuaded to follow *Blondin*'s lead and conclude that, in exercising its authority to deny a return

petition under article 13b, following its determination of abuse, the trial court must conduct a thorough analysis of ameliorative measures").

5. In short, the decision of the court of appeals below perpetuates the entrenched conflict and confusion among the federal courts of appeals and state appellate courts regarding the consideration of ameliorative measures. The inconsistency in approaches exacerbates the inequity to respondents like Ms. Golan who escape to a jurisdiction that requires the consideration of all undertakings no matter the severity of the grave risk. In light of the depth and duration of the conflict, and the unfairness of differential treatment of respondents depending upon their location, the Court's guidance is sorely needed.

B. The Decision Below Is Erroneous

The court of appeals' approach—which mandates the consideration of ameliorative measures—is erroneous. That approach conflicts with the text of the Hague Convention and is inconsistent with guidance issued by the U.S. State Department. This Court's intervention is necessary to make clear that courts need not consider ameliorative measures upon a finding of grave risk.

1. The Text, Purpose, and History of the Hague Convention Do Not Support a Requirement of Consideration of Ameliorative Measures

a. "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellin* v. *Texas*, 552 U.S. 491, 506 (2008). The requirement that a court consider ameliorative measures finds no support within the text of the Hague Convention. *See* Hague Convention. As courts have explained, "[t]he concept of 'undertakings' is based neither in the Convention nor in the implementing legislation of any nation." *Danaipour*, 286 F.3d at 21

(citation omitted). Rather, it is "a judicial construct, developed in the context of British family law." *Ibid.* (citation omitted); *see also Baran*, 526 F.3d at 1349. That alone should end the matter: there is simply no basis for *requiring* district courts to consider ameliorative measures, a concept that appears nowhere in the Hague Convention. What is more, the judicially created requirement that courts fashion ameliorative measures to allow return of children in circumstances of grave risk—measures that are not mentioned in the text of the treaty that Congress ratified—raises serious separation-of-powers concerns. *Cf. Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1855, 1857 (2017) (stating that courts must exercise great caution when considering remedies "not explicit in the statutory text itself," and "separation-of-powers principles are or should be central to the analysis").

b. Even if the absence of a textual basis were not dispositive, there is more. As a matter of policy, protective measures should not be a required element of a court's grave-risk analysis because such measures often fail. Although certain courts consider ameliorative measures, those courts "retain no power to enforce [conditional return] orders across national borders." *Baran*, 526 F.3d at 1350 (citing Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 Fordham L. Rev. 593, 678 (2000) ("[T]here is currently no remedy for the violation of an undertaking. Contrary statements by some courts are simply wrong.")). Moreover, even enforceable protective orders—like the one the district court proposed—are ineffective because domestic abusers often violate them. *See* Christopher T. Benitez, MD *et al.*, *Do Protection Orders Protect?*, 38 J. Am. Acad. Psych. Law 376, 384 (2010) (discussing an analysis that found a 40% average rate of violation of protective orders). There is also ample research showing that domestic violence is

an exercise of power and control, and that perpetrators often have little regard for the consequences of their actions. *See, e.g.*, Q&A with Evan Stark, Ph.D. MSW, New York State Office for the Prevention of Domestic Violence (2013), available at https://www.opdv.ny.gov/professionals/abusers/coercivecontrol.html ("Coercive control is a strategic course of oppressive behavior designed to * * * establish[] a regime of dominance [over a victim's] personal life.").

c. The purpose and history of the Hague Convention indicate that consideration of undertakings is inappropriate, particularly in grave risk cases involving domestic violence. The paramount concern of the Hague Convention is the protection of children. As described in the explanatory report of the official Hague Conference Reporter and a primary source of interpretation for the Hague Convention, "the interest of the child in not being removed from its habitual residence * * * gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation." Explanatory Report of E. Pérez-Vera ¶ 29. The Hague Convention was adopted more than forty years ago to address a specific problem: international abductions by non-primary caretaker parents (mostly fathers) seeking a more favorable forum to litigate custody. The Convention was designed to deter such forum shopping. *See* Shani M. King, *The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children From Domestic Violence*, 47 Fam. L.Q. 299, 299–300 (2013); Kyle Simpson, *What Constitutes A "Grave Risk Of Harm?": Lowering The Hague Child Abduction Convention's Article 13(b) Evidentiary Burden to Protect Domestic Violence Victims*, 24 Geo. Mason L. Rev. 841, 842–43 (2017).

As a result of the original assumption that the Convention would be used primarily to return children in instances of fleeing non-primary caretaker fathers, the Convention drafters did not directly consider how to address victims fleeing domestic violence. Today, however, the typical Hague Convention case involves a respondent who is the mother and primary caretaker, and many of the cases involve an attempt to escape domestic violence. *See* Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 Colum. Hum. Rts. L. Rev. 275, 277–78 (2002); King, *The Hague Convention And Domestic Violence*, 47 Fam. L.Q. at 300–01; Simpson, *What Constitutes A "Grave Risk Of Harm?,"* 24 Geo. Mason L. Rev. at 843; *see also Simcox*, 511 F.3d at 605 (citing Weiner's article for the proposition that the purposes of the Hague Convention would not be furthered by "forcing the return of children who were the direct or indirect victims of domestic violence").

Indeed, the trend of Hague Convention cases involving domestic violence is exemplified in the Second Circuit. Of the twelve Hague Convention cases the Second Circuit decided most recently, including the instant case,[2] six in-

[2] App., *infra* at 26a–40a; *Valles Rubio* v. *Veintimilla Castro*, 813 F. App'x 619 (2d Cir. 2020); *In re NIR*, 797 F. App'x 23 (2d Cir. 2019); *Eidem* v. *Eidem*, 796 F. App'x 27 (2d Cir. 2019); *Davies* v. *Davies*, 717 F. App'x 43 (2d Cir. 2017); *Marks on Behalf of SM* v. *Hochhauser*, 876 F.3d 416 (2d Cir. 2017); *Adamis* v. *Lampropoulou*, 659 F. App'x 11 (2d Cir. 2016); *Tann* v. *Bennett*, 648 F. App'x 146 (2d Cir. 2016); *Souratgar* v. *Lee*, 818 F.3d 72 (2d Cir. 2016); *Taveras ex rel. L.A.H.* v. *Morales*, 604 F. App'x 55 (2d Cir. 2015); *Ermini* v. *Vittori*, 758 F.3d 153 (2d Cir. 2014); and *Pignoloni* v. *Gallagher*, 555 F. App'x 112 (2d Cir. 2014).

volved domestic violence. *See* App., *infra* at 26a–40a; *Valles Rubio* v. *Veintimilla Castro*, 813 F. App'x 619 (2d Cir. 2020); *In re NIR*, 797 F. App'x 23 (2d Cir. 2019); *Davies* v. *Davies*, 717 F. App'x 43 (2d Cir. 2017); *Souratgar* v. *Lee*, 818 F.3d 72 (2d Cir. 2016); *Ermini* v. *Vittori*, 758 F.3d 153 (2d Cir. 2014). The grave risk exception is one of the only lifelines in the Hague Convention for victims of domestic violence seeking safety, peace, and protection for themselves and their children. Yet, despite the increasing number of domestic violence victims and their children in dire need of that lifeline, the ameliorative-measures framework adopted by certain courts and as applied by the district court here have effectively gutted the grave risk exception.

d. The instant case illustrates the problem with the court of appeals' approach. Applying the Second Circuit's framework, the district court ordered the return of B.A.S. to Italy—despite finding that B.A.S. would be subject to the grave risk of an abusive father upon that return—because his father was willing to consent to a protective order and pay some money. *See* App., *infra*, 13a–25a. That approach ignores the facts that domestic violence by definition demonstrates indifference to the law, and that the authorities in the home country did not prevent or stop the abuse, leading the victim to flee. And, as a result, it threatens the safety of children and their caregivers.

The dangers of the court of appeals' approach are underscored by other cases in which it has been applied. In *Valles Rubio*, for example, the child was returned to Ecuador without the protection of his primary caretaker, who was too afraid to return. *See* 813 F. App'x at 622. And in *Maurizio R.*, 135 Cal. Rptr. 3d, a young child was returned to Italy because the abusive father satisfied various undertakings, including consent to Italian court orders restricting his access to the child. But upon return,

the father kidnapped the child and disappeared for two weeks, prompting an international search across Europe. *See* Rosie Scammell, *Italian dad goes on the run with American son*, The Local (Jan. 16, 2014), https://www.thelocal.it/20140116/italian-dad-goes-on-the-run-with-american-son.[3]

There is no room for a wait-and-see approach when the safety of children is concerned. Potential life-and-death decisions involving complex psychological issues and complicated family dynamics require more than the expedited treatment of a Hague proceeding. The court of appeals' approach is fundamentally at odds with the purpose of the Hague Convention, and is an abdication of a court's responsibility to treat the safety of children as paramount. That approach led to the deeply concerning result in this case, and the decision below cannot be allowed to stand.

2. The State Department Advises Against Extensive Undertakings

Consistent with the purpose and history of the Hague Convention, the State Department has advised against

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[3] And, although not a U.S. matter, the approach had tragic consequences for Cassandra Hasanovic, a mother who fled with her young children from the UK to Australia to escape an abusive husband and father, but was forced to return under the Hague Convention subject to undertakings by the father. Shortly after their return, the young mother was brutally stabbed to death in front of the children by the father as she tried to take the family to a domestic violence shelter. Sandra Laville, *Woman's Murder Could Have Been Prevented, Says Jury*, The Guardian (Feb. 26, 2014), https://www.theguardian.com/society/2014/feb/26/cassandra-hasanovic-murder-domestic-violence. *See also* Department of Community Services & Hadzic [2007], FamCA 1703 (30 November 2007); Michael Salter, *Getting Hagued: The impact of international law on child abduction by protective mothers*, 39 Alternative L. J. 1, 19–23 (2014).

the use of ameliorative measures beyond those that are simple and uncontroversial. Specifically, the State Department has emphasized that in cases of "grave risk," it is most appropriate for courts to "deny the return request" because to do otherwise could "embroil the court in the merits of the underlying custody issues and would tend to dilute the force of the [grave risk] exception." Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, U.S. Dep't of State, to Michael Nicholls, Lord C.'s Dep't, Child Abduction Unit, United Kingdom. "Undertakings that do more than [paying return airfare] would appear questionable under the Convention." *Ibid.*

The State Department's interpretation of the Convention is entitled to "great weight." *Blondin*, 238 F.3d at 162 n.10; *Danaipour*, 286 F.3d at 22; *Simcox*, 511 F.3d at 606. Numerous courts of appeals have thus relied upon the State Department's guidance in declining to return children in situations of domestic violence. *See, e.g.*, *Van De Sande*, 431 F.3d at 572; *Simcox*, 511 F.3d at 606–07; *Danaipour*, 286 F.3d at 25–26; *Baran*, 526 F.3d at 1350.

C. The Question Presented Is Exceptionally Important And Warrants The Court's Review In This Case

1. This case perfectly illustrates the importance of the question presented for ensuring the safety of children, the principal concern of the Hague Convention. The ameliorative measures ordered in this case—which rely on Mr. Saada's willingness and ability to obey foreign court orders—are precisely the types of considerations that undermine the express text and purpose of the grave-risk exception.

The district court made robust, specific factual findings regarding Mr. Saada: that he is a vicious abuser, engaged in violence "without thinking," could not control his explosive anger, and showed no capacity to change. App, *infra*, 51a, 67a, 80a. Mr. Saada had little regard for the law when he assaulted, raped, threatened, and generally abused Ms. Golan, often in the presence of their young child and in some instances causing physical harm to the child. *See id.* at 51a–52a, 54a–55a, 59a. Despite those findings, the court ordered the return of B.A.S. to Italy subject to, among other things, the issuance of a foreign court order. At bottom, the court's order relied on the promises of a known domestic abuser whose own expert testified that "his reliability was 'down the tube'" after he lied about the frequency and severity of the abuse, and that "he could not control his anger or take responsibility for his behavior." *Id.* at 67a, 80a.

The Court's intervention is thus necessary to bring the courts of appeals into uniformity and to ensure that Article 13(b) of the Hague Convention functions as an effective avenue for ensuring the safety of children. *See* Explanatory Report of E. Pérez-Vera ¶ 29; *Van De Sande*, 431 F.3d at 572.

2. This case is also an excellent vehicle in which to decide the question presented. The question of whether courts can require ameliorative measures is squarely presented here: it was the sole issue presented in the immediate decision below, and has been fully litigated on a complete record. Numerous courts have analyzed whether ameliorative measures are adequate when a child is at grave risk of harm because of domestic abuse, and reached differing conclusions. Further percolation among the courts of appeals is therefore unnecessary.

The Court should grant certiorari in this case and make clear the Hague Convention does not require the consideration of ameliorative measures.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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