No. 20-1034

IN THE

Supreme Court of the United States

NARKIS ALIZA GOLAN,

Petitioner,

v.

ISACCO JACKY SAADA,

Respondent.

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

BRIEF FOR *AMICI CURIAE* INDIVIDUALS AND ORGANIZATIONS ADVOCATING FOR VICTIMS OF DOMESTIC VIOLENCE IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici are organizations and individuals with extensive experience providing services to and advocating for victims of domestic violence in the United States and abroad. Based on first-hand experience, *amici* have gained valuable insight into the impact of interpretation of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670 ("Hague Convention"), on children and their caregiver parents who have fled domestic violence. A list of *amici* appears in the Appendix to this brief.

Amici are concerned that the decision below and the interpretation that the Second Circuit prescribes for Hague Convention cases involving grave risk findings will have a lasting detrimental effect on children and their caregiver parents who flee to escape domestic violence. *Amici* therefore submit this brief in support of Petitioner Golan.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. *Amicus* Sanctuary for Families, a non-profit organization that provides a range of services to domestic violence victims, has provided Petitioner with various services, including limited legal advice on matters not at issue in this Petition. All parties were timely notified and consented in writing to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented by this case is of great significance to victims of domestic violence—both children whose interests were intended to be protected under the Hague Convention and parents who are primary caregivers for those children and who have fled with a child to escape persistent physical and psychological abuse. At stake is whether courts will return the child to the country, and likely to the abuse, from which the child and primary caregiver parent fled. The decision below rests on application of a circuit standard that pushes district courts to craft supposedly protective measures—a concept that is not referenced in the text of the Convention or the text of ICARA,[2] its implementing legislation—and order return of the child, thereby driving the child and its primary caregiver back to the abusive environment that drove them to escape in the first place. That standard largely eviscerates an important Hague Convention exception that should protect children and their primary caregiver parents who flee to another country to escape their abusers.

This Court has recognized the importance of resolving conflicts in interpretation of the Hague Convention. *See, e.g.*, *Monasky v. Taglieri*, 140 S. Ct. 719 (2020); *Abbott v. Abbott*, 560 U.S. 1 (2010). The threat to domestic violence victims posed by the Second Circuit standard weighs strongly in favor of review here.

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[2] Int'l Child Abduction Remedies Act, 22 U.S.C. § 9001 et seq.

Although the Hague Convention does not explicitly address domestic violence, this Court has noted that the drafters included an important exception that should help guard children from the harms resulting from such violence. Article 13(b) allows a court to refrain from ordering a child's return to the country of habitual residence if it is shown that "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." *See Monasky*, 140 S. Ct. at 729. This grave risk exception offers the one protection available to domestic violence victims when the abuser seeks to force them back to the abuser's home country and sphere of control.

Allowing the decision below to stand means that in the Second Circuit (and in two other circuits that have followed the Second Circuit's lead) the key protection the Hague Convention provides for children who face grave risks of exposure to harm from domestic violence will be eviscerated, leaving these children without effective protection. The Second Circuit's approach subordinates the interests of the child to be safe from physical or psychological harm to the interests of the country to which the abuser seeks to return the child, contrary to the intention of the Hague Convention's drafters.

In considering the Petition, the Court should take into account important characteristics of domestic violence and its perpetrators that make it difficult to develop effective protective measures under the best of circumstances. This becomes a Herculean task when attempted in a jurisdictional proceeding that values speed, by a federal court unaccustomed to

assessing domestic violence protective measures and without authority to enforce the supposed protective measures once a child is returned. In particular, because of the strong tendency of abusers to continue or escalate their abuse, especially after a period of separation from the child and caregiver parent, it is virtually impossible to guarantee that any condition—even if embodied in a court order in the country of return—will prevent resumption of abuse following return. For this and other reasons, the Second Circuit's approach is inconsistent with important interests underlying the Hague Convention.

The Court should grant the Petition and resolve the conflict by ruling that a district court that finds that return presents a grave risk of exposure to harm to the child is not required to strive to craft conditions to facilitate return.

ARGUMENT

Federal courts of appeals are split on the question whether, once a district court has found that return will present a grave risk to the child, it must strive to fashion conditions that would allegedly protect the child and permit return.[3] As the Petition notes, the majority of federal circuits do not dictate that district courts that have found grave risk must then go on to attempt to fashion conditions that would facilitate return, especially in cases involving domestic violence. Pet. 10–17.

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[3] State courts have adopted similarly conflicting approaches to this issue. Pet. 17–18.

However, the Second Circuit *requires* district courts to make an effort to craft ameliorative conditions, and the Third and Ninth Circuits have followed that lead. Pet. 13–14. In these three circuits, despite finding by clear and convincing evidence[4] that return would present a grave risk of exposure to harm to the child—a finding that should militate against *any* consideration of return—district courts must attempt to craft ameliorative measures that could supposedly mitigate that risk. *Id.*

The Second Circuit's approach is inconsistent with the text, purpose, and drafting history of the Hague Convention, and with State Department guidance on the subject. Pet. 18–24. It is inconsistent with the overriding goal of protecting children, as well as the goal of expeditiously resolving Hague Convention cases.

The Second Circuit's requirement fails to consider adequately the context in which Hague Convention cases arise. For instance, in the many cases in which the primary caregiver parent removed the child to escape domestic violence and/or abuse directed at the child, the Second Circuit's approach overlooks key characteristics of domestic abuse. In such cases, requiring return, even with conditions, perpetuates the power and coercive control that abusers exert over their victims by relying on the abuser's supposed good faith promises, money, or ability to secure residency or working papers for the caregiver parent. Conditions

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[4] *See, e.g., Simcox v. Simcox*, 511 F.3d 594, 604 (6th Cir. 2007) (requiring proof of a grave risk of exposure to harm to the child by clear and convincing evidence).

frequently amount to a set of ineffective requirements the abuser is likely to ignore and that U.S. courts—and the primary caregiver—are powerless to enforce once the child is returned. The Second Circuit's approach pressures district courts to return a child in reliance on such illusory "protections," eviscerating the grave risk exception, subjecting the child to an unacceptable risk of exposure to harm following return, and preventing the primary caregiver from breaking the cycle of abuse.

I. WHERE A DISTRICT COURT HAS MADE A GRAVE RISK FINDING BASED ON DOMESTIC ABUSE, IT SHOULD NOT BE REQUIRED TO STRIVE TO FASHION CONDITIONS TO FACILITATE RETURN OF THE CHILD.

A. In cases involving sustained and pervasive domestic violence, framing effective conditions for return is a near-impossibility.

In considering the question presented by this case, it is essential to take account of the characteristics of domestic violence. The court below and the two other circuits that require district courts to consider ameliorative measures necessarily assume that there are conditions that could sufficiently guarantee protection of children sent back to dangerous situations. However, where a district court has found grave risk based on domestic abuse, that assumption is incorrect. In cases of domestic violence that meet the grave risk standard, it is nearly impossible to frame measures that can effectively guarantee

protection of the child and the primary caregiver parent, whose welfare is inextricably linked with that of the young child.[5]

1. Coercive control by the abuser renders ameliorative conditions ineffective.

Domestic abuse is sometimes mistakenly understood as a series of discrete violent acts, when in fact it is most often an insidious pattern of physical and psychological abuse marked by an ever-present exploitation of control. This misunderstanding underlies the assumption that strict measures, carefully crafted and supervised by an authority in the country of return, could be effective protection. However, where the violence consists of continuous psychological abuse and exploitation (as it often does and as it did in this case), the safety and well-being of a child cannot be guaranteed simply by an order of protection, a supervised visit, or some amount of money.

Perpetrators of domestic abuse use a combination of tactics to maintain and gain power and control over their target, including but not limited to physical, sexual, psychological, emotional, economic, and immigration-related abuse. Using a combination of

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[5] *See, e.g.*, Michael S. Scheeringa & Charles H. Zeanah, *A Relational Perspective on PTSD in Early Childhood*, 14 J. Traumatic Stress 799, 808–11 (2001); Lisa Bolotin, *When Parents Fight: Alaska's Presumption Against Awarding Custody to Perpetrators of Domestic Violence*, 25 Alaska L. Rev. 263, 270 (2008) ("Merely observing domestic violence can have the same effect on a child as actually being abused.").

these modes of abuse, perpetrators gradually begin to exert an insidious but powerful kind of manipulative control over their victims, known as "coercive control."[6] "Coercive control is a strategic course of oppressive behavior designed to . . . establish[] a regime of dominance [over a victim's] personal life." N.Y. State Office for the Prevention of Domestic Violence, *Interview with Dr. Evan Stark* (2013), http://www.coercivecontrol.us/new-york-state-office-for-the-prevention-of-domestic-violence-interview-with-dr-evan-stark/. Non-physical forms of abuse expand a perpetrator's sphere of control and continue to undermine the victim well beyond the end of their relationship. *E.g.*, Laurel B. Watson & Julie R. Ancis, *Power and Control in the Legal System: From Marriage/Relationship to Divorce and Custody*, 19 Viol. Against Women 166, 167 (2013) ("The tactics of power and control . . . often continue to manifest

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[6] In the past year, a number of state legislatures—including California, Hawaii, New York, and Connecticut—have either enacted or introduced laws that criminalize coercive control and/or allow the introduction of evidence of coercive control behavior as evidence of domestic violence in family court, Melena Ryzik & Katie Benner, *What Defines Domestic Abuse? Survivors Say It's More Than Assault,* N.Y. Times (Jan. 22, 2021), https://www.nytimes.com/2021/01/22/us/cori-bush-fka-twigs-coercive-control.html. In 2015, England and Wales became the first countries to criminalize coercive control behavior within relationships, making it punishable by up to five years in jail, Ciara Nugent, *'Abuse Is a Pattern.' Why These Nations Took the Lead in Criminalizing Controlling Behavior in Relationships,* TIME (June 21, 2019), https://time.com/5610016/coercive-control-domestic-violence/, with other countries since following suit. *See, e.g.*, Domestic Abuse (Scotland) Act 2018, 2018 asp 5.

during the dissolution of the relationship and pervade legal proceedings.").

Efforts to craft ameliorative measures are based on the often-erroneous assumption that the abuser, whose past behavior presented grounds for finding a grave risk of exposure to harm to the child, will reform and start to live consistent with a set of conditions wholly out of step with the abuser's past conduct. In reality, serious and persistent abusers generally do not abandon their abusive conduct, especially when there is no criminal penalty imposed or close monitoring of their behavior. In *amici's* experience, which has been confirmed by social science research, abusers remain highly likely to continue and escalate their abuse, including by initiating abuse of the child, even if they did not previously target the child. Abusers cannot be trusted to implement undertakings designed to mitigate their own abuse. *See id.* at 167; *see also* Merle H. Weiner, *Int'l Child Abduction and the Escape from Domestic Violence*, 69 Fordham L. Rev. 593, 680 (2000) ("Some victims may only be safe a continent away from their abusers, regardless of the conditions that courts could impose for their safety."). Instead of serving to protect children and their primary caregiver parents who flee abuse, ameliorative measures may provide abusers an avenue by which to continue to exert, or even expand, their spheres of control.

2. In cases of pervasive domestic violence, several factors heighten the grave risk of exposure to harm to the child upon return.

Once a victim of domestic abuse (either the child or the child's caregiver parent or both) returns to the abuser's home country—separated from the caregiver parent's own country, language, and support system—and is again within the abuser's sphere of control, several factors heighten the risk that the child and/or the caregiver parent will suffer further abuse. An adult victim's escape, with a child, from the abuser's control often enrages the abuser and motivates the abuser to punish the victim's efforts to escape and to re-establish that control through even stronger means. This is why serious violence often *follows* separation. Daniel G. Saunders, Ph.D., National Resource Center on Domestic Violence, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends Risk Factors, and Safety Concerns* 4 (2007); *see also* Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. Rev. 2117, 2138–39 (1993) ("Separation tends to increase, not decrease the violence, and many of the women who are murdered by their partners are killed after separation."); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 65 (1991) ("Men who kill their wives describe their feeling of loss of control over the woman as a primary factor.").

Social science research shows that "physical abuse, stalking, and harassment continue at significant rates post-separation and may even become more severe."

Peter G. Jaffe et al., *Parenting Arrangements After Domestic Violence: Safety as a Priority in Judging Children's Best Interest*, J. Ctr. for Families, Child. & Cts. 81, 82 (2005) (citations omitted). Importantly, research also shows that a woman's separation from her abusive partner puts her at a greater risk of murder by the abuser. Jacquelyn C. Campbell, Ph.D. et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. Pub. Health 1089, 1090 (2003); *see also* Carolyn R. Block, *How Can Practitioners Help an Abused Woman Lower Her Risk of Death?*, 250 Nat'l Inst. Just. J. 6 (2003), https://www.ojp.gov/pdffiles1/jr000250c.pdf (explaining that a woman's attempt to leave was "the precipitating factor in 45 percent of the murders of a woman by a man").

This body of research is not based on mere theory; in the experience of *amici*, the results reflect the realities of the post-separation experiences of domestic abuse victims. In Hague Convention cases, courts that order repatriation for children—and frequently by extension the primary caregiver—often place the children (as well as the primary caregiver) in grave danger. Roxanne Hoegger, *What if She Leaves? Domestic Violence Cases under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 Berkeley Women's L.J. 181, 196–97 (2003) ("If courts force victims to return to countries of habitual residence, where they are immigrants, judges may unwittingly enable [abusers] to control their victims more effectively. . . . [Abusers] can easily isolate and take advantage of victims' marginalized status."). For example, in 2008, an Australian court did just that, ordering two young boys returned to the

United Kingdom, where they had been born and where their abusive father lived. Shortly after their return, the mother, who had accompanied the boys as their primary caregiver, was forced to flee to a refuge with her children. She never made it there. En route, her estranged husband brutally murdered her, on a public street, in front of her children and her mother. *See* Sandra Laville, *Woman's Murder Could Have Been Prevented, Says Jury*, Guardian (Feb. 26, 2014), https://www.theguardian.com/society/2014/feb/26/cassandra-hasanovic-murder-domestic-violence.

In addition, social scientists report that, even if the abuser did not direct violence against the child before separation, the risk of violence to the child may increase after the separation ends. While the abuser might comply with an order to stay away from the caregiver parent following return, the abuser may also turn anger and abuse toward the child. "Abusers may be more likely to use children as proxies for control post-separation, as other forms of abuse become less available." Brittany E. Hayes, Ph.D., *Indirect Abuse Involving Children During the Separation Process*, 32 J. of Interpersonal Viol. 2974, 2987 (2017) (finding a higher likelihood that an abuser will threaten to harm children post separation); April M. Zeoli et al., *Post-Separation Abuse of Women and Their Children: Boundary-Setting and Family Court Utilization among Victimized Mothers*, 28 J. Fam. Viol. 547, 547 (2013) (citing threats against children as a manner in which abuse escalates post-separation). Psychological harm to the child may also increase. Children exposed to persistent domestic violence live in an "ongoing alarm state," which has tremendous negative consequences

for brain development and can eventually lead to substance abuse, suicide attempts, and depressive disorders. Lynn H. Schafran, *Domestic Violence, Developing Brains, and the Lifespan: New Knowledge from Neuroscience*, 53 Judges' J. 32, 33–34 (2014). The American Psychological Association noted that, "[e]ven during supervised visitation, in which physical violence is constrained by the presence of an observer, threats as well as verbal and emotional abuse may continue" with the result that "the children often feel responsible for the violence against their mother, because the father was visiting them." Am. Psych. Ass'n, *Violence and the Family, Report of the American Psychological Association Presidential Task Force on Violence and the Family* 40 (1996).

The risk of a child's exposure to serious harm is not ameliorated by a court order in the country of habitual residence (like the one the Italian court issued in this case). Formal court orders do not change an abuser's personality or disregard for the law—which a longstanding record of unlawful physical assaults clearly demonstrates. Given their propensity to continue or escalate the abuse, it is hardly surprising that abusers regularly violate such conditions, including those embodied in court orders, rendering the conditions mere empty promises. A 2003 survey of cases imposing conditions on abusers found that those addressing violence (including some included in court orders imposed in the country of return) were broken *in every case*. Reunite Research Unit, Int'l Child Abduction Centre, *The Outcomes for Children Returned Following an Abduction* 31–33 (Sept. 2003), http://takeroot.org/ee/pdf_files/library/freeman_2003.pdf. Moreover, in some cases, "it was clear from what

was stated by the undertaking parent that the failure to [honor] was deliberate and premeditated." *Id.* at 32. Consequently, even where orders in the country of return appear nominally protective, there is no way to guarantee the safety of the child following return, particularly where the abuser has a long record of serious violence in the family.

Thus, a Canadian court presiding over a Hague Convention proceeding recognized the inadequacy of protective measures when it deemed a U.S. safe harbor order insufficient to protect the child from grave risk in a case involving sustained and pervasive domestic violence. In *Achakzad v. Zemaryalai* [2011] W.D.F.L. 2, 20 July 2010, Ontario Court of Justice (Canada) [INCADAT Reference: HC/E/CA 1115], the father had assaulted the mother on multiple occasions, threatened to rape her, and bore a loaded firearm near the child. The Canadian court held that returning the child to California posed a grave risk to the child that could not adequately be controlled by a court order because the father had shown a disregard for the judicial system by lying throughout his evidence and, of particular significance, shown himself incapable of controlling his behavior when angry. This case presents a similar situation. The district court found that Mr. Saada had not demonstrated an ability to change his behavior or to control his anger and that he could not accept responsibility or understand the severity of his actions. Pet. App. 66a–67a, 80a. Ordering return on such a record is a recipe for disaster.

B. Requiring courts to strive to fashion conditions for return in cases involving persistent domestic violence is inconsistent with key interests underlying the Hague Convention.

1. The Second Circuit approach is inconsistent with the Convention's paramount interest in protecting the child.

The Second Circuit's insistence that courts strain to frame conditions that will permit return of the child not only ignores the realities of domestic violence; it is also inconsistent with core concerns underlying the Hague Convention. The Hague Convention's preamble places the interests of the child at "paramount importance." *See also* Weiner, 69 Fordham L. Rev. at 677 ("[P]rotection of children is the *raison d'étre* of the Convention.*"*). While the Convention contemplates deterrence of abduction and return to a home country as the primary means of furthering children's well-being, the grave risk exception reflects the drafters' clear understanding that return is not always in the children's interests. The Second Circuit's insistence on a searching inquiry for conditions to facilitate return demotes the child's safety and well-being below an abusive parent's interest in return and is contrary to the explicit purpose of the Convention.

It is nearly impossible to frame effective ameliorative conditions where the grave risk arises from domestic violence severe enough to constitute clear and convincing evidence of a grave risk of exposure to harm to a child. Although conditions may

appear to a judge to be adequate on their face, the research shows that most, if not all, abusers violate conditions, and there is no guarantee that the conditions will be enforced. A U.S. judge can sanction violations and enforce conditions only if the parties, or the child, remain in the United States. "There is currently no remedy for the violation of an undertaking . . . . When an undertaking is violated, the violator is typically outside the jurisdiction that imposed the condition, and the child has already been returned." *Id*. at 678.

The inability of a U.S. court to enforce any conditions once the child leaves this country makes it tantalizingly easy for an abuser to "agree" to undertakings that he never intends to fulfill and that therefore will do little to protect the child. Experience shows that is precisely what has occurred too often in Hague Convention cases. *See* Reunite Research Unit, *supra*, at 31 (finding that, in a survey of cases imposing conditions on abusers, that *every condition* directed to violence was broken). In fact, attorneys for alleged abusers frequently advise their clients to agree to specific undertakings because "the laws in the[ir] home State were different and 'the undertakings mean nothing.'" *Id.* at 33.

Even when a court in the country of return issues a facially satisfactory protective order, enforcement by that foreign court is not assured. Through the sort of coercive control discussed above, the abuser often can prevent the caregiver parent from enforcing conditions in the abuser's home country once the child is returned. In this case, *amici's* collective experience and social science research strongly suggest that Mr.

Saada is likely to break his promises and continue or even escalate his abuse against Ms. Golan if B.A.S. is returned to Italy. *See, e.g.*, Lynn H. Schafran, Saada v. Golan*: Ignoring the Red Flags of Domestic Violence and What Is Required to Protect a Child from 'Grave Risk,'* 25 Dom. Viol. Rep. 3, 15 (2019) (describing Mr. Saada's behavior in this case as "the reddest of flags" before concluding that "[i]t defies reality to believe 'undertakings' can contain an abuser who is this dangerous"). When that red flag proves prescient, Ms. Golan will have no recourse because the U.S. district court will lack jurisdiction to enforce the conditions and Mr. Saada will be free to exercise coercive control stratagems to discourage any efforts by Ms. Golan to enforce the Italian court order and to do what he can to modify that order. In these circumstances, Ms. Golan will have little or no ability to protect B.A.S. from the situation of continuing (and likely worsening) abuse they will face. Consequently, there are no measures that can protect B.A.S. from the grave risk of exposure to harm once he is returned.

2. The Second Circuit approach is inconsistent with the Convention's interest in expedited proceedings.

The Hague Convention signatories also prioritized expeditious determinations in matters affecting children. *See, e.g.*, Hague Convention Art. 11 (providing for requests for "statement[s] of the reasons for the delay" where proceedings exceed six weeks); 22 U.S.C. § 9001 (providing procedures for "prompt" determinations); *Monasky*, 140 S. Ct. at 720 (noting the Convention's "emphasis on expedition."); *Blondin v. Dubois*, 189 F.3d 240, 244 (2d Cir. 1999)

(emphasizing the "importance of deciding matters affecting children as expeditiously as possible"); *Norinder v. Fuentes*, 657 F.3d 526, 532–33 (7th Cir. 2011) (collecting authorities). Requiring that district courts engage in intensive analyses of all potential conditions or coordinate with another country's judicial and social service authorities to set up conditions makes expedition virtually impossible, especially when the laws and regulations of the foreign country are unfamiliar to the U.S. court.

In cases involving persistent domestic violence, the effort to fashion conditions will almost certainly embroil district courts in lengthy resource-intensive disputes involving the kinds of parenting and domestic violence protective issues that are more properly the focus of family courts. In this case, for example, the district court took an additional nine months to determine potential measures, Pet. App. 12a, during which it mobilized the resources of the U.S. Department of State, the International Judicial Network, the Italian Central Authority, the Italian Ministry of Justice, and the Court of Milan. *See id.* (summarizing relevant communications, conferences, status reports, and briefing). The actions the district court was forced to undertake to satisfy the Second Circuit's burdensome framework went well beyond the traditional purview of district courts and are inconsistent with the goal of an expeditious proceeding.

Further, the protracted proceedings called for by the Second Circuit's pressure to develop ameliorative conditions particularly prejudice domestic violence victims who have fled abuse, often with very limited

financial resources as a result of the abuse. An abuser's coercive control frequently leaves the caregiver parent without sufficient resources to pursue complex litigation.[7] Absent extraordinary circumstances, such as extensive assistance from attorneys willing to take the case on a pro bono basis and assist their pro bono client in securing critical experts,[8] it is often far too costly for domestic violence victims to make even the threshold showing of grave risk. Requiring the parties to further litigate the issue of conditions adds significantly to the financial burden.[9] The Second Circuit's approach requires such extensive time and resources that it is infeasible for most domestic violence victims to make the case for

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[7] Coercive control is a "strategic form of ongoing oppression and terrorism that invades all areas of women's activity by limiting access to money and other basic resources." *Interview with Dr. Evan Stark, supra*; *see also, e.g.*, Evan Stark, Ph.D, MSW, *Looking Beyond Domestic Violence: Policing Coercive Control*, 12 J. Police Crisis Negot. 199, 211 (2012) (documenting a survey of over 500 women who sought domestic violence support, 79% of whom reported being denied access to money or having it taken from them). In this case, a Social Services investigation found Mr. Saada "kept [Ms. Golan] from financial and legal independence," and that she lacked financial autonomy. Pet. App. 58a–59a.

[8] "Having an informed and prepared expert witness is critical to using the grave risk exception successfully." Jeffrey L. Edleson, *The Role of Expert Witnesses in Proving Grave Risk to Children*, 25 Dom. Viol. Rep. 5, 6 (2019).

[9] *See* Merle H. Weiner, *The Article 13(b) Guide to Good Practice*, 25 Dom. Viol. Rep. 7, 21 (2019) ("[Litigating protective measures] puts an additional burden on a survivor who is already disadvantaged in many ways in the litigation, including by the higher burden of proof.").

adequate protection, creating a significant risk that children are repatriated without adequate protections against the grave risk the district court has identified.

* * *

This Court should not endorse an approach that undermines the Convention's interest of "paramount importance," protecting the child, as well as the Convention's explicit priority of expedited proceedings. As the Petition explains, neither the text nor the drafting history of the Hague Convention makes any reference to fashioning conditions for return once a court has found that return would create a grave risk of exposure to harm for the child. Indeed, both the Convention preamble and the drafting history repudiate the Second Circuit approach.[10] *See* Explanatory Report by Elisa Pérez-Vera ¶ 29 (1981) ("[T]he interest of the child in not being removed from its habitual residence without sufficient guarantees of stability in its new environment, gives way before the primary interest of *any* person in not being exposed to physical or psychological danger . . . ."). District courts that have made a grave risk finding should not be required then to strain to frame conditions that make return seem less dangerous, particularly where the

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[10] Requiring litigation of conditions is particularly inappropriate in light of the high threshold U.S. courts have set for finding a grave risk of harm. *See* Weiner, *Article 13(b) Guide*, *supra*, at 21 ("The U.S. is one of the only countries that uses a clear-and-convincing-evidence standard [for the grave risk defense]."); *see also Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013) ("This 'grave risk' exception is to be interpreted narrowly, lest it swallow the rule.").

grave risk finding is based on a persistent or extreme history of abuse.

II. THE SIGNIFICANCE OF THE QUESTION PRESENTED FOR DOMESTIC VIOLENCE VICTIMS WEIGHS HEAVILY IN FAVOR OF REVIEW.

The importance of this case to victims of domestic violence is a factor that weighs heavily in favor of granting the Petition. Since the 1980s, when it was drafted, an increasing number of cases arising under the Hague Convention have involved children and their caregiver parents who have fled domestic abuse. The Hague Convention was drafted and ratified in the United States at a time when domestic abuse and its devastating effects on children's psychological and cognitive development were not widely known. *See* Weiner, 69 Fordham L. Rev. at 601–10. The dominant concern at the time of drafting was abduction by a noncustodial parent seeking a more favorable forum for custody adjudication. Brenda Hale, *Taking Flight—Domestic Violence and Child Abduction*, 70 Current Legal Problems 1, 4 (2017). The assumption in that context was that any removal was harmful to the child. Weiner, 69 Fordham L. Rev. at 624.

Today, many parents who remove their children are primary caregivers fleeing domestic abuse. *See* Nigel Lowe & Victoria Stephens, Int'l Child Abduction Centre, *Part I—A Statistical Analysis of Applications Made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of Int'l Child Abduction—Global Report* 8 (2018), https://assets.hcch.net/docs/d0b285f1-5f59-41a6-

ad83-8b5cf7a784ce.pdf; *see also* Merle H. Weiner*, A Note from the Guest Editor*, 25 Dom. Viol. Rep. 1, 3–4 (2019) ("Seventy-three percent (73%) of the international abductors are mothers, and many claim to be fleeing from domestic violence."). As many as one-third of all published and unpublished Hague Convention cases mention violence at home. Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of Int'l Parental Child Abduction*, 11 Viol. Against Women 115, 120 (2005); *see also* Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women & Children are Being Returned by Coach & Four*, 13 Int'l J.L., Pol'y & Fam. 191, 193 (1999) ("[I]n at least half of the instances of parental abduction [in the United States], violence is a relevant presence in the parental relationship."). Removal of a child in this setting raises much different considerations than abduction by a non-custodial parent who is forum-shopping. In cases of domestic violence, the grave risk exception provides crucial protection for the child.

Signatories to the Hague Convention have taken notice. In 2011, at the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions, a number of state participants recognized that domestic violence was an important factor in many cases and had a significant impact on the children the Hague Convention was intended to protect. Hale, *supra*, at 10–11. Lady Hale, President of the Supreme Court of the United Kingdom and a member of a working group created to address the issue of domestic violence in Hague Convention cases, concluded:

> There was and remains a real concern in some states that their primary carer nationals were being required to choose between returning with the child to a situation where they would face a real risk of violence or abuse or refusing to return so that the child would have to go alone to a new situation. In either case there was a real risk of harm to the child.

Id. at 11.

The Second Circuit's approach pushes district courts to order return subject to ineffective and unenforceable conditions, undermining the goal of protecting the child and eviscerating the grave risk exception. If this conflict persists, whether a child can be protected in situations of grave risk due to domestic violence will depend on the location within the United States to which the caregiver parent flees. There is no reason to tolerate such inconsistency, particularly when the important interests of the safety and protection of a child are at stake. The Second Circuit's approach should be rejected because it lacks support in the Hague Convention itself and is inconsistent with its goals. The conflict should be resolved in favor of the circuits that decline to insist that district courts strive to fashion ameliorative conditions to permit return where the court has found a grave risk of exposure to harm to the child.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Certiorari and resolve the conflict in favor of those circuits that decline to require district courts that find return would create a grave risk of exposure to harm to then craft conditions in an effort to facilitate return of the child.

Respectfully submitted,

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APPENDIX—List of *Amici Curiae*

Amici curiae are the following organizations and individuals with extensive experience providing services to and advocating for victims of domestic violence in the United States and abroad.[11]

1. **Sanctuary for Families, Inc.**

2. **Battered Mothers Custody Conference**

3. **Deborah Epstein**, Professor of Law and Director, Domestic Violence Clinic, Georgetown University Law Center

4. **Her Justice Inc.**

5. **Joan Meier**, Professor of Clinical Law and Director, National Family Violence Law Center at the George Washington University Law School

6. **Lawyers Committee Against Domestic Violence New York**

7. **Legal Momentum, the Women's Legal Defense and Education Fund**

8. **Leigh Goodmark**, Marjorie Cook Professor of Law and Co-Director, Clinical Law

[11] Individuals' institutional affiliations are included for identification purposes only and do not constitute or reflect institutional endorsement.

Program, University of Maryland Francis King Carey School of Law

9. **Merle Weiner**, Philip H. Knight Professor, University of Oregon School of Law

10. **National Network to End Domestic Violence, Inc.**

11. **New York State Coalition Against Domestic Violence Inc.**

12. **New York Legal Assistance Group Inc.**

13. **Pathways to Safety International**

14. **Safe Horizon, Inc.**