No. 20-1034

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

REPLY BRIEF FOR THE PETITIONER

DANIEL H. LEVI
CARL RIZZI
RANDALL W. BRYER
XINSHU SUI
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

KAREN R. KING
Counsel of Record
MORVILLO, ABRAMOWITZ, GRAND, IASON & ANELLO PC
565 Fifth Avenue
New York, NY 10017
(212) 856-9600
kking@maglaw.com

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There is no dispute that a conflict exists among the courts of appeals regarding the consideration of ameliorative measures to facilitate return of children to foreign countries under the Hague Convention and ICARA, despite a finding that such return would place the child at grave risk of harm. This conflict has legal significance, is exceptionally important, and has real-world consequences for families that have been shattered by domestic violence.

Where, as here, the unreliable temperament and violent nature of the parent in the foreign country is the source of the grave risk, courts should not be forced—in what is supposed to be an expedited, narrow proceeding—to try and fashion solutions to complex social, emotional,

and psychological problems. Such a mandate has no textual basis in the Hague Convention. And in domestic-violence cases in particular, that mandate is antithetical to the primary purpose of the Hague Convention—the safety of children.

The realities surrounding American mothers fleeing violent abusers who have been found by a court to pose a grave risk to their children should not be ignored in deference to the abusers' home countries. History has demonstrated that protective orders, therapy, and money are insufficient to contain domestic violence. This case is an ideal vehicle to resolve the conflict among the lower courts. The petition for a writ of certiorari should be granted.

A. Mr. Saada Acknowledges That A Conflict Exists Among The Federal Courts Of Appeals

Critically, Mr. Saada does not dispute that there is a conflict among the federal courts of appeals, as well as confusion among various state courts, regarding the use of ameliorative measures in Hague Convention cases where it has already been determined that return of the child to the country of habitual residence would place the child at grave risk. *See* Pet. 14-17.

Instead of disputing the existence of this conflict, Mr. Saada argues that judicial discretion makes the conflict inconsequential. *See* Br. in Opp. 1-2, 11-15. Mr. Saada is wrong.

1. The allowance of judicial discretion does not render the conflict over whether courts are *mandated* to consider ameliorative measures any less significant. Indeed, this Court regularly grants certiorari to resolve conflicts and review frameworks involving discretionary and mandatory considerations. *See, e.g.*, *Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969, 1975 (2016)

("We granted certiorari to decide whether § 8127(d) requires the Department to apply the Rule of Two in all contracting, or whether the statute gives the Department some discretion in applying the rule."); *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014) (holding that the Federal Circuit's framework for awarding attorneys' fees in patent litigation was "unduly rigid" and "impermissibly encumbers the statutory grant of discretion to district courts").

2. This Court rejected an argument much like respondent's in *I.N.S.* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987). There, the petitioner argued that the distinction between discretionary asylum status and mandatory withholding of deportation had "no practical significance" because the district court has ultimate judicial discretion over whether an alien can remain in the United States. *Id.* at 443-444. This Court rejected the argument, holding that lower court decisions with inconsistent results "clearly demonstrate the practical import of the distinction." *Id.* at 444.

Here too, the rulings in circuits that mandate consideration of ameliorative measures are starkly different from the outcomes in circuits that disfavor ameliorative measures. *See* Pet. 10-18. Only federal district courts and state appellate courts that follow the Second Circuit's mandate in *Blondin*—requiring consideration of ameliorative measures—have ordered the return of children found to be at grave risk due to domestic violence. *E.g.*, Pet. 13-14; *Maurizio R.* v. *L.C.*, 135 Cal. Rptr. 3d 93, 110 (Cal. Ct. App. 2011).

In contrast, we have not found any instance where a court in one of the circuits that do not require consideration of ameliorative measures has granted a petition for return where the grave-risk finding is rooted in domestic violence. Pet. 11-13; *e.g.*, *Gomez* v. *Fuenmayor*, 812 F.3d

1005, 1014 (11th Cir. 2016) (affirming grave-risk finding and denying petition for return without considering ameliorative measures); *Taylor* v. *Taylor*, 502 F. App'x 854, 857 (11th Cir. 2012) (same). Rather, those courts consistently deny petitions for return in such circumstances—even where types of ameliorative measures encouraged by the Second Circuit may have been available. *See, e.g.*, *Acosta* v. *Acosta*, 725 F.3d 868, 877 (8th Cir. 2013) (affirming denial of petition despite potential availability of Peruvian social services); *Baran* v. *Beaty*, 526 F.3d 1340, 1351-1353 (11th Cir. 2008) (affirming denial of petition even though district court refused to consider availability of Australian court orders).

The difference in outcomes is not surprising. The circuits that require a review of possible ameliorative measures do more than require mere *consideration*; if the district court finds that there are any sufficient ameliorative measures, it is then required to order the child's return. *See Blondin* v. *Dubois*, 189 F.3d 240, 248-249 (2d Cir. 1999) ("[W]e are required to place our trust in the court of the home country to issue whatever orders may be necessary to safeguard children who come before it."); *Gaudin* v. *Remis*, 415 F.3d 1028, 1033-1036 (9th Cir. 2005). That rule is a far cry from one in which a district court can decline to order a child's return upon a finding of grave risk. And it strips the court of the broad discretion to decline return specifically authorized by Article 13 of the Hague Convention.

There is simply no basis for Mr. Saada's speculative assertion that the results would not be different had those cases been litigated under a different legal standard. *See* Br. in Opp. 14-15. Indeed, many of those cases, like the present one, involve foreign countries with established legal systems, the availability of foreign protective orders,

and petitioners who could afford a large financial payment. *See, e.g.*, *Baran*, 526 F.3d at 1351-1353 (affirming denial of petition for return to Australia); *Walsh* v. *Walsh*, 221 F.3d 204, 217, 219-222 (1st Cir. 2000) (reversing grant of petition despite petitioner promising to pay for transportation, housing, clothing, and medical care in Ireland).

Because of the depth and duration of the conflict among the circuits, and the divergence in approaches and outcomes on matters involving the safety of children, this Court's intervention is necessary.

B. The Decision Below Is Erroneous

The approach of the court of appeals—which requires the consideration of ameliorative measures in the face of a grave-risk finding—is fundamentally inconsistent with the Hague Convention.

1. Mr. Saada argues that non-mandatory consideration of ameliorative measures would be "contrary to the plain reading of the text of the Convention as well as its [] goals and purposes." Br. in Opp. 15. That is incorrect. The Convention does *not* address ameliorative measures, much less require consideration of such measures. Instead, the treaty's text provides for a grave-risk exception, and makes clear that safety of the child is paramount. Pet. 18-19. The Second Circuit's mandate to then reassess grave risk in light of potential ameliorative measures is a judicial construction, not a textual one.

2. Mr. Saada asserts that "requiring courts to examine ameliorative measures in domestic-violence cases is imperative to achieving the basic purpose of the Hague Convention," Br. in Opp. 22, but the third-party commentary cited for this proposition does not address ameliorative measures. Moreover, the commentary makes clear that the overriding purpose of the Hague Convention is to protect children from harm.

For example, the Explanatory Report cited by Mr. Saada explains 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 Elisa Pérez-Vera ¶ 29 (Apr. 1981), https://www.fjc.gov/content/311576/explanatory-report-eliza-perezvera-report. The Hague Conference publication cited by Mr. Saada warns that "unless voluntary undertakings can be made enforceable in the State of habitual residence of the child, they should be used with caution, especially in cases where the grave risk involves domestic violence." Hague Conference on Private International Law, *1980 Child Abduction Convention Guide to Good Practice Part VI, Article 13(1)(b)*, ¶¶ 3, 8, 47 (2020); *see* Br. in Opp. 22.

3. Similarly, the State Department guidance cited by Mr. Saada merely recognizes that undertakings and safe harbor orders are "tools available to courts," but it does not advise that courts *must* consider them, nor that it is appropriate to use them in cases involving grave risk to the child arising from a history of domestic abuse. *See* James D. Garbolino, *The Use of Undertakings in Cases Arising Under the 1980 Hague Convention on the Civil Aspects of Child Abduction*, FEDERAL JUDICIAL CENTER 10 (Mar. 2016), https://tinyurl.com/FJCHagueConvention. Indeed, the State Department has made clear that courts are ill-equipped to consider and fashion ameliorative measures to address complex domestic situations, and it has warned against embroiling courts in the merits of custody issues. See Pet. 23-24.

4. It is telling that Mr. Saada largely ignores the findings of serial domestic violence in this case or blatantly mischaracterizes them.

Particularly egregious is Mr. Saada's assertion that the district court's grave-risk finding was based on mutual abuse and "possible future domestic violence between the parties." Br. in Opp. 5-6. This is incorrect. The district court found grave risk based on *Mr. Saada's* serial abuse of Ms. Golan, including in front of the child. Pet. App. 79a. It found that Mr. Saada "physically, psychologically, emotionally and verbally abused Ms. Golan," and that he "could not control his anger or take responsibility for his behavior." Pet. App. 48a, 51a, 67a, 79a-80a. Having found that the child would be at grave risk if he were to return to Italy because of Mr. Saada's violent tendencies, the district court should not have been required to consider and construct ameliorative measures.

5. Mr. Saada defends mandatory consideration of ameliorative measures on the ground that "all grave risk cases do not involve domestic violence" and therefore such measures "are broad in nature and can be molded to the specifications of each case." Br. in Opp. 17. This argument is irrelevant. This case, and a growing number of Hague Convention cases, involves domestic violence, and the conflict of law among the circuits has serious consequences for the victims, including the children. Whether ameliorative measures *might* be appropriate in *some* cases does not justify *requiring* consideration of "any measures" in aid of returning the child to the home country of a violent offender. The First, Eighth, and Eleventh Circuits, which do not require consideration of ameliorative measures, and the Sixth and Seventh Circuits, which disfavor their use, capture the appropriate skepticism with which the courts should view abusers like Mr. Saada

who have a history of violence, uncontrollable temper, inability to appreciate the consequences of his actions, and fundamental disrespect for the law.[1]

6. Mandatory consideration of ameliorative measures also rewards wealthy abusers who have the means to provide a sum of money ostensibly to put their victims on better footing to protect themselves and the child, but who also have the resources to exploit their home court advantage and to continue their economic abuse by keeping a victim's financial well-being tied her abuser. Here, Mr. Saada could afford a $150,000 payment as one of the ameliorative measures, while he continues to accuse Ms. Golan of kidnapping in Italian court proceedings and seeks sole custody of B.A.S by asserting that she is unstable.

7. Lastly, Mr. Saada points to the fact that the district court took "approximately nine months" to evaluate "what was available and enforceable in Italy" as an "exemplar of using the tools at hand to correctly apply the law and further the goals of the Hague Convention." Br. in Opp. 23. The opposite is true. The fact that the district court spent two-and-a-half months fashioning an initial

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[1] Mr. Saada notes that the EU and UK also mandate consideration of ameliorative measures, but he cannot deny that the issue is part of a current international debate on the prudence of ameliorative measures in situations of domestic violence. *See* Frederick K. Cox International Law Center Br. 3, 14-16. Moreover, Mr. Saada's citation to the Brussels IIa Regulations is inapposite given that such regulations have no force in non-EU European nations, and U.S. courts are not treated with the same level of reciprocity. *See id.* This leaves the "enforceability" of any ameliorative measures required by a U.S. court "questionable at best." *Ibid.* Mr. Saada also mischaracterizes *In re E. (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, which actually recognized that "[t]he appropriate protective measures and their efficacy will obviously vary from case to case and from country to country." *Id.* ¶ 36.

set of ameliorative measures, and another nine months fashioning a revised set of ameliorative measures, goes to show that the Second Circuit's mandate frustrates the purpose of the Hague Convention to resolve certain narrow issues expeditiously. As amici note, "this lengthy history directly contravenes one of the Convention's overarching goals—that child abduction petitions are ruled on promptly, so that a child's life does not remain in legal limbo for any longer than is absolutely necessary." *See* Frederick K. Cox International Law Center Br. 16. There is no dispute that issues of a child's safety and domestic abuse require careful consideration by courts with the time and expertise to examine these complex matters. And that is precisely why district courts should not be mandated to engage in such an exercise in the context of an expedited Hague Convention petition.

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

The Court's review is 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. Mr. Saada argues that review by the Court "would not substantially alter the application of the Convention" and that cases involving children at grave risk do not "arise with sufficient frequency to warrant this Court's attention." *See* Br. in Opp. 15. Mr. Saada is wrong on both counts.

1. First, there is certainly no basis to presume, as Mr. Saada suggests, that the district court would have reached the same result had it not been bound by Second Circuit precedent to consider ameliorative measures, including Italian court orders, after a finding of grave risk. *See* Br. in Opp. 1, 13-15, 23. At the time of the district court's consideration of the petition for return, the law

was settled in the Second Circuit that the district court was *mandated* to consider ameliorative measures. *Blondin* v. *Dubois*, 189 F.3d 240, 248 (2d Cir. 1999). The Second Circuit reaffirmed that requirement in the first appeal of this case. Pet. App. 33a, 35a-36a. Indeed, the district court expressly acknowledged and cited the Second Circuit mandate in both its original and its modified return orders. Pet. App. 13a-14a, 81a.

It is thus entirely possible that the district court would not have considered ameliorative measures at all had it not been required to do so. And it is well established that a change in the law on which a district court may have relied requires remand. *See Madison* v. *Alabama*, 139 S. Ct. 718, 729 (2019); *Kindred Nursing Centers L. P.* v. *Clark*, 137 S. Ct. 1421, 1429 (2017). If—as petitioner argues—consideration of ameliorative measures cannot be mandated, the district court was operating under an error of law, and remand is necessary.

2. Second, Mr. Saada's assertion that Hague Convention cases involving children found to be at grave risk from domestic violence do not arise with sufficient frequency to warrant this Court's review is unsupported and cavalier. The number of Hague Convention cases involving domestic violence has been steadily increasing; they represent half of the most recent Hague Convention cases in the Second Circuit. Pet. 21-22. Moreover, the issue of children's safety is of paramount importance and should not be disregarded even if only a handful of lives are at stake. *See Chafin* v. *Chafin*, 568 U.S. 165, 179 (2013).

3. Finally, the purpose and history of the Hague Convention make clear that the safety interest of the child is paramount. *See Baran*, 526 F.3d at 1348 ("[T]he text of the Convention and the commentaries on it place a higher premium on children's safety than on their return."). The realities of domestic violence make the Second Circuit's

approach incompatible with this philosophy. As amici note, "[a]lthough 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." Individuals and Organizations Advocating for Victims of Domestic Violence Br. 15-16.

This case perfectly illustrates the importance of the question and why the required consideration of ameliorative measures undermines the express text and purpose of the grave-risk exception.

* * * * *

There is plainly a conflict among the courts of appeals on the role of ameliorative measures in facilitating the return of a child where the departing parent has already met the high burden of proving the grave-risk exception under Article 13(b) of the Hague Convention. The decision below was built upon resolution of the question presented in this petition and there are no impediments to the Court's consideration of the question. The Court should therefore grant review and resolve this important question of law.

Respectfully submitted.

DANIEL H. LEVI
CARL RIZZI
RANDALL W. BRYER
XINSHU SUI
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the
Americas
New York, NY 10019

KAREN R. KING
MORVILLO, ABRAMOWITZ,
GRAND, IASON & ANELLO
PC
565 Fifth Avenue
New York, NY 10017
(212) 856-9600
kking@maglaw.com

MARCH 2021