No. 20-1034

In the Supreme Court of the United States

NARKIS ALIZA GOLAN, PETITIONER

v.

ISACCO JACKY SAADA

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

BRIEF FOR THE PETITIONER

KANNON K. SHANMUGAM
AIMEE W. BROWN
MATTEO GODI
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006

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

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

ANDREW A. ZASHIN
CHRISTOPHER R. REYNOLDS
AMY M. KEATING
ZASHIN & RICH CO., L.P.A.
950 Main Avenue, 4th Floor
Cleveland, OH 44113

QUESTION PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction requires that a child wrongfully removed from a country in which he or she was habitually resident must be returned to that country for an adjudication of custody rights unless, *inter alia*, there is a grave risk that return would expose the child to physical or psychological harm. The question presented is:

Whether, upon determining 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 despite the grave-risk determination.

TABLE OF CONTENTS

Page

Table of contents—continued:

TABLE OF AUTHORITIES

Cases:

Page

Cases—continued:

Treaties and statutes:

Page

Miscellaneous:

Page

Miscellaneous—continued:

Page

Miscellaneous—continued:

In the Supreme Court of the United States

No. 20-1034

NARKIS ALIZA GOLAN, PETITIONER

v.

ISACCO JACKY SAADA

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

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not published in the Federal Reporter, but is reprinted at 833 Fed. Appx. 829. An earlier opinion of the court of appeals (Pet. App. 26a-40a) is reported at 930 F.3d 533. The opinions of the district court (Pet. App. 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 (Pet. App. 86a). The petition for a writ of certiorari was filed on January 26, 2021, and was granted on December 10, 2021. The jurisdiction of this Court rests on 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, 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 is an international child-custody dispute governed by the Hague Convention on the Civil Aspects of International Child Abduction. The Convention provides that a child who is removed from a country in which he or she was "habitually resident" must be returned to that country for an adjudication of custody rights. Of particular relevance here, however, the Convention provides that a court "is not bound to order the return of the child" if it is established 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."

This case concerns a five-year-old boy, B.A.S., who currently lives in New York City with his mother, petitioner Narkis Aliza Golan, an American citizen. B.A.S. was born in Italy. It is undisputed that petitioner was the

victim of severe and sustained domestic violence at the hands of her husband and B.A.S.'s father, respondent Isacco Jacky Saada, an Italian citizen. When B.A.S. was two years old, petitioner traveled to the United States with B.A.S. for a wedding. After respondent threatened to kill petitioner or permanently take B.A.S. from her, petitioner remained in the United States with B.A.S. and sought refuge at a domestic-violence shelter.

Respondent filed a petition in the Eastern District of New York seeking B.A.S.'s return to Italy under the Hague Convention. The district court determined that there is a grave risk that B.A.S. would be exposed to harm if he were returned to Italy because of respondent's history of abuse. Despite that determination, the district court was required under Second Circuit precedent to consider whether any possible ameliorative measures would mitigate the grave risk and to order B.A.S.'s return "if at all possible." In light of that precedent, the district court undertook a protracted process to fashion ameliorative measures and eventually ordered that B.A.S. be returned to Italy, subject to an Italian protective order (which the district court ordered the parties to arrange) imposing supervised visitation and requiring psychotherapy for respondent, and also subject to respondent paying petitioner $150,000 for her living expenses and legal fees. The court of appeals upheld the district court's order.

The court of appeals' categorical rule requiring consideration of ameliorative measures is inconsistent with the Convention's text, purposes, and drafting history, the views of the State Department, and the practices of other signatories. Those sources make plain that, once a court determines that the child would face a grave risk of exposure to harm upon return to the country of habitual residence, the court may decline to return the child. The court of appeals' rule ignores the discretion the Convention

leaves to the court making the grave-risk determination; prolongs proceedings that are meant to be expeditious; and risks enmeshing courts in custody-related issues that are outside the scope of permissible consideration under the Convention and its implementing legislation.

Although the Convention does not prohibit the discretionary use of ameliorative measures, such measures are consistent with the Convention's text and purposes only if they are capable of mitigating the grave risk while remaining limited in scope and enforceable by the court making the grave-risk determination. In cases involving domestic violence, however, adequate ameliorative measures would necessarily require an extensive understanding of the complex psychology behind domestic abuse and of the workings of a foreign legal system, and such measures would necessarily involve custody-related determinations and protections extending beyond the child's return. In such cases, like this one, it is impossible to craft ameliorative measures that are both effective in protecting the child and appropriately limited under the Convention.

For those reasons, the Court should reverse the court of appeals' judgment and allow B.A.S. to remain in the United States, where he has now spent the majority of his life—free from the grave risk he would face in Italy if he were required to return.

A. Background

The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1988 WL 411501, is a multilateral treaty adopted "in response to the problem of international child abductions during domestic disputes." *Abbott* v. *Abbott*, 560 U.S. 1, 8 (2010). The Convention aims to "protect children internationally from the harmful effects of their wrongful

removal or retention," and it adopts the "core premise" that "the interests of children * * * in matters relating to their custody" are best served when the custody determination is made in a child's country of "habitual residence." Convention pmbl. Consistent with that premise, the Convention provides that the court of the country to which the child has been removed "shall not decide on the merits of rights of custody," Convention art. 16, and that a decision "concerning the return of the child shall not be taken to be a determination on the merits of any custody issue," Convention art. 19. Rather, where a child has been "wrongfully removed" from the country in which he or she was "habitually resident," the child should ordinarily be returned to that country for the custody determination. Convention arts. 1, 3, 4, 12.

That general rule, however, is subject to a number of important exceptions. For example, return is not required where the petition for return is filed more than a year after removal and "it is demonstrated that the child is now settled in its new environment." Convention art. 12. Nor is return required where the parent seeking return was not "actually exercising" custody rights when the child was removed, Convention art. 13(a); where "the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views," Convention art. 13; or where return would contravene "fundamental principles * * * relating to the protection of human rights and fundamental freedoms," Convention art. 20.

Of particular relevance here, Article 13(b) of the Convention provides that a court "is not bound to order the return of the child" if the party opposing the child's return establishes that "there is 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."

Courts have recognized that a grave risk of exposure to harm may exist in a variety of situations, including where domestic violence is present, see, *e.g.*, *Baran* v. *Beaty*, 526 F.3d 1340, 1346 (11th Cir. 2008); *Blondin* v. *Dubois*, 189 F.3d 240, 243 (2d Cir. 1999); where a child would be returned "to a zone of war, famine, or disease," *Friedrich* v. *Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996); see, *e.g.*, *Velasquez* v. *Funes de Velasquez*, 102 F. Supp. 3d 796, 812 (E.D. Va. 2015); where the child would be deprived of needed medical treatment, see, *e.g.*, *Ermini* v. *Vittori*, 758 F.3d 153, 165-166 (2d Cir. 2014); *Leonard* v. *Lentz*, 288 F. Supp. 3d 945, 960 (N.D. Iowa 2018), aff'd, 748 Fed. Appx. 87 (8th Cir. 2019); and where return would otherwise be damaging to the child, see, *e.g.*, *Neumann* v. *Neumann*, 310 F. Supp. 3d 823, 840 (E.D. Mich. 2018).

In 1988, in connection with the United States' ratification of the Convention, Congress enacted the Convention's implementing statute, the International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988) (ICARA). Under that statute, a federal or state court considering a petition for return is empowered to determine "only rights under the Convention and not the merits of any underlying child custody claims." 22 U.S.C. 9001(b)(4). In addition, the party opposing the return of the child must establish that certain exceptions to return apply "by clear and convincing evidence." 22 U.S.C. 9003(e)(2)(A).

Approximately 100 other countries, including Italy, are parties to the Convention. See Hague Conference on Private International Law, Status Table (July 19, 2019) <tinyurl.com/hcchstatustable>.

B. Facts And Procedural History

1. In 2015, petitioner Narkis Aliza Golan, an American citizen, married respondent Isacco Jacky Saada, an Italian citizen. They have one child, B.A.S., who was born in Italy in 2016 and is a dual citizen. Throughout their relationship, petitioner has been the victim of egregious domestic violence at the hands of respondent. The abuse was often in the presence of B.A.S. and at times resulted in physical contact with B.A.S. Pet. App. 41a, 44a-45a, 79a.

Petitioner has been the primary caregiver and protector of B.A.S. since birth. In 2018, petitioner traveled to the United States with B.A.S. for a wedding. While petitioner was in the United States, respondent repeatedly threatened to kill petitioner or permanently take B.A.S. from her. Fearing for her life and for her son's safety, petitioner remained in the United States with B.A.S. and sought refuge at a domestic-violence shelter. Pet. App. 47a, 63a; J.A. 51.

2. On September 20, 2018, respondent filed a petition in the United States District Court for the Eastern District of New York, seeking the return of B.A.S. to Italy under the Hague Convention. See D. Ct. Dkt. 1. Six months later, the district court granted the petition. Pet. App. 41a-85a.

a. After a nine-day bench trial, the district court determined that petitioner had established by clear and convincing evidence that returning B.A.S. to Italy would subject him to a grave risk of exposure to harm in light of respondent's history of domestic violence. Pet. App. 42a, 80a. In particular, the district court found that respondent "was violent—physically, psychologically, emotionally, and verbally—to [petitioner]"; that "B.A.S. was present for much of it"; and that respondent's abuse of petitioner is "harmful to B.A.S." *Id.* at 42a, 79a.

The record on which the district court made those findings was extraordinary. Respondent admitted that he repeatedly "slapped, pushed, and grabbed" petitioner; that he "tried to restrain" her and "hit [her] 'to shut her up'"; that he "threw a glass bottle during an argument"; and that he "yelled, swore, and called her names" such as "animal," "bitch," and "whore." Pet. App. 48a & n.11; see *id.* at 52a-53a. One incident in which respondent head-butted petitioner culminated in a trip to the emergency room, where petitioner received an X-ray and CAT scans for the lump that had formed on her forehead. *Id.* at 61a. Respondent also repeatedly threatened to kill petitioner, both directly and in conversations with family members. In a particularly chilling example, respondent told petitioner's brother that she would "be leaving [Italy] in a pine box." *Id.* at 48a, 63a & n.31.

The violence occurred even while petitioner was pregnant with B.A.S. For example, when petitioner and respondent were in a car together, "[h]e grabbed her by the hair[] and 'bash[ed] [her] face against the dashboard,' causing her sunglasses to cut her face." Pet. App. 51a-52a. On another occasion during petitioner's pregnancy, respondent pushed into her while they were walking down a flight of stairs, causing her to fall down the stairs. *Id.* at 53a.

There was also significant evidence that respondent had repeatedly sexually assaulted petitioner throughout the course of their relationship. Pet. App. 52a, 55a; J.A. 31. One such assault, when petitioner was pregnant with B.A.S., caused ripped tissue and bleeding resulting in petitioner's hospitalization. Pet. App. 52a. Shortly after B.A.S. was born, another sexual assault ripped petitioner's internal stitches. *Id.* at 55a & n.21. And on yet another occasion, respondent "threw [petitioner] on the bed, grabbed her crotch, and demanded, 'Who owns you,

huh? Who owns you?'" *Id.* at 55a. He pressed his thumbs on her throat until she lost consciousness, then proceeded to rape her. *Ibid.*

In addition to physical violence, the evidence indicated that respondent was emotionally abusive and sought to exercise coercive control over petitioner, including by isolating her from family and friends; denying her control over any money; threatening legal claims and process against her; and openly cheating on her, including with prostitutes. Pet. App. 51a-64a; J.A. 35-39.

B.A.S. was not spared from respondent's behavior. While the district court determined that there was "no significant evidence" that respondent was "intentionally violent" to B.A.S., it noted that respondent "hit [B.A.S.] really hard on his behind" on one occasion and "pushed B.A.S." on another. Pet. App. 49a-50a. Respondent also slapped and punched petitioner while she was breastfeeding B.A.S. *Id.* at 54a.

What is more, B.A.S. was a frequent witness to respondent's abuse. On at least one occasion when respondent sexually assaulted petitioner, B.A.S. was in the bed with them. Pet. App. 55a. As petitioner's expert reported, during the course of other sexual assaults, respondent sometimes threatened to wake up B.A.S. and make him watch. J.A. 31. Respondent also hit petitioner with a candle in B.A.S.'s presence, causing bruising, Pet. App. 54a, and respondent admitted that B.A.S. overheard "screaming and fighting and yelling," *id.* at 49a; see *id.* at 79a.

Finally, over the course of the trial, the district court heard significant evidence that the numerous abusive incidents had a substantial negative impact on B.A.S. Petitioner's expert evaluated B.A.S. and found that he was "very delayed in his development along a number of lines." J.A. 27. She also noted that B.A.S. had imitated

his father's abuse of his mother, including by "attempt[ing] to choke and poke at the eyes and head of his mother and other children." J.A. 28.

b. Ultimately, the district court found—as even respondent's own expert recognized—that respondent had "to date not demonstrated a capacity to change his behavior," and that he had "minimized or tried to excuse his violent conduct." Pet. App. 80a. Respondent's expert conceded that there was a "significant risk" that he "would engage in [psychologically] harmful behavior towards B.A.S." Tr. 1221 (Jan. 15, 2019). The expert also acknowledged that respondent had lied to the expert about the abuse and consequently that "[his] reliability was 'down the tube.'" Pet. App. 80a. And the expert further testified that respondent "could not control his anger or his behavior, or take responsibility for its effect on B.A.S." *Id.* at 66a.

On the basis of respondent's sustained abuse of petitioner, the district court determined that returning B.A.S. to Italy would "subject [him] to a grave risk of harm." Pet. App. 80a.

c. Despite that determination, the district court granted the petition for return. Under Second Circuit precedent, the district court was required to consider the "full panoply" of "ameliorative measures" (also known as "undertakings") that might mitigate the risk to the child upon return and to return the child "if at all possible." *Blondin*, 189 F.3d at 242, 248. Consistent with that mandate, after the conclusion of trial, the court ordered the parties to propose potential ameliorative measures. See D. Ct. Dkt. (order dated Jan. 30, 2019).

Petitioner argued that no measures would be sufficient to ameliorate the grave risk to B.A.S. stemming from respondent's violence; his inability to appreciate the

consequences of his behavior or change it; and his disregard for the law. See D. Ct. Dkt. 58, at 82-93. Nonetheless, petitioner complied with the district court's order under protest and identified potential ameliorative measures, see *id.* at 93-97, as did respondent, see D. Ct. Dkt. 59, at 37. Notably, respondent presented no evidence that his proposed ameliorative measures would be effective in mitigating the grave risk to B.A.S. See *ibid.*

The district court ordered the return of B.A.S. to Italy, subject to ameliorative measures consistent with those proposed by respondent. Pet. App. 81a-84a. In particular, the court noted that respondent had agreed to (1) pay petitioner $30,000 for her living expenses and legal fees; (2) stay away from petitioner "until the Italian courts address this issue"; (3) "pursue dismissal of criminal charges against [petitioner] relating to her abduction of B.A.S."; (4) "begin cognitive behavioral therapy in Italy"; and (5) waive all rights to legal fees or costs arising from this action. *Id.* at 84a. The court further directed respondent to provide the full record of its proceedings to the Italian court presiding over the custody proceeding; to assist petitioner in obtaining legal immigration and work status in Italy; and not to pursue any other actions against her in the Italian courts. *Ibid.*

3. On petitioner's appeal, the court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 26a-40a. As is relevant here, in response to petitioner's challenge to the district court's decision to grant respondent's petition notwithstanding its grave-risk determination—a determination that respondent did not challenge—the court of appeals concluded that it was "not convinced" that the ameliorative measures were "sufficient to mitigate the undisputed grave risk of harm that B.A.S. faces if returned to Italy." *Id.* at 35a. The court

explained that many of the ameliorative measures imposed were "unenforceable because they need not—or cannot—be executed until after B.A.S. is returned to Italy," and it added that the record "does not otherwise contain evidence of sufficient guarantees of performance." *Ibid.* The court of appeals instructed the district court to consider on remand whether "there exist[ed] alternative ameliorative measures" that did not suffer from those deficiencies. *Id.* at 40a.

4. The district court reassumed jurisdiction on July 19, 2019, and embarked on a months-long process to fashion new ameliorative measures. The district court first directed the parties to submit revised proposals for those measures. See D. Ct. Dkt. 69. Petitioner renewed her argument that no measures would be sufficient to ameliorate the grave risk to B.A.S. stemming from respondent's violence, but once again complied with the district court's order and identified potential measures. See D. Ct. Dkt. 70. For his part, respondent argued that the previously imposed measures were sufficient. See D. Ct. Dkt. 72, at 1.

The district court also began corresponding with two Italian judges, who stated that protective orders were used by Italian courts and that such an order could be issued before the return of the child. See D. Ct. Dkt. 73-74, 77-78, 87-88. On that basis, the district court directed the parties to obtain a protective order from an Italian court and to request court-monitored behavioral therapy for respondent. See D. Ct. Dkt. 89, 95, 97.

On December 12, 2019, the Italian court issued an order directing respondent to stay away from petitioner and B.A.S.; requiring respondent's visitation with B.A.S. to be supervised by Italian social services; and directing Italian social services to oversee respondent's parenting classes and behavioral and psychoeducational therapy sessions.

See Pet. App. 17a, 20a; D. Ct. Dkt. 96-1. The protective order is time-limited relief, lasting for only a year from B.A.S.'s return to Italy, and it is subject to modification at any point by the Italian court. See Pet. App. 19a & n.9; D. Ct. Dkt. 141, at 3.

On January 28, 2020, the district court directed the parties to submit additional briefing on the proposed ameliorative measures. See D. Ct. Dkt. (minute entry). Petitioner again argued that no measures would be sufficient to ameliorate the grave risk to B.A.S. stemming from respondent's violence. See D. Ct. Dkt. 103.

Among other things, petitioner noted that the Italian protective order would have no deterrent effect on respondent—someone who had violently abused petitioner in the presence of others without fear of reprisal. See D. Ct. Dkt. 103, at 14-15. Petitioner pointed to respondent's conduct since the district court's initial return order as further proof: respondent refused to grant petitioner a Jewish divorce (thus controlling her interactions with men in their religion), and delayed the start of therapy for nearly six months (until he was chastised for the delay by the district court). See *id.* at 6-7. Petitioner also argued that, in light of the district court's finding that respondent had demonstrated no capacity to change his behavior, the therapy ordered by the Italian court was not likely to result in any behavioral improvement. See *id.* at 16-17. And petitioner introduced evidence that B.A.S. had been diagnosed with autism and needed treatment in the United States. See Pet. App. 23a-24a. In response, respondent maintained that the measures were sufficient and, in light of the Italian court's order, were now enforceable. See D. Ct. Dkt. 106, at 1.

On May 5, 2020—more than nine months after the proceedings on remand began—the district court issued a new order granting the petition for return. Pet. App. 11a-

25a. The district court relied on the Italian court's protective order, *id.* at 17a-21a, and also directed respondent to pay petitioner $150,000 for her living expenses and legal fees, *id.* at 21a-23a.

5. In a per curiam summary order, the court of appeals affirmed. Pet. App. 1a-10a. The court of appeals determined that the district court had not clearly erred by finding that respondent was likely to comply with the Italian court's protective order. *Id.* at 9a. In light of that finding, the court of appeals concluded, there were "sufficiently guaranteed ameliorative measures that would remedy the grave risk of harm to B.A.S." *Ibid.*

6. Petitioner filed a petition for rehearing, which the court of appeals denied. Pet. App. 86a. The court of appeals has stayed B.A.S.'s return pending this Court's review.

SUMMARY OF ARGUMENT

In the decision below, the court of appeals held that the Hague Convention mandates consideration of ameliorative measures even after a court has determined that a child faces a grave risk of exposure to harm upon return to the country of habitual residence. That holding departs from the plain text of the Convention and is inconsistent with its purposes and drafting history, the views of the State Department, and the practices of other signatories.

Ameliorative measures may be appropriate if they can adequately mitigate the grave risk while remaining limited in scope and enforceable by the court making the grave-risk determination. But in cases involving domestic violence such as this one, where ameliorative measures that are adequate to protect the child would necessarily require lengthy proceedings and protections that extend well beyond what the Convention contemplates, a court should instead permit the child to remain where he or she

is safe. The judgment of the court of appeals should be reversed.

A. 1. The text of the Hague Convention nowhere requires a court to consider the "full panoply" of ameliorative measures to facilitate the return of a child "if at all possible" after the court has determined that the child would face a grave risk of exposure to harm if returned to the country of habitual residence. Instead, if a court determines there is a grave risk, the return requirement is lifted and the court has discretion to determine whether the child should be returned. The absence of any reference to ameliorative measures is especially noteworthy because Article 13 of the Convention requires a court to take into account other background factors when making the grave-risk determination. That shows the drafters knew how to mandate such consideration, but chose not to do so.

ICARA, the Convention's implementing legislation in the United States, similarly contains no mention of ameliorative measures. While Congress went beyond the requirements of the Convention in certain respects—including by requiring clear and convincing evidence of a grave risk—it did not impose any additional burdens following the grave-risk determination. Because neither the Hague Convention nor ICARA imposes a requirement to consider ameliorative measures, the court of appeals lacked the power to do so itself.

2. The Convention's purposes provide further support for the foregoing interpretation of the text. Those purposes include (1) securing the prompt resolution of the threshold question of jurisdiction; (2) leaving the substantive question of custody to the custodial court once the question of return is resolved; and (3) protecting children. Mandatory consideration of ameliorative measures is in-

consistent with each of those purposes. Such consideration lengthens court proceedings, delaying resolution of the question of return. The imposition of ameliorative measures in many cases, including those involving domestic violence, necessitates consideration of issues related to the subsequent custody determination that the Convention and ICARA expressly prohibit a court making the threshold return determination from addressing. And requiring consideration of ameliorative measures and return of the child "if at all possible," even where the child is facing a grave risk of exposure to harm, upsets the balance the Convention strikes in favor of protecting the child in such circumstances.

3. The Convention's negotiation and drafting history is consistent with the understanding that the Convention does not mandate consideration of ameliorative measures. The explanatory report, recognized as the official history of the Convention, emphasizes that the Convention's goal is to protect children and that it does not regulate the award of custody rights. Like the Convention and ICARA, the explanatory report contains no mention of ameliorative measures; to the contrary, it recognizes that removal of a child from the country of habitual residence can be justified and that the Convention vests a court with discretion to refuse to return a child after making a grave-risk determination.

4. The views of the State Department—which the Court finds particularly persuasive in treaty interpretation—also support the foregoing understanding of the Convention. The State Department's legal analysis of the Convention recognizes that courts have discretion in deciding whether to return a child after making a grave-risk determination, and it makes no mention of ameliorative measures. In a 1995 letter to the British government, moreover, the State Department directly addressed the

role of ameliorative measures and warned that extensive measures should be avoided because they risk improperly enmeshing courts in custody-related issues and prolonging proceedings that are intended to be expeditious.

5. The practices of other signatories similarly confirm that the Convention does not impose an obligation to consider ameliorative measures. Some signatories permit but do not require consideration of ameliorative measures, while others do not recognize their use under the Convention. In short, each applicable interpretive aid aligns with the text and confirms that the Convention does not require consideration of ameliorative measures.

B. To be sure, the Convention grants a court discretion to decide whether to return a child after determining that there is a grave risk of exposure to harm, and that discretion may include consideration of ameliorative measures in some circumstances. But there are important limitations on those measures. The appropriateness and adequacy of ameliorative measures will depend on the source of the grave risk. Where ameliorative measures can be implemented in expeditious proceedings without wading into custody-related issues, and where those measures are enforceable by the court making the grave-risk determination, they may be appropriate. But where effective ameliorative measures would require extensive proceedings concerning custody-related issues, and where those measures would necessitate enforcement after the child's return, they should be avoided as inconsistent with the Convention.

For those reasons, ameliorative measures will almost never be appropriate in the context of domestic violence. In such a case, fashioning ameliorative measures would require a court to attempt to understand the complex, psychological issues associated with the underlying abuse

and the ways such issues affect the adequacy of any potential measures. Moreover, any potential ameliorative measures must protect against domestic violence in the country of habitual residence, which would require a court to understand the legal system and enforceability of such measures in that foreign country. Gaining an understanding of the relevant issues will inevitably extend the length of the proceedings beyond what the Convention contemplates. And ameliorative measures in domestic-violence cases would necessarily implicate custody-related issues, because the safety of the child would obviously hinge on who has custody. Yet the Convention and ICARA prohibit a court making a threshold return determination from reaching into those issues.

In addition, for ameliorative measures to be effective in addressing the grave risk, they must be enforceable. That is particularly true in cases involving domestic violence, where court orders often have little deterrent effect on abusers. But because ameliorative measures directed at domestic violence must extend to conduct in the country of habitual residence, such measures will not be enforceable by an American court making a grave-risk determination. The enforceability of such measures will depend on a foreign legal system that the American court may not fully understand and that may not provide sufficient protections.

When the grave risk stems from other sources, by contrast, it may be possible to craft appropriately limited and effective ameliorative measures. For example, where a child would be subject to a grave risk of exposure to harm from a disease prevalent in the country of habitual residence, where medication or other treatment exists in the United States, a court may order return contingent upon

receipt of the medication or treatment. Such an order effectively protects the child, does not involve custodial determinations, and avoids prolonged proceedings.

C. In this case, the ameliorative measures the district court adopted, and the process it undertook to craft them, were inconsistent with the Convention. The district court issued its initial order of return, incorporating ameliorative measures, some six months after the petition for return was filed; after remand, the court spent an additional nine months devising new measures. Those measures wade into issues related to custody, in contravention of the Convention and ICARA. They also fail sufficiently to protect B.A.S. from the grave risk of exposure to harm, because the district court did not account for respondent's inability to change, control his anger, or take responsibility for his behavior. And if respondent fails to comply once B.A.S. is in Italy, petitioner would have to proceed through the Italian legal system to obtain any recourse—a system that the court did not examine to determine whether its enforcement mechanisms would be sufficient.

Under such circumstances, the measures the district court ordered are both inappropriate and inadequate. This Court should avoid further delay in these proceedings, reverse the court of appeals' judgment, and allow B.A.S. to remain in the United States—where he has now lived for a majority of his life, and where he is unquestionably safer than he would be if he were returned to Italy.

ARGUMENT

THE COURT OF APPEALS ERRED BY MANDATING THE CONSIDERATION OF AMELIORATIVE MEASURES AFTER A DETERMINATION THAT RETURN TO THE COUNTRY OF HABITUAL RESIDENCE WOULD PLACE A CHILD AT GRAVE RISK

The Second Circuit requires consideration of ameliorative measures and return of the child "if at all possible" after a court determines, under Article 13(b) of the Hague Convention, that returning a child to the country of habitual residence would result in a grave risk of exposure to harm. The text of the Convention and its implementing legislation contains no such requirement. Such a requirement is inconsistent with the Convention's purposes and history, the views of the State Department, and the practices of other signatories. And ameliorative measures are particularly inappropriate in cases involving domestic violence, such as this one, where petitioner proved by clear and convincing evidence that the egregious domestic violence suffered at the hands of respondent presents a grave risk of exposing B.A.S. to harm. Yet the district court, applying the court of appeals' rule, undertook prolonged proceedings, did not obtain sufficient information to assess the sufficiency of ameliorative measures to mitigate the grave risk, and ultimately ordered inadequate ameliorative measures that went far beyond what the Convention contemplates. This Court should reverse the court of appeals' judgment upholding the imposition of those measures.

A. The Hague Convention Does Not Require Consideration Of Ameliorative Measures

There is no ambiguity in the text of the Hague Convention or its implementing legislation. Neither requires

a court to consider possible ameliorative measures to facilitate a child's return after determining there is a grave risk the child will be exposed to physical or psychological harm if returned to the country of habitual residence. The Convention's purposes and drafting history, the views of the State Department, and the practices of other signatories all confirm that plain-text interpretation.

1. The Text Of The Hague Convention And ICARA Does Not Require Consideration Of Ameliorative Measures

"The interpretation of a treaty, like the interpretation of a statute, begins with its text," *Abbott* v. *Abbott*, 560 U.S. 1, 10 (2010) (citation omitted), including "the context in which the written words are used," *Air France* v. *Saks*, 470 U.S. 392, 396-397 (1985). Here, the text of the Hague Convention makes plain that, upon a grave-risk determination, the return requirement is lifted and a court has the discretion to determine whether the child should be returned to the country of habitual residence. Nothing in the Convention refers to—let alone requires—the consideration of ameliorative measures once a court has made a grave-risk determination.

a. As this Court has recognized, although the Convention generally requires the return of children to the country from which they have been removed, that mandate "is not absolute," and "the Convention does not pursue" its goal of deterring international child abduction through the return requirement "at any cost." *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 5, 16-17 (2014). Instead, the Convention establishes a number of important exceptions to that requirement, including Article 13(b), which states that "the requested State is not bound to order the return of the child" if it is established 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." By its terms, therefore, the Convention gives a court discretion to decide whether to return a child once it finds the existence of a grave risk.

Indeed, while the Convention's text requires courts to consider certain background factors in making determinations under Article 13, there is no mention of ameliorative measures at all. The Convention provides that, "[i]n considering the circumstances referred to" in Article 13, a court "shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." Convention art. 13. That is in order to develop a "balanced record" of the facts leading up to the child's removal "upon which to determine whether the child is to be returned." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986). The treaty drafters thus plainly knew how to require courts to consider particular factors, yet did not include ameliorative measures among those factors.

Nothing in the Convention suggests that a court invariably must "develop a thorough record on potential ameliorative measures" and take into account "the [full] range of [such] remedies"—much less order the child's return "if at all possible," as the court of appeals here held. Pet. App. 35a-36a (internal quotation marks and citation omitted; first alteration in original). Instead, by providing that "the requested State is not bound" to order return, the Convention unambiguously affords the court discretion not to order the child's return upon a grave-risk determination.

b. Nor does ICARA, the Convention's implementing legislation in the United States, impose such a requirement. To the contrary, the text of ICARA, like that of the

Convention, does not refer to ameliorative measures at all.

In enacting ICARA, Congress chose to go beyond the text of the Convention in certain respects. For example, Congress placed on the party opposing the child's return the burden of proving by clear and convincing evidence that certain exceptions to return apply, including the grave-risk exception. See 22 U.S.C. 9003(e)(2)(A). But ICARA does not require a court to consider ameliorative measures. Instead, echoing the Convention, ICARA provides that "[c]hildren who are wrongfully removed * * * are to be promptly returned" unless one of the exceptions applies. 22 U.S.C. 9001(a)(4).

In short, by providing a court with discretion upon a grave-risk determination, and by expressly mentioning other considerations that a court must take into account, the Convention and its implementing legislation affirmatively foreclose any requirement to consider ameliorative measures. Such a requirement has no basis in the treaty's text, and a court has "no power to insert an amendment" where the text and structure of the treaty are clear. *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989). This Court need go no further in order to hold that the court of appeals erred by requiring consideration of ameliorative measures. See, *e.g.*, *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1511 (2017).

2. The Mandatory Consideration Of Ameliorative Measures Is Inconsistent With The Hague Convention's Purposes

The Convention's core purposes provide further support for the plain-text interpretation. Requiring a court to consider ameliorative measures after a grave-risk determination conflicts with each of those purposes.

The Convention sets forth two explicit goals: first, to "secure the prompt return of children wrongfully removed or retained in any Contracting State," and second, to "ensure that rights of custody and access under the law of one Contracting State are effectively respected in the other Contracting States." Convention art. 1(a), (b). In addition, the Convention's preamble states that "the interests of children are of paramount importance in matters relating to their custody." Article 13's exceptions to the return requirement "clearly derive from a consideration of the interests of the child," including "the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation." Elisa Pérez-Vera, *Explanatory Report* 433 (Hague Permanent Bureau trans. 1982) <tinyurl.com/hagueexplanatoryreport> (*Explanatory Report*).

The mandatory consideration of ameliorative measures in all grave-risk cases conflicts with each of those purposes.

First, such consideration often delays the prompt return of the child. The United States has long been critical of foreign courts that "condition return on broad 'undertakings' that place an onerous burden on left-behind parents and tend to lengthen court proceedings." Department of State, *Report on Compliance with the Hague Abduction Convention* 15 (2004) <tinyurl.com/2004haguecompliance>; see Department of State, *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction* 17 (Apr. 2007) <tinyurl.com/2007haguecompliance>. Commentators have similarly recognized that "it is very difficult to assess whether countries can protect victims without first knowing the dimensions of the abuse, which will slow down proceedings." 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, 201 (2003) (Hoegger).

Second, the imposition of ameliorative measures such as those at issue here necessitates consideration of custody-related issues that are appropriately the province of foreign courts. The Convention and ICARA expressly prohibit a court from resolving the underlying custody dispute in considering a child's return. See Convention arts. 16, 19; 22 U.S.C. 9001(b)(4). Consistent with those provisions, the United States has repeatedly stressed its "special concern" with "undertakings in which the foreign court effectively usurps the role of the court of the country of habitual residence." Department of State, *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction* 37 (Apr. 2010) <tinyurl.com/2010haguecompliance> (2010 Hague Report). Adopting ameliorative measures that intrude on the authority of foreign courts is inconsistent with the Convention's demand for "respect[]" for the "rights of custody and access" under foreign legal systems. Convention art. 1(b).

Third, the mandatory consideration of ameliorative measures—especially under the court of appeals' standard, which requires the return of the child "if at all possible"—is inconsistent with the Convention's overarching purpose of protecting the best interests of the child. A categorical requirement to consider ameliorative measures in all grave-risk cases suggests that the Convention seeks the return of the removed child "at any cost." *Lozano*, 572 U.S. at 16-17. But the exceptions to the return requirement—including Article 13(b)—"are as much a part of the philosophy of the Convention as prompt return and respect for rights of custody and access between Contracting States." Rhona Schuz, *The Doctrine of Comity in the Age of Globalization: Between International Child*

Abduction and Cross-Border Insolvency, 40 Brooklyn J. Int'l Law 31, 68 (2014) (citation omitted).

Article 13(b), in particular, strikes a different balance than the court of appeals' rule suggests. Upon a determination that a grave risk exists, Article 13(b) eliminates any preference for the child's return. If anything, far from mandating return "if at all possible," Article 13(b) has been applied in exactly the opposite way: our research has revealed no case, outside the context of ameliorative measures, in which an American court has exercised its discretion to return a child to the country of habitual residence upon a determination that there would be a grave risk there. That is unsurprising, especially in the context presented here, because "the Convention's purposes [would] not * * * be furthered by forcing the return of children who were the direct or indirect victims of domestic violence." *Simcox* v. *Simcox*, 511 F.3d 594, 605 (6th Cir. 2007) (citation omitted; alterations in original).

The court of appeals turned Article 13(b) on its head by requiring the child's return to the country of habitual residence "if at all possible," even after a court has found a grave risk of exposure to harm. Pet. App. 7a. There is no indication that the Convention's drafters intended to impose an additional requirement before a court may decline to return the child.

3. The Mandatory Consideration Of Ameliorative Measures Is Inconsistent With The Hague Convention's Negotiation And Drafting History

The Convention's negotiation and drafting history further corroborates the plain-text interpretation. See, *e.g.*, *Monasky* v. *Taglieri*, 140 S. Ct. 719, 727 (2020).

The government has identified the explanatory report as the "official history" and "source of background on the meaning of the provisions of the Convention." 51 Fed. Reg. 10,503-10,504; see, *e.g.*, *Monasky*, 140 S. Ct. at 726

n.2; *Abbott*, 560 U.S. at 19-20. That report elaborates on the purposes set out in the Convention's text, and, like the text itself, it fails to mention ameliorative measures at all.

The explanatory report notes that application of the Convention "must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests." *Explanatory Report* 432. It makes clear that, because the Convention "does not seek to regulate the problem of the award of custody rights," it is premised on the notion that "any debate on the merits * * * of custody rights[] should take place before the competent authorities in the State where the child had its habitual residence prior to its removal." *Id.* at 430. And it explains that the Convention "necessarily coexist[s] with the rules of each Contracting State on applicable law and on the recognition and enforcement of foreign decrees." *Id.* at 436.

Those statements confirm that the drafters of the Convention did not intend to create any requirement to consider ameliorative measures in all grave-risk cases. As discussed above, the mandatory consideration of ameliorative measures is inconsistent with the goals of protecting the best interests of the child and refraining from deciding custody-related issues. See pp. 25-26, *supra*. And the explanatory report's statement that it "coexist[s]" with the laws of contracting states includes civil-law jurisdictions, which generally do not recognize ameliorative measures. See p. 33, *infra*.

More fundamentally, the explanatory report notes that "the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children," including the grave-risk exception. *Explanatory Report* 432. In fact, the report expressly recognizes that "the removal of the child can sometimes be justified." *Ibid.* And the report

stresses the discretion granted to courts in applying the exceptions. See *id.* at 460. The mandatory consideration of ameliorative measures would be difficult to reconcile with any of those statements.

4. The Mandatory Consideration Of Ameliorative Measures Is Inconsistent With The Views Of the State Department

In interpreting a treaty, this Court often relies on a consistent pattern of Executive Branch interpretation. See *Abbott*, 560 U.S. at 15; *O'Connor* v. *United States*, 479 U.S. 27, 33 (1986). Here, the longstanding views of the State Department lend further support to the conclusion that the consideration of ameliorative measures is not required. In its legal analyses issued after the Convention's ratification, the State Department either did not address ameliorative measures at all or affirmatively cautioned against their use.

a. Shortly after ICARA's enactment, the State Department published a legal analysis of the text of the Convention in the Federal Register. See 51 Fed. Reg. 10,503. In that analysis, the State Department emphasized a court's discretion in grave-risk cases, making no mention of ameliorative measures.

Specifically, the State Department explained that "a court in its discretion need not order a child returned" where the requisite grave risk exists or return would "otherwise place the child in an intolerable situation." 51 Fed. Reg. 10,510. The State Department recognized that a grave-risk determination "does not make refusal of a return order mandatory," as "[t]he courts retain the discretion to order the child returned even if they consider that [the] exception applies." *Id.* at 10,509. Yet the State Department did not suggest that consideration of ameliorative measures is a necessary component of that exercise of discretion; indeed, it did not even mention it.

Notably, in discussing grave-risk determinations, the State Department offered as an example a situation in which a custodial parent sexually abuses the child. See 51 Fed. Reg. 10,510. In such a situation, the State Department emphasized that, "[i]f the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition." *Ibid.* The State Department thus contemplated that return may be denied in that situation, again with no suggestion that the consideration of ameliorative measures was mandatory.

b. The State Department had the opportunity directly to address the role of ameliorative measures in a 1995 letter and legal memorandum to the British government. See U.S. Cert. Br. 1a-20a (Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Dep't of State, to Michael Nicholls, Child Abduction Unit, Lord Chancellor's Dep't, United Kingdom (Aug. 10, 1995)). Writing in response to concerns about American courts' failure consistently to enforce British undertakings, the State Department expressed its view that such measures should be used sparingly.

In the letter, the State Department noted that "undertakings appear to be consistent with" the general rule of return and the discretion afforded to a court making a grave-risk determination, at least where the undertakings are "narrowly tailored to ensure the prompt return of a child to his/her country of habitual residence." U.S. Cert. Br. 12a-13a. But the State Department stressed that "undertakings should be limited in scope and further the Convention's goal of ensuring the prompt return of the child to the jurisdiction of habitual residence." *Id.* at 2a.

According to the State Department, undertakings may be appropriate when they "temporarily obviate any

concern about placing the child in the immediate custody of the left-behind parent while still effectuating a prompt return of the child to his/her country of habitual residence." U.S. Cert. Br. 16a. But where undertakings would necessarily have to be "extensive" in order to mitigate the grave risk, they should be avoided, since they "could embroil the court in the merits of the underlying custody issues and would tend to dilute the force of the Article 13(b) exception." *Ibid.* In those cases, "it would seem less appropriate for the court to enter extensive undertakings than to deny the return request." *Ibid.*

The State Department also noted that certain cases had gone beyond those bounds and imposed undertakings that ran counter to the limited nature of the threshold determination of the appropriate jurisdiction. U.S. Cert. Br. 3a-4a. It concluded that, while undertakings "may facilitate return of children and do not appear inconsistent with the Convention when limited in scope," they are "not necessary to the [Convention's] operation." *Id.* at 18a-19a.

c. In more recent statements, the State Department has taken a consistent approach.

A 2006 newsletter for judges published by the Hague Permanent Bureau, written by then-Deputy Director of the State Department's Office of Children's Issues, reaffirmed courts have discretion whether to consider undertakings, and cautioned against using such discretion to undermine the basic precepts of the Convention. The newsletter explained that, while consideration of ameliorative measures is "not necessary to the proper operation of the Convention," the State Department supported their "limited use" as long as they are narrowly tailored to "facilitate prompt return" of a child to the country of habitual residence. Kathleen Ruckman, *Undertakings As Convention Practice: The United States Perspective*, 11 The Judges' Newsletter 45, 46 (2006) (Hague Conf. on Private

Int'l Law, London, England) <tinyurl.com/haguejudges-newsletter>. At the same time, the newsletter warned that "[c]ourts that choose to use the mechanism of undertakings walk a fine line" and "undertakings that are in fact preconditions on return * * * necessarily cause significant delays in return of children." *Id.* at 46-47.

Similarly, in a 2010 report on Convention compliance, the State Department "urge[d] its Convention partners not to include undertakings in their return orders," and it criticized the use of undertakings that undermine the treaty's limitations by requiring payment of spousal support or setting "custodial conditions." 2010 Hague Report 37.

In short, it has been the State Department's long-held view that the Convention does not require a court to consider ameliorative measures when determining whether to refrain from ordering the return of a child under Article 13(b), and that such measures can affirmatively undermine the purposes of the Convention. Notably, the United States reaffirmed that view in its brief at the certiorari stage here. See U.S. Cert. Br. 9-19.

5. The Practices Of Other Signatories Confirm That The Convention Does Not Mandate Consideration Of Ameliorative Measures

This Court has recognized that the practices of a treaty's other signatories can provide useful evidence of the parties' understanding. See *Medellin* v. *Texas*, 552 U.S. 491, 507 (2008); *United States* v. *Stuart*, 489 U.S. 353, 369 (1989). The practices of other signatory countries are consistent with the conclusion that the Convention does not require consideration of ameliorative measures. Ameliorative measures were created in British family courts, yet even British courts recognize that they are not universally enforced or recognized by Convention signatories. Rather, other common-law countries permit, but do not

require, their consideration. In civil-law jurisdictions, by contrast, ameliorative measures are generally not recognized at all. And in the European Union, consideration of ameliorative measures is required only among member states—and pursuant to a separate regulation, not the Convention itself. There is thus no indication of an agreed-upon meaning of the Convention that is consistent with the interpretation articulated by the court of appeals here.

a. As courts have recognized, "[t]he concept of 'undertakings' is based neither in the Convention nor in the implementing legislation of any nation," but is instead a "judicial construct, developed in the context of British family law." *Danaipour* v. *McLarey*, 286 F.3d 1, 21 (1st Cir. 2002) (citation omitted); see *Baran* v. *Beaty*, 526 F.3d 1340, 1349 (11th Cir. 2008). But there is no indication that the Convention exported that construct to all other signatories. Indeed, while British courts have "extract[ed] undertakings" in order to "avoid placing the child in an intolerable situation," *In re D*, [2007] 1 A.C. 619 (H.L.) (U.K.), they recognize that "undertakings are not enforceable in the courts of the requesting country and indeed the whole concept of undertakings is not generally understood outside the common law world," *In re E*, [2011] UKSC 27 (H.L.) (U.K.).

b. Other common-law countries permit, but do not require, consideration of ameliorative measures once a grave-risk determination has been made. For example, Australia implemented the Convention through a regulation providing that, "[i]f a court is satisfied that it is desirable to do so," the court "may" include in a return order "a condition that the court considers to be appropriate to give effect to the Convention." *Arthur & Secretary*, [2017] FamCAFC 111 ¶ 69(1)(c) (Austl.). Consistent with that practice, a guide prepared by the Hague Conference on

Private International Law, which was developed to "promote, at the global level, the proper and consistent application of the grave risk exception," contemplates the inclusion of ameliorative measures only "if considered necessary and appropriate." See Hague Conference on Private International Law, *1980 Child Abduction Convention: Guide to Good Practice Part VI Article 13(1)(b)* ¶¶ 3, 36, at 15, 27 (2020) <tinyurl.com/hagueconferenceguide>.

c. Outside common-law jurisdictions, ameliorative measures are generally not used. See Hague Conference on Private International Law, *Report and Conclusions of the Fifth Meeting of the Special Commission* 55 (Mar. 2007) <tinyurl.com/hcchfifthmeeting> (*Report on the Fifth Meeting*). Indeed, "undertakings as a legal concept are practically unknown and thus unenforceable in civil law jurisdictions." Katarina Trimmings & Onyója Momoh, *Intersection Between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings*, 35 Int'l J.L. Pol'y & the Family 1, 12 (2021). Accordingly, in countries such as Sweden, Germany, the Netherlands, and Slovakia, ameliorative measures are either expressly prohibited or simply not provided for (except in the limited situation discussed below). See Hague Conference on Private International Law, *Enforcement of Orders Made Under the 1980 Convention—An Empirical Study* 25, 30, 35, 41, 49, 50 (Oct. 2006) <tinyurl.com/hcchempiricalstudy>.

There has been no suggestion that countries that do not permit or recognize ameliorative measures are out of compliance with the Convention. The reason is simple: the Convention, by its terms, does not require consideration of ameliorative measures. See pp. 21-23, *supra*.

d. There is one context in which consideration of ameliorative measures is mandated: in disputes between

members of the European Union. As the government has recognized, that is a special case. See U.S. Cert. Br. 14. Members of the European Union (other than Denmark) are legally obligated to comply with a regulation called Brussels IIa, which imposes requirements above and beyond those included in the Convention. In particular, Brussels IIa limits the discretion of a court to refuse to return a child to another member state in light of an Article 13(b) defense where "adequate arrangements have been made to secure the protection of the child after his or her return." Council Regulation 2201/2003, art. 11(4), 2003 O.J. (L 338) 6 (EU) (Brussels IIa).

That regulation does not suggest that the Convention itself mandates that a court take ameliorative measures into account; instead, it is based on the unique structure of the European Union, which makes the order of a court in one member state (including any undertakings) enforceable across the entire Union. See Brussels IIa, art. 42(1). In other words, like many other EU regulations, Brussels IIa effectively treats the European Union as a single jurisdiction, allowing its members (most of which are civil-law jurisdictions) to enforce undertakings that they would not otherwise recognize. Thus, while Brussels IIa represents an exception to the rule against recognition of ameliorative measures in those civil-law countries, it does not sanction, much less require, consideration of those measures outside of the EU more generally.

* * * * *

In sum, the Convention's text, purposes, and drafting history, the views of the State Department, and the practices of other signatories all point to the same conclusion: the consideration of ameliorative measures is not required in all grave-risk cases. This Court has repeatedly rejected

attempts by lower courts to impose extratextual requirements on the Convention. See, *e.g.*, *Monasky*, 140 S. Ct. at 728; *Lozano*, 572 U.S. at 11. It should likewise reject the court of appeals' categorical rule.

B. The Hague Convention Imposes Limits On The Discretionary Consideration of Ameliorative Measures

By affording a court discretion to decide whether to return a child after determining that there is a grave risk of exposure to harm, Article 13(b) does not forbid the consideration of ameliorative measures. But the Convention's text and purposes impose important limitations on what measures are appropriate and adequate. In order to be both effective and consistent with the Convention, ameliorative measures must be limited to circumstances in which the source of the grave risk is easily identifiable and addressable through measures enforceable by the court making the grave-risk determination.

As this case illustrates, imposing ameliorative measures outside those circumstances would force a court to engage in extensive proceedings to understand the problems that give rise to the grave risk and the ways they may be addressed, thereby undermining the Convention's purpose of resolving the threshold question of jurisdiction expeditiously; to wade into custody-related issues, thereby undermining the Convention's purpose of allowing the country of habitual residence to make such determinations; and to rely on measures the court making the grave-risk determination cannot enforce, thereby undermining the Convention's purpose of protecting the child.

1. The Convention places great emphasis on ensuring the prompt resolution of issues related to return, instructing contracting states to "use the most expeditious procedures available." Convention art. 2. This Court has rec-

ognized Article 11 of the Convention, which permits inquiry into "delay[]" after six weeks, as "prescribing" the "normal time for return-order decisions." *Monasky*, 140 S. Ct. at 724. Accordingly, the Court has emphasized that "courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation." *Chafin* v. *Chafin*, 568 U.S. 165, 179 (2013). Ameliorative measures that require the court to delve into complex factual circumstances or the workings of a foreign legal system are likely significantly to slow the proceedings in a manner that is inconsistent with the Convention's aims.

In particular, where the grave risk involves domestic violence, fashioning ameliorative measures will necessarily require a court to attempt to understand the complex psychological issues associated with such abuse and the ways it might affect the adequacy of any potential ameliorative measures. While the court may gain some insight into those issues when making the initial grave-risk determination, additional expert testimony and analysis will be required to determine whether measures such as separate living quarters, financial support, supervised visitation, or psychotherapy can adequately address the risks.

Moreover, in situations involving domestic violence, a court would inevitably rely heavily on protections in the country of habitual residence, as the court did here. But because a court making the grave-risk determination will lack jurisdiction to enforce any such measures, see pp. 41-42, *infra*, the court will need to understand the legal system in the country of habitual residence and assess the enforceability of such measures there. Even if the country of habitual residence is a relatively familiar jurisdiction, an American court is unlikely to be acquainted with

the nuances of the country's legal system; the enforcement procedures for protective orders and other types of undertakings; the interplay among the country's courts, law enforcement, and social services; and the challenges and resources for domestic-violence victims who are not native to the country. Without conducting such an analysis, the court may order measures that are unenforceable or otherwise ineffective.

Danaipour v. *McLarey*, 286 F.3d 1 (1st Cir. 2002), is instructive. In that case, the district court granted a petition for return and ordered various ameliorative measures to address allegations that a child had been sexually abused by her father. Among those measures, the court required that the father not have contact with the child unless ordered otherwise by a Swedish court, and further required that a forensic evaluation be conducted in Sweden to determine whether the alleged sexual abuse had occurred. See *id.* at 21. The court noted that the parties had agreed to ask the Swedish court to enter a mirror order imposing such conditions. See *id.* at 24.

The First Circuit reversed the district court's order. See 286 F.3d at 5. The First Circuit cited evidence that the mirror order would not "be enforceable even if so entered." *Id.* at 23. The mother had submitted a State Department report indicating that "Swedish courts do not have authority to issue contempt orders for violations of visitation orders." *Id.* at 24. Moreover, events following the district court's decision revealed that "the Swedish court lacked the authority to order a full forensic sexual abuse evaluation conducted in keeping with the established protocols for such evaluations." *Ibid.*

The First Circuit noted that the district court's orders "offended notions of international comity" because it "expect[ed] that the Swedish courts would simply copy and enforce them." 286 F.3d at 25. More fundamentally, the

district court failed to understand significant differences in the Swedish legal system that undermined any possible effectiveness of the measures. See *id.* at 23-24. As *Danaipour* shows, achieving such an understanding necessitates additional time and evidence, slowing the proceedings and embroiling the court in additional complexities.

In cases involving a grave risk of exposure to harm stemming from factors other than domestic violence, by contrast, such lengthy and complex proceedings may be unnecessary. For example, courts have recognized that a grave risk of exposure to harm may exist where a child would be returned "to a zone of war, famine, or disease," *Friedrich* v. *Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996); see p. 6, *supra*. In such circumstances, a court may be able to order ameliorative measures without delving into complex psychological issues or resorting to the legal system of the country of habitual residence. If, for example, the country of habitual residence is facing an outbreak of a contagious disease but preventative medications are available in the United States, the court could issue an order conditioning the child's return on receipt of the medications.

2. In crafting ameliorative measures, a court must also avoid wading into issues related to custody determinations. Both the State Department and the Hague Permanent Bureau have repeatedly cautioned that the Convention simply addresses the threshold question of jurisdiction and is aimed at securing the return of the child so that a court in the country of habitual residence may address the underlying substantive question of custody. See, *e.g.*, 2010 Hague Report 37; *Report on the Fifth Meeting* 56. Indeed, both the Convention and ICARA contain express provisions prohibiting courts from determining the "merits" of any custody-related issue. See Convention, arts. 16, 19; 22 U.S.C. 9001(b)(4).

Consistent with the Convention and ICARA, the State Department has stated that it supports ameliorative measures only where they "respect the jurisdictional divisions established by the Convention by not addressing the merits of the custody dispute, and instead leaving this question to be handled by the courts in the country of habitual residence, as envisioned by Article 16 of the Convention." 2010 Hague Report 37. The State Department has highlighted as problematic "undertakings in which the foreign court effectively usurps the role of the court of the country of habitual residence by investigating the [parent's] financial circumstances and setting custodial conditions," including requiring the parent seeking return to prepay spousal and child support; to pay travel expenses for the other parent; or to provide living arrangements for the other parent upon return. *Ibid.*

In cases involving domestic violence, however, ameliorative measures will necessarily involve custody-related issues because the child's safety hinges on the custody arrangement—specifically, on ensuring that the child is not in the sole custody of, and is appropriately protected from, the abusive parent. See, *e.g.*, *Luis Ischiu* v. *Gomez Garcia*, 274 F. Supp. 3d 339, 355 (D. Md. 2017); *Sabogal* v. *Velarde*, 106 F. Supp. 3d 689, 710 (D. Md. 2015). As courts have explained, "undertakings are most effective when the goal is to preserve the status quo of the parties prior to the wrongful removal," but "[t]his, of course, is not the goal in cases where there is evidence that the status quo was abusive." *Danaipour*, 286 F.3d at 25; see *Simcox*, 511 F.3d at 607; *Van De Sande* v. *Van De Sande*, 431 F.3d 567, 572 (7th Cir. 2005). Indeed, the State Department has advised that ameliorative measures are "less appropriate" in grave-risk cases for precisely that reason: "The development of extensive undertakings in such a context could embroil the court in the merits of the underlying custody

issues and would tend to dilute the force of the Article 13(b) exception." U.S. Cert. Br. 16a.

Once again, in cases involving a grave risk of exposure to harm stemming from factors other than domestic violence, courts can craft ameliorative measures without running afoul of this consideration. For example, a court addressing a grave risk resulting from war, famine, disease, or a medical condition need not wade into custody-related issues, because such a risk is not dependent on whether the child resides with one parent or another. In *Ermini* v. *Vittori*, 758 F.3d 153 (2d Cir. 2014), the court determined that the child faced a grave risk of exposure to harm in part because repatriation to Italy would remove him from his current therapy for autism. Experts testified that removal from the therapy would result in "severe loss of the skills that he had successfully developed since beginning his program" and could mean that he would "cease to be able to learn to write or to talk and w[ould] most likely never learn to read." *Id.* at 166 (citation omitted; alteration in original). The court ultimately determined that no ameliorative measures were available because the particular therapy program did not exist in Italy. See *id.* at 165 n.10, 166. But if such a program were available, a court could order its use without resolving any custody-related issues.

3. Finally with regard to the appropriateness of ameliorative measures, such measures must be enforceable in order to be effective. An order requiring certain undertakings is of little worth if it is likely to be violated. The Hague Permanent Bureau has expressed concern that "undertakings were commonly not respected where they were not enforceable or where there was no monitoring or follow-up after return." Hague Conference on Private International Law, *Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special*

Commission 35 (Nov. 2011) <tinyurl.com/hcchsixthmeeting>. One study noted that, in the four cases it examined in which the parties agreed to undertakings in American courts, "none of these agreements were carried out in the other country by the left-behind parent." Jeffrey L. Edleson et al., *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the United States for Safety: A Study of Hague Convention Cases*, Final Rep. 169 (2010) <tinyurl.com/studyofcases>.

A court making a grave-risk determination has no enforcement power once the child is returned to the country of habitual residence, and it thus cannot ensure that the conditions on which it based the return order are met. In those circumstances, the court will have to confront complex questions concerning the legal system in the country of habitual residence, inevitably lengthening the proceedings. See pp. 36-38, *supra*. For that reason, as the United States has emphasized, ameliorative measures are most appropriate when they are limited to those that the court making the grave-risk determination can enforce—generally, those that simply "ensure prompt return of the child." U.S. Cert. Br. 19.

In the specific context of domestic violence, moreover, the enforceability of ameliorative measures is of paramount importance, both because of the nature of the risk to the child and because of the reality that court orders often have little deterrent effect. A research study conducted by a British child-abduction charity revealed that non-molestation undertakings had been broken in every single one of the representative sample of cases reviewed, and all undertakings had been broken in some two-thirds of cases. Reunite Research Unit, *The Outcomes for Children Returned Following an Abduction* 31 (Sept. 2003) <tinyurl.com/reunitestudy>. The study also showed that parents in the countries of habitual residence were often

counseled by their lawyers to agree to the imposition of undertakings because they "mean nothing." *Id.* at 33.

Even if the court making the grave-risk determination takes the time to understand the foreign legal system and the parties secure an order that is enforceable in that jurisdiction, the risks of harm are not at an end. Where the abused parent is not a native of the country of habitual residence, "judges may unwittingly enable batterers to control their victims more effectively." Hoegger 196. When an abused parent returns to a foreign jurisdiction, separated from her support system and without financial resources, it can be extremely difficult for the parent to enforce the order if it is violated. See Merle H. Weiner, *You Can And You Should: How Judges Can Apply the Hague Abduction Convention to Protect Victims of Domestic Violence*, 28 UCLA Women's L.J. 223, 240-241 (2021). And by definition, the enforcement of such an order "occurs only after the protective measures have failed and harm has already been inflicted." *Id.* at 289.

* * * * *

A court must take into account the specific circumstances of the grave risk of exposure to harm in determining whether ameliorative measures will be both effective and consistent with the Convention's aims. In cases involving domestic violence, in particular, adequate ameliorative measures inevitably require lengthy evidentiary proceedings, implicate custody-related issues, and are unlikely to be enforceable by the court making the grave-risk determination. Given those difficulties, ameliorative measures will almost never be appropriate in the domestic-violence context.

C. The Ameliorative Measures Adopted By The District Court Were Inappropriate And Inadequate

The ameliorative measures the district court adopted in this case, and the process it undertook to craft them, illustrate the problems with ameliorative measures in domestic-violence cases. Those measures go far beyond what the Convention contemplates, yet they do not adequately protect B.A.S. from the grave risk of exposure to harm that would exist upon his return to Italy. After the district court's multiple, protracted, and ultimately unsuccessful attempts to craft adequate and appropriate ameliorative measures, this Court should reverse the court of appeals' judgment and allow B.A.S. to remain in the United States, where he has now spent the majority of his life safely with his mother, pending a custody determination by an American court.

1. The lengthy process that the district court undertook was inconsistent with the Convention's goal of providing for expeditious proceedings on the threshold question of jurisdiction so that the underlying question of custody may be resolved in the proper forum as quickly as possible. Respondent filed the petition for return in 2018. The district court's first decision was issued six months later, after not only a trial on the grave-risk determination but lengthy post-trial proceedings on ameliorative measures. See Pet. App. 41a-42a. At the conclusion of those proceedings, the court of appeals held that the district court had erred by relying on largely unenforceable and ultimately inadequate ameliorative measures. See *id.* at 39a-40a. On remand, the district court spent an additional nine months examining possible ameliorative measures and corresponding with Italian authorities (yet gaining only a superficial understanding of the complexities of that legal system). See *id.* at 12a. That process extended

wildly beyond the six weeks that this Court has recognized as the "normal time for return-order decisions." *Monasky*, 140 S. Ct. at 724; see Convention art. 11.

Compounding its error in prolonging the proceedings, the district court ordered ameliorative measures that waded into issues related to custody determinations, in contravention of the Convention and ICARA, and failed adequately to account for enforceability concerns. After communicating with Italian authorities, the district court ordered the parties to seek a protective order from an Italian court that would direct respondent to stay away from petitioner and B.A.S.; require supervision for respondent's visits with B.A.S.; and mandate court-monitored behavioral and psychoeducational therapy for respondent. See p. 12, *supra*. And the district court further ordered respondent to pay petitioner $150,000 for her living expenses and legal fees. See Pet. App. 21a-23a.

In ordering such measures, the district court embroiled itself in custody-related issues of spousal support, child support, visitation, and other conditions that it viewed as furthering the best interests of the child. Moreover, in demanding that the parties seek an order with such particular terms, the district court veered dangerously close to conditioning return on a foreign court's issuance of a protective order, "rais[ing] serious comity concerns." *Danaipour*, 286 F.3d at 23; see U.S. Cert. Br. 20a. As the Convention's drafting history makes clear, "the return of the child cannot be made conditional upon [a] decision or other determination being provided" by the court of the country of habitual residence. *Explanatory Report* 463.

At the same time, the measures the district court ordered failed sufficiently to protect against the grave risk of exposure to harm that B.A.S. faces. The district court

undertook no analysis of the Italian legal system or its enforcement mechanisms beyond relying on the Italian authorities' general assurance that the country uses protective orders. In addition, the court entirely failed to account for the implications of respondent's extensive history of abuse. The court found that respondent had "to date not demonstrated a capacity to change his behavior"; had "minimized or tried to excuse his violent conduct"; and had been described by his own expert as unreliable and unable to "control his anger or his behavior[] or take responsibility for its effect on B.A.S." Pet. App. 66a, 80a. Despite those findings, the district court made no effort to analyze how respondent's violent aggression could be addressed or whether a protective order from an Italian court could prevent it. Indeed, the court did not hear any evidence related to the effectiveness of ameliorative measures in the domestic-violence context at all.

Addressing such questions would have required the district court to delve into nuanced issues of psychological diagnoses and treatments, as well as complicated issues concerning Italian law and the Italian legal system generally. The court could not have ensured effective protection for B.A.S. without resolving those issues. Yet doing so would have resulted in even more protracted proceedings, and ameliorative measures that extended far beyond what the Convention contemplates.

2. Respondent's conduct since the district court ordered B.A.S.'s return proves the point. His refusal to grant petitioner a Jewish divorce—holding her hostage in a religious marriage, unless she grants him sole custody of B.A.S.—and his delay in beginning therapy shows that respondent's recalcitrance cannot be altered by court orders. That is particularly true because the Italian order is subject to modification at any point, meaning that respondent could seek its rescission as soon as petitioner

and B.A.S. return to Italy. In the face of that evidence, the court of appeals nevertheless upheld the district court's determinations that respondent "has complied with previous Italian social service investigations as well as the conditions of his supervised visits with B.A.S. in the United States" and that respondent "knows he will face consequences" in Italy should he violate the terms of the Italian order. Pet. App. 9a.

Even with only the limited information available in the district-court proceedings, respondent has not shown that the ameliorative measures the district court ordered are sufficient here, given the mountain of evidence of respondent's consistent record of physical and psychological abuse—as recognized even by respondent's own expert. Nor did the previous involvement of Italian social services do anything to deter respondent from continuing to abuse petitioner. See Pet. App. 58a-61a. While there is evidence that respondent abided by conditions of supervised visits with B.A.S. while in the United States, that evidence proves little: those visits were arranged through petitioner's counsel, with resources to ensure appropriate protection. And even then, respondent repeatedly objected to supervision and tried to eliminate it. See Resp. C.A. Br. 30. Although visits with B.A.S. in Italy are to be supervised by social services, the details of that supervision are unresolved and beyond the court's control. And there is no reason to believe that respondent's behavior will be any better once B.A.S. is back in Italy and petitioner is without family, relevant language skills, or long-term financial or legal support.

The district court's findings concerning respondent's character and behavior, together with respondent's post-trial conduct and the extensive evidence that ameliorative measures are frequently ignored in the domestic-violence context, indicate that there are inadequate guarantees of

enforcement of the ameliorative measures the court ordered—which are, in any event, wholly inconsistent with the Convention's limits. Should respondent violate the ordered measures, petitioner would have to proceed through the Italian legal system to obtain any recourse—a system that the district court did not examine to understand its operation or enforcement mechanisms. Under such circumstances, the district court was not entitled to assume, and respondent did not show, that respondent would comply with the ordered measures and that B.A.S. would thereby be protected.

The record thus establishes that the ameliorative measures the district court ordered are both inappropriate and inadequate. And the passage of time has only increased the harm to B.A.S. if he is returned to Italy—a country of which he has no memory—and is removed from the stable environment, educational services, and his circle of family and friends in the United States. Under these circumstances, a remand would serve no valid purpose and "would consume time when swift resolution is the Convention's objective." *Monasky*, 140 S. Ct. at 731. The Court should avoid further delay, reverse the court of appeals' ruling, and allow for B.A.S. to remain with his mother in the United States—free from the grave risk that his father presents.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KANNON K. SHANMUGAM
AIMEE W. BROWN
MATTEO GODI
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006

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

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

ANDREW A. ZASHIN
CHRISTOPHER R. REYNOLDS
AMY M. KEATING
ZASHIN & RICH CO., L.P.A.
950 Main Avenue, 4th Floor
Cleveland, OH 44113

JANUARY 2022