No. 20-1034

In The
Supreme Court of the United States

NARKIS ALIZA GOLAN,

Petitioner,

v.

ISSACO JACKY SAADA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*

The interest of *Amicus Curiae* is the protection of children whose parents are divorced, separated, or unmarried. The American Academy of Matrimonial Lawyers ("AAML") is a national organization of nearly 1,650 matrimonial attorneys practicing in the United States.[1] The AAML was founded in 1962 by highly-regarded family law attorneys "to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected." The AAML has published numerous articles[2] and handbooks in furtherance of parenting, including *Child Centered Residential Guidelines*, *Model Parenting*

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[1] Pursuant to Rule 37.2(a), petitioner's counsel on January 11, 2022, filed a letter granting blanket consent to the filing of amicus curiae briefs in support of either or of neither party. Respondent's counsel also provided consent to the filing of a brief by AAML. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

This brief does not necessarily reflect the views of any judge who is a member of the American Academy of Matrimonial Lawyers. No inference should be drawn that any judge who is a member of the Academy participated in the preparation of this brief or reviewed it before its submission.

[2] The *Journal of the American Academy of Matrimonial Lawyers* is a scholarly law review published semiannually by the AAML in conjunction with the University of Missouri Kansas City School of Law, which is retrieved at https://aaml.org/page/AAMLJournal.

Plan, *Voices of the Children of Divorce*, and *Stepping Back from Anger*.

The AAML has adopted resolutions supporting the enactment and enforcement of laws and treaties that protect children who are affected by parental disharmony, including the Hague Convention on Civil Aspects of International Child Abduction[3] ("Hague Abduction Convention"), the International Child Abduction Remedies Act[4] ("ICARA"), the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"),[5] and the Uniform Deployed Parents Custody and Visitation Act.[6]

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[3] The 1980 Hague Convention on the Civil Aspects of International Child Abduction, T.I.A.S. No. 11670, 1988 WL 411501 (Oct. 25, 1980) (hereinafter "Hague Abduction Convention").

[4] International Child Abduction Remedies Act, Pub. L. 100-300, 102 Stat. 437 (1988), originally codified at 42 U.S.C. §§ 11601-11611 (1988), recodified at 22 U.S.C. §§ 9001-9011 (2017) (hereinafter "ICARA").

[5] The Uniform Child Custody Jurisdiction and Enforcement Act is a model act drafted by the Uniform Law Commission in 1997 and enacted by 49 U.S. States, the District of Columbia, Guam, and the U.S. Virgin Islands. 9 UNIF. L. ANN. CHILD CUST. JUR. & ENF. § 101 et seq. (hereinafter "UCCJEA").

[6] The Uniform Deployed Parents Custody and Visitation Act was drafted in 2012 and enacted by 15 States. UNIF. L. ANN. DEPLOYED PARENT CUST. & VISIT. § 101 et. seq. (hereinafter "UDPCVA").

SUMMARY OF THE ARGUMENT

The Hague Abduction Convention is not a statute inviting the courts to govern custody of non-resident minors.[7] It is instead an international treaty respecting the authority of signatory nations to determine parenting conditions for their youngest habitual residents, and discouraging the illicit activity of parents who abduct their children across borders. The Hague Abduction Convention's mandate to return children to their habitual residence yields only to narrow exceptions, such as where the "State is not bound to order the return of the child if . . . 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."[8]

Article 13(b), as negotiated by the Hague Conference on Private International Law ("HCCH")[9] and ratified by the United States Congress, reserved judicial discretion in the Courts to return children to their habitual residences, even in cases where a grave risk of harm may exist. The phrase "*not bound*" in Article 13(b) was chosen to strike a deliberate balance

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[7] The 1980 Hague Convention on the Civil Aspects of International Child Abduction, T.I.A.S. No. 11670, 1988 WL 411501 (Oct. 25, 1980) (hereinafter "Hague Abduction Convention").

[8] Hague Abduction Convention, *supra*, at Article 13(b).

[9] The Hague Conference on Private International Law (hereinafter "HCCH") is a global affiliation of governments that develops and administers cross-border treaties and conventions in civil and commercial matters. The participation of the United States is authorized by 22 U.S.C. § 269g.

between the worthy goals of deterring cross-border child abduction and protecting children from physical or psychological harm.

The authority to consider ameliorative measures devised to enable a child's return free from harm, or "undertakings," is an inherent element of the Courts' discretion under Article 13(b).[10] Article 13(b) authorizes the Courts to deny the return remedy only when repatriation might pose a grave risk to a child's safety and well-being. In assessing the gravity of the risk, then, the Courts are summoned to conduct a forward-looking assessment of the probability and magnitude of the threats, the efficacy of existing measures in place, and the availability of other safeguards to mitigate or eliminate the risk, among other factors. Undertakings are measures that may be implemented to mitigate or eliminate risk, facilitating a child's safe return to its habitual residence. Their consideration is a natural component of the risk assessment that is required when adjudicating an

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[10] "The U.S. Department of State . . . says that a U.S. 'court has wide latitude in ordering provisions for the safe return of the child. As such, either party may ask the court for undertakings to facilitate the child's safe return, and the court will decide accordingly.' "

Melissa A. Kucinski, "The Future of Litigating An International Child Abduction Case in the United States, 33 J. OF THE AMER. ACADEMY OF MATRIMONIAL LAWYERS 31 & n.70 (2020), citing the United States Response to "Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction," at 37, retrieved at https://assets.hcch.net/docs/d2db449b-43ab-4a1e-9971-a61b08ad5648.pdf.

Article 13(b) affirmative defense to a petition for return.

In the United States, the analogous provision of ICARA imposes an elevated evidentiary standard to prove a grave risk of harm, which was not prescribed by the Hague Abduction Convention.[11] Raising the standard has constricted the grave risk defense under ICARA. Undertakings could further erode Article 13(b) if they are not adequately delimited. The AAML urges that undertakings which are proposed to repatriate at-risk children must be scrutinized to ensure that they will effectively mitigate the threat to a level that is substantially less than "grave."

This Court has an opportunity to enunciate standards for the Courts to evaluate undertakings ensuring that they will diminish the risks to which children are exposed, not only from international child abduction, but also from the perils of child abuse and domestic violence. When assessing the gravity of the risk posed by a child's return, the burden to recommend undertakings that effectively mitigate risk must lodge with the parent seeking the child's return.[12]

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[11] ICARA, *supra*, at § 9003(e)(2)(A) (2021) provides: "[A] respondent who opposes the return of the child has the burden of establishing (A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies."

[12] "Clearly, one reason for a parent to offer undertakings is self-interest, since undertakings are one of the measures that a court might consider as an alternative to an outright denial of a return petition."

Hon. James D. Garbolino, "The Use of Undertakings in Cases Arising Under the 1980 Hague Convention on the Civil Aspects of

As held by the Second Circuit below, undertakings must be enforceable by the issuing Court itself, or supported by other sufficient guarantees of performance if not enforceable by the issuing Court. Proposed undertakings must be judged by their capacity to be enforced rigorously, comprehensively, and expeditiously upon the child's return to its habitual residence. Undertakings may be approved, but only in service to the laudable goals of the Hague Abduction Convention and ICARA, by mitigating or eliminating the grave risk of harm, through our own Courts or the local authorities in the child's native country, expediting the safe return of children and deterring parental abduction across national borders.

International Child Abduction," at 3, Federal Judicial Center (2016), retrieved at https://www.fjc.gov/sites/default/files/2016/Use%20of%20Undertakings_0.pdf (hereinafter "FJC Undertakings Article").

ARGUMENT

I. Article 13(b), As Drafted By The HCCH And Ratified By Congress, Reserved Judicial Discretion In The Courts To Return An Abducted Child To The Child's Habitual Residence Even In Cases Where A Grave Risk of Harm May Exist.

A. The Phrase "*Not Bound*" Struck a Deliberate Balance Between the Twin Goals of Deterring Cross-Border Child Abduction And Protecting Children from Physical and Psychological Harm or Intolerable Circumstances.

The Hague Abduction Convention is a treaty between signatory nations whose predominant purpose is to deter parents from wrongfully removing children from their habitual residence.[13] The Hague Abduction Convention functions reciprocally, not only protecting our children who, upon their removal from the United States, might be deprived of the benefits of the law of their native land, but also deferring wherever possible to the legal authority of signatory

[13] The Hague Abduction Convention endeavors to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as secure protection for rights of access." Hague Abduction Convention, *supra*, at preamble.

nations to govern the child custody interests of their own citizens.[14]

The interests of our treaty partners in governing the child custody rights of their citizens is presumably identical to our own interest, as amplified (for instance) by the International Parental Kidnapping Crime Act ("IPKCA"), which makes it a felony to remove a minor from the United States with intent to obstruct the lawful exercise of parental rights.[15] The interests of left-behind parents who are citizens of signatory countries must be protected by the same measure as U.S. citizen-parents under ICARA, a federal statute that promotes the prompt return of abducted children to their habitual residences, and the Hague Abduction Convention, which is the progenitor of IPKCA and ICARA.[16]

A parent's interest in the care and control of their children, protected by the Due Process Clause of the Fourteenth Amendment,[17] has been long acknowledged as a fundamental liberty interest,[18] and there is no

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[14] Emphasizing the importance of "allow[ing] the jurisdiction of habitual residence to resolve the custody dispute between the parties," *see Chafin v. Chafin*, 2013 WL 6654389, at *2 (11th Cir. Dec. 18, 2013), *quoting Chafin v. Chafin*, 133 S. Ct. 1017, 1028 (2013).

[15] International Parental Kidnapping Crime Act, 18 U.S.C. § 1204 et seq. (hereinafter "IPKCA").

[16] Hague Abduction Convention, *supra*; ICARA, 22 U.S.C. §§ 9001-11 (2021).

[17] U.S. CONST. AMEND. XIV, § 1.

[18] *Troxel v. Granville*, 530 U.S. 57 (2000).

reason to suggest that foreign nations are less protective of their citizens' rights when one of their children are abducted across national borders.[19] The U.S. Department of Justice, Criminal Division, Child Exploitation and Obscenity Section (CEOS), on its web page explains:

> Every year, situations of international parental kidnapping are reported in the United States. It is common for the removal of a child to occur during a heated or emotional marital dispute, in the early stages of separation or divorce, or in the waiting period for a court custody order or agreement. International parental kidnappings of U.S. children have been reported in countries all over the world, including Australia, Brazil, Canada, Colombia, Germany, India, Japan, Mexico, Philippines, and the United Kingdom.
>
> Child victims of international parental kidnapping are often taken from a familiar environment and suddenly isolated from their community, family, and friends. They may miss months or even years of schooling. The

[19] For instance, Section 1, Article 30 of the Italian Constitution provides: "It shall be the duty and right of parents to support, instruct and educate their children, including those born out of wedlock." Constitution of Italy, 22 December 1947, retrieved at https://www.refworld.org/docid/3ae6b59cc.html.

Section 7 of the Canadian Charter of Rights and Freedoms, also has been interpreted as securing the interest of Canadian parents in raising their children. Canadian Charter of Rights and Freedoms, § 7, Part 1 of the Constit. Act 1982, Schedule B to the Canada Act 1982; *see B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

> child may be moved to multiple locations in order to stay hidden or out of reach of the parent remaining in the United States. In some cases, the child's name, birth date, and physical appearance are altered or concealed to hide identity.
>
> In addition, the tense and unfavorable situation between the parents may be emotionally troubling to a child. Kidnapped children are at high risk for long-term psychological problems including anxiety, eating disorders, nightmares, mood swings, sleep disturbances, and aggressive behavior. As adults, child victims of international parental kidnapping may struggle with identity, relationship, and family issues.[20]

The adverse consequences of child abduction, such as those described by the Justice Department in its report, must be balanced against the risk of physical or psychological harm that a child might face when returning to a habitual residence where the child may be exposed to physical or sexual abuse or domestic violence.

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[20] U.S. Dept. of Justice, "International Parental Kidnapping," retrieved at https://www.justice.gov/criminal-ceos/international-parental-kidnapping.

As Justice Kennedy wrote in *Abbott v. Abbott*, 560 U.S. 1, 15 (2010): "It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight." (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)).

Article 13(b) of the Hague Abduction Convention seeks to protect children from a grave risk of physical or psychological harm by carving out a narrow exception to the general principle that children should be returned to their habitual residence. Article 13(b) provides that: " . . . the requested State is *not bound* to order the return of the child if. . . . 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 (emphasis added)."[21]

No definition of "grave risk" appears in the Hague Abduction Convention or ICARA, but it has been judicially articulated as potential harm that is severe, in which the level of risk and magnitude of danger is very high;[22] in other words, "a real risk of being hurt, physically or psychologically, as a result of repatriation."[23]

One of the central tenets of Article 13(b) of the Hague Abduction Convention is the prevention of harm stemming from child abuse and domestic violence, whose effects may be permanent and devastating:

> When children live in situations of abuse and neglect, there can be chronic or frequent activation of the child's physiologic stress

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[21] Article 13(b), Hague Abduction Convention, *supra*.

[22] *West v. Dobrev*, 735 F.3d 921, 931 (10th Cir. 2013); *Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013).

[23] *Baxter v. Baxter*, 423 F.3d 363, 373 (3d Cir. 2005); *Blondin v. Dubois*, 238 F.3d 153, 162 (2d Cir. 2001) ("*Blondin III*").

> response system without the adequate response of a supportive responsive caregiver. [Leading researchers] Andrew Garner and Jack Shonkoff have labeled this toxic stress. Toxic stress leads, through the excessive or prolonged activation of physiologic stress response systems, to alterations in neuro-development, gene translation, and immune response, resulting in predictable behavioral, learning, and health issues. Those areas of the brain involved in cognition, rational thought, emotional regulation, activity level, attention, impulse control, and executive function are particularly vulnerable, especially in the young child.[24]

The grave risks to a child who is exposed to domestic violence has not always garnered as much attention as the physical and sexual abuse of children, despite similar research conclusions about its effects:

> The American Academy of Pediatrics has documented that a parent committing domestic violence against the other parent in front of the child is a form of child abuse that significantly contributes to negative physical

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[24] Heather C. Forkey, "Children Exposed to Abuse and Neglect: The Effects of Trauma on the Body and Brain," 30 J. OF THE AMER. ACADEMY OF MATRIMONIAL LAWYERS 307 (2018), citing Andrew S. Garner & Jack P. Shonkoff, "Early Childhood Adversity, Toxic Stress, and the Role of the Pediatrician: Translating Developmental Science into Lifelong Health," 129 PEDIATRICS 224 (2012); Jack P. Shonkoff & Andrew S. Garner, Committee on Psychosocial Aspects of Child and Family Health, et al., "The Lifelong Effects of Early Childhood Adversity and Toxic Stress," 129 PEDIATRICS 232 (2012).

> and mental health outcomes in adulthood. A home with daily violence wherein one partner (most commonly a man in cases of coercive abuse) physically or verbally assaults the other partner (most commonly a woman) in front of his or her children turns those children into victims of that violence as well. Such environments negatively affect children who grow up in them, and children who witness more family violence tend to suffer as a result.[25]

That children are frequently removed from their habitual residences by parents in order to rescue them from child abuse or domestic violence is established by the historical data[26] that has accumulated since the promulgation of the Hague Abduction Convention.[27]

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[25] Debra Pogrund Stark, Jessica M. Choplin & Sarah E. Wellard, Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform Proposal, 26 MICH. J. GENDER & L. 1 (2019), retrieved at: https://repository.law.umich.edu/mjgl/vol26/iss1/2.

[26] "The Hague Conference on Private International Law ("HCCH") employs the help of a law professor approximately every five or six years to compile statistics on open cases from governments prior to a meeting of the Special Commission that examines the practical operation of the 1980 Convention. The most recent Special Commission met in the Netherlands in October 2017, and the statistics reported to the group were from 2015."

Melissa A. Kucinski, "The Future of Litigating an International Child Abduction Case in the United States," 33 J. OF THE AMER. ACADEMY OF MATRIMONIAL LAWYERS 31, 33 (2020),

[27] *See* Nigel Lowe & Victoria Stevens, "A Statistical Analysis of Applications Made in 2015 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child

Statistics compiled periodically on behalf of the HCCH consistently show, over time globally, that cross-border child removal is most frequently initiated by mothers,[28] who comprised 73% of the removing parents recorded in 2015, 69% of those recorded in 2008, 68% in 2003, and 69% in 1999. Most of the removing parents (91% in 2015) were identified as the children's primary or joint-primary caregiver.[29] The Article 13(b) affirmative defense, requiring proof of a grave risk of physical or psychological harm to the child, is one of the most common grounds for the denial of return petitions that proceeded to a judicial determination.[30] Child abuse and domestic violence are among the most frequently-litigated grounds for a grave risk defense in Hague Abduction Convention cases.

Commenting on the increased incidence of the Article 13(b) grave risk defense based upon allegations of domestic violence, one scholar wrote:

> The shift towards courts recognizing domestic violence targeted at victims as posing a grave risk toward the child has been furthered by many seminal cases, congressional resolutions, and recent research showing the effects of domestic violence on children. In 1990, a

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Abduction," published by the Hague Conference on Private International Law (July 2018), retrieved at https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57 (hereinafter "Lowe & Stevens Report").

[28] Lowe & Stevens Report, *supra*, at §§ B.10. and D.37.

[29] Lowe & Stevens Report, *supra*, at §§ B.11. and D.42.

[30] Lowe & Stevens Report, *supra*, at §§ D.84. and D.85.

> congressional resolution passed that specifically found that "children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser" and "the effects of physical abuse of a spouse on children include. . . . the potential for future harm where contact with the batterer continues [because] . . . children often become targets of physical abuse themselves or are injured when they attempt to intervene on behalf of a parent."[31]

Article 13(b) of the Hague Abduction Convention, by creating an affirmative defense to a petition for the child's return, carved out a narrow exception that is invoked only when a child's well-being is seriously endangered. When the Article 13(b) exception was drafted, the HCCH did not choose its words lightly. In the words of the Elisa Pérez-Vera Report, an official commentary on the Hague Abduction Convention, Article 13(b) "gives judges a discretion – and does not impose upon them a duty – to refuse to return a child in certain circumstances," such as when they might be exposed to a grave risk of harm.[32] The Pérez-Vera

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[31] Kevin Wayne Puckett, "Comment, Hague Convention on International Child Abduction: Can Domestic Violence Establish the Grave Risk Defense?" 30 J. OF THE AMER. ACADEMY OF MATRIMONIAL LAWYERS 259, 265 (2020) (hereinafter "Puckett Article"), citing H.R. Cong. Res. 172, 104 Stat. 5182, 5182 (1990).

[32] Elisa Pérez-Vera, Explanatory Report at ¶ 113, in 3 ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION (1982) (hereinafter "Pérez-Vera Report") at ¶ 113. The Pérez-Vera Report is the official commentary of the Reporter to the proceedings leading to the adoption of the Hague Convention by the HCCH.

Report describes the vigorous debate leading to a "fragile compromise" in the language of the treaty, by which Courts are "*not bound*" to return a child and have no duty to refuse their return.[33]

The compromise achieved by the HCCH in drafting Article 13(b) vested the Courts with discretion when called upon to weigh the risks associated with a child's return against the adverse consequences of condoning the abduction. By refraining from compelling a child's return, the Hague Abduction Convention in Article 13(b) preserved the opportunity for a child's home country to address abuse or domestic violence under its own laws. Nonetheless, a child's safety and well-being must remain as the paramount concern. When a child's well-being is faced with a threat even greater than the perils of abduction, the duty of *parens patriae* must be invoked, analogous to the duty of the Courts under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") in interstate custody cases.[34]

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[33] Pérez-Vera Report, *supra*, at ¶¶ 113, 116.

[34] UCCJEA, *supra*, § 204 at 30 provides:

"(a) A court of this State has temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse."

B. The Authority To Impose Ameliorative Measures Calculated To Mitigate The Risk of Harm, Or "Undertakings," Is An Inherent Element Of Judicial Discretion under Article 13(b).

Assessing the risk of physical or psychological harm to a child is inevitably a forward-looking endeavor that "focuses on the circumstances of the child upon return and on whether those circumstances would expose the child to a grave risk."[35] In other words, measuring the gravity of the risk requires the District Court, when hearing an Article 13(b) objection to the child's return, to contemplate the hazards a child might encounter upon returning to the habitual residence. By the same token, the District Court must not disregard any pragmatic means of mitigating the risk. A risk assessment that refuses to consider the potential mitigation of risk is myopic and devalues the capacity of the child's native country to protect its citizens under its own laws.

The petitioner, Narkis Golan, in her *Petition for Certiorari*, described the approaches that have developed in the Circuit Courts when presented with

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[35] "The wording of Article 13(1)(b) is 'forward-looking' . . . it focuses on the circumstances of the child upon return and on whether those circumstances would expose the child to a grave risk."

HCCH Permanent Bureau, "1980 Child Abduction Convention Guide to Good Practice – Part VI, Article 13(1)(b)," ¶ 35 at 27 (2020), published by the Hague Conference on Private International Law, retrieved at https://www.hcch.net/en/publications-and-studies/details4/?pid=7059&dtid=3.

the opportunity to address ameliorative measures:[36] (a) refusal in the First, Eighth, and Eleventh Circuits to consider undertakings upon finding that a grave risk exists;[37] or (b) compulsory assessment of undertakings in the Second, Third, and Ninth Circuits;[38] or (c) a hybrid approach in the Sixth and Seventh Circuits that considers undertakings only in cases in which they are likely to be effective.[39]

These approaches may not be irreconcilable, if undertakings are viewed as an essential step in measuring the gravity of risk. Article 13(b) does not confine the Courts to a rearview-mirror perspective when assessing the magnitude of risk that a child might encounter upon its return to a habitual residence. The nature of risk requires an examination of the child's future prospects, whether or not a child is returned. A risk assessment, so long as it is not permitted to devolve into a "best interests" proceeding,[40]

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[36] *Golan v. Saada*, Petition for Certiorari, at 11-17 (No. 20-1034, U.S. Supreme Ct., filed Jan. 26, 2021).

[37] *See Danaipour v. McLarey*, 386 F.3d 289 (1st Cir. 2004) ("*Danaipour II*"); *Acosta v. Acosta*, 725 F.3d 868 (8th Cir. 2013); *Baran v. Beaty*, 526 F.3d 1340 (11th Cir. 2008).

[38] *See Blondin v. Dubois*, 189 F.3d 240 (2d Cir. 1999) ("*Blondin II*"); *In re Adan*, 437 F.3d 381 (3d Cir. 2006); *Gaudin v. Remis*, 415 F.3d 1028 (9th Cir. 2005).

[39] *See Simcox v. Simcox*, 511 F.3d 594 (6th Cir. 2007); *Van De Sande v. Van De Sande*, 431 F.3d 567 (7th Cir. 2005).

[40] Article 16 specifically prohibits a determination on the merits of custody rights; and Article 19 stipulates that "[a] decision concerning the return of the child shall not be taken to be a determination on the merits of any custody issue." Hague Abduction Convention, *supra*.

is within the ambit of the Hague Abduction Convention and ICARA. Undertakings to protect a child may be viewed as inherent in the Courts' judicial discretion to assess risk under Article 13(b).

A monogram published by the Federal Judicial Center describes the history and development of "undertakings," which are conditions that may be imposed by a District Court in a Hague Abduction Convention proceeding to mitigate the risk of harm to a child, as follows:

> Undertakings are official promises, concessions, or agreements given to a court. They are typically given in Hague Convention cases by the parent who has petitioned for the child's return. Generally, a parent's purpose for giving undertakings is to assure a court that in the event the court orders a child returned, certain conditions will be put into place (1) to allow the child to be returned despite the finding that such a return would subject the child to the grave risk defense and (2) to ease the child's transition back to the habitual residence. . . .
>
> The judicial practice of using undertakings in connection with Hague Convention cases began in British courts, where they are predominantly used in common law jurisdictions. Initially, undertakings consisted of bare promises to act or refrain from doing an act in connection with an order for return of a child. The promise could only be reduced to an enforceable order so long as the child or the

> parties remained in the United States. Once the child had been returned to the habitual residence, there could be no guarantee that the undertaking would be performed in the habitual residence. At best, the enforcement of a U.S. order abroad would be subject to the vagaries of comity as perceived by the foreign court.
>
> The use of undertakings in U.S. courts has gained traction and has evolved since their introduction in the early 1990s. In contemporary practice, many undertakings are actually ordered as preconditions to the issuance or enforcement of an order for the return of the child. Reflecting this trend, some courts refer to these measures as "enforceable conditions," and accept undertakings with "sufficient guarantees of performance."[41]

Undertakings have been reported both in cases where a grave risk of harm has been proven, and in those where it has not.[42] The authority to issue undertakings may be vital in cases in which a child's safety is imperiled by a history of domestic violence or child abuse. If the District Courts are not permitted to consider protective measures that might ensure a child's safe return to the habitual residence, then the

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[41] FJC Undertakings Article, *supra*, at 1-2.

The Federal Judicial Center is the research and education agency of the judicial branch of the United States Government, established under the statutory authority of 28 U.S.C. § 620-629.

[42] FJC Undertakings Article, *supra*, at 6.

purposes of the Hague Abduction Convention and Article 13(b) may be frustrated.

C. When Considering Ameliorative Measures That Might Be Issued To Repatriate A Child, The Courts Must Be Satisfied That The Undertakings Can Effectively Mitigate The Risk Of Harm To A Level That Is Substantially Less Than "Grave."

A panoply of undertakings have developed[43] in the District Courts to protect children, such as mirror-image and safe harbor orders;[44] financial aid to enable the removing parent to establish a separate household upon return;[45] domestic violence protective orders; mental health counseling and social services; and supervised visitation orders. Perhaps in some cases,

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[43] FJC Undertakings Article, *supra*, at 4, citing *Blondin v. Dubois*, 78 F.Supp.2d 283 (S.D.N.Y. 2000) ("*Blondin I*"); *Tabacchi v. Harrison*, slip op. at No. 99C4130, 2000 WL 190576 (N.D.Ill. 2000); *In re D.D.*, 440 F.Supp.2d 1293 (M.D.Fla. 2006); *Krefter v. Wills*, 623 F.Supp.2d 125 (D.Mass. 2009); *Habrzyk v. Habrzyk*, 775 F.Supp.2d 1054 (N.D.Ill. 2011).

[44] Hon. James D. Garbolino, "The 1980 Hague Convention: A Guide for Judges, Second Edition," Federal Judicial Center (2015) at 142, 150-152, retrieved at https://www.fjc.gov/sites/default/files/2015/Hague%20Convention%20Guide.pdf (hereinafter "FTC Judges' Guide").

[45] "[T]he obligation of the State to which the child is abducted is the remedy of return, usually to the country of habitual residence, and not to the left-behind parent." Linda Silberman, "Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence," 38 U.C. DAVIS L. REV. 1049, 1079 (2005) (hereinafter "Silberman Article").

the parent who is petitioning for a child's return may propose the undertakings, as suggested by an experienced judge:

> Clearly, one reason for a parent to offer undertakings is self-interest, since undertakings are one of the measures that a court might consider as an alternative to an outright denial of a return petition.[46]

By the same token, a parent who proposes undertakings to facilitate a child's safe return might tolerate brief delays despite the Hague Abduction Convention's admonishment to conclude proceedings in six weeks.[47]

As protective measures are considered as an element of risk assessment, the District Court must insist upon undertakings that are likely to reduce the level of risk to a level that is substantially less than "grave." As stated by the HCCH in its *Guide to Good Practice Under the 1980 Convention – Part VI: Article 13(1)(b)*:

> [T]he court determines whether it is satisfied that the grave risk exception to the child's return has been established by examining and evaluating the evidence presented by the person opposing the child's return / information gathered, and by taking into account the evidence / information pertaining to protective measures available in the State of habitual

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[46] FJC Undertakings Article, *supra*, at 3.

[47] Hague Abduction Convention, *supra*, at Article 11.

> residence. This means that even where the court determines that there is sufficient evidence or information demonstrating elements of potential harm or of an intolerable situation, it must nevertheless duly consider the circumstances as a whole, including whether adequate measures of protection are available or might need to be put in place to protect the child from the grave risk of such harm or intolerable situation, when evaluating whether the grave risk exception has been established.[48]

If protective measures will not sufficiently reduce the risk, then the child's return must be denied. Amplifying this principle, one scholar wrote:

> [T]he Convention is quite clear that this defense should not serve as a pretext for inquiring into the merits of the custody issue and is not to be equated with a 'best interests of the child' standard. Return of the child is to the country – not to a particular parent – and thus only if return would somehow expose a child to serious harm because the court in that country cannot provide sufficient protection should the defense be satisfied.[49]

An author published in the *Journal of the American Academy of Matrimonial Lawyers* on behalf of domestic violence victims has written:

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[48] HCCH Article 13(b) Guide, *supra*, ¶41 at 31.

[49] Silberman Article, *supra*, at 1055.

> . . . undertakings have proved to be insufficient since often the only true way for a domestic victim and her child to be safe are to be on a different continent then their abuser. This is because the abuser can be extremely dangerous, or the child's habitual residence would ineffectively protect the mother and children from when the abuser violates, or threatens to violate, the undertaking. U.S. courts are well-intentioned in seeking to return children to their habitual residence so custody proceedings can commence as soon as possible utilizing undertakings, but a domestic violence victim should not have to put her life in danger to litigate custody. The reality is that upon the return of the child it is too easy for an abuser to simply ignore the undertaking order issued by the abducted-to countries' courts and commence the violence and begin revictimizing the mother and children.[50]

This author's plea emphasizes the necessity of a probing and incisive inquiry when protective measures are proposed in Hague Abduction Convention proceedings in which a risk of harm is detected. Again, the underlying purpose of the 1980 Hague Abduction Convention (deterrence of international child abduction) does not demur to the *parens patriae* authority of our Courts to protect at-risk children.

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[50] Puckett Article, *supra*, at 275.

D. Undertakings Must Be Enforceable By The Issuing Court, Or Supported By Other Sufficient Guarantees Of Performance If Not Enforceable By The Issuing Court.

Undertakings that are just promises should not be regarded as sufficient to mitigate the risk to be faced by children upon their return to a habitual residence.[51] When undertakings are mere promises, children remain at risk of noncompliance, particularly in cases where the promises might not be backed by the force of law when the child and parent return to the habitual residence.[52] The Second Circuit, in its penultimate opinion in this matter, endorsed a cogent argument as to why undertakings must be enforceable by the issuing Court itself, or supported by sufficient guarantees of performance if not enforceable by the issuing Court:

> We conclude that, in cases in which a district court has determined that repatriating a child will expose him or her to a grave risk of harm, unenforceable undertakings are generally disfavored, particularly where there is reason

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[51] The Second Circuit has recognized the practical limitations of our Court's power and authority: "Once a determination properly applying the Convention to the facts at hand has been made, all other issues leave the realm of the treaty's domain. The Convention is not, and cannot be, a treaty to enforce future foreign custody orders, nor to predict future harms or their dissipation." *Ermini v. Vittori*, 758 F.3d 153, 168 (2d Cir. 2014).

[52] *See* FJC Undertakings Article, *supra*, at 6, citing *Danaipour v. McLarey*, 286 F.3d 1 (1st Cir. 2002) ("*Danaipour I*").

> to question whether the petitioning parent will comply with the undertakings and there are no other 'sufficient guarantees of performance.'
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> * * *
>
> In most cases, the international comity norms underlying the Hague Convention require courts in the United States to assume that an order by a foreign court imposing protective measures will guarantee performance of those measures [internal citation omitted]. But, in certain circumstances, even a foreign court order might not suffice. *See Simcox*, 511 F.3d at 608 ("[U]ndertakings would be particularly inappropriate . . . in cases where the petitioner has a history of ignoring court orders."); *Walsh*, 221 F.3d at 221 (rejecting use of undertakings where petitioning parent "violated the orders of the courts of Massachusetts" and "the courts of Ireland," and there was "every reason to believe that he [would] violate the undertakings he made to the district court in this case and any barring orders from the Irish courts").[53]

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[53] *Saada v. Golan*, 930 F.3d 533, 540 & n.33 (2d Cir. 2019), citing *Simcox v. Simcox*, 511 F.3d 594, 608 (6th Cir. 2007) ("Where a grave risk of harm has been established, ordering return with feckless undertakings is worse than not ordering it at all."); *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000) ("A potential grave risk of harm can, at times, be mitigated sufficiently by the acceptance of undertakings and sufficient guarantees of performance of those undertakings.").

Logic dictates that the burdens to propose undertakings and to prove their efficacy to mitigate risk must rest with the parent seeking the child's return. The left-behind parent is typically most capable of investigating the protective measures available in the child's native country. ICARA authorizes expedited discovery and evidentiary procedures that facilitate the judicial evaluation of undertakings.[54] Furthermore, the cooperation of foreign courts is encouraged, through the International Hague Network of Judges and its secure electronic communications platform, which enables protective measures to be coordinated in the child's native country.[55] For these reasons, the burdens of production and persuasion should be assigned to the petitioning parent.

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[54] Section 9005 provides: "With respect to any application to the United States Central Authority, or any petition to a court under section 9003 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court." ICARA, 22 U.S.C. § 9005.

[55] The capabilities of the International Hague Network of Judges, organized by the HCCH, are described on its website at https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction/ihnj/.

II. Proposed Undertakings Must Be Evaluated For Their Capacity to Be Enforced Rigorously, Expeditiously, and Comprehensively, Upon The Child's Return To The Child's Habitual Residence.

The reduction of harm is chief among the objectives of the Hague Abduction Convention, whether resulting from a "traumatic loss of contact" that accompanies the severance of an abducted child's relationship with the left-behind parent, the injury to a child's educational, emotional, developmental, or financial interests, the forfeiture of a child's native culture, language, and customs, or other physical or psychological harm.[56] In many cases, the damage may be minimized by returning a child promptly to its habitual residence under the auspices of undertakings that mitigate the risk. Yet, since undertakings typically require coordination with, and enforcement by, the child's native country, it is imperative that undertakings are more than bare promises.

Undertakings that must be performed abroad must not be assumed to be inferior to the protective measures that our Courts might issue if the children were not returned. On the other hand, it is incumbent upon the Courts before authorizing a child's return to hear compelling evidence about the efficacy of the proposed undertakings. Three well-defined standards might guide the Courts in deciding whether

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[56] Pérez-Vera Report, *supra*, ¶ 30, at 433.

undertakings are adequate to reduce or eliminate the risk of harm to a child:

> 1. First, proposed undertakings must be enforceable by law enforcement, criminal courts, and/or civil courts having legal authority to compel rigorous compliance and issue coercive sanctions against individuals who fail to comply fully and timely with the protective measures. In other words, ameliorative undertakings must be sufficiently rigorous to induce strict compliance.
>
> 2. Secondly, undertakings must be comprehensive in scope and duration, with clear and unambiguous directives for a period of time sufficient to protect the child. Undertakings may be rejected if they do not bind the persons who are identified as actual threats, whether they are parents or their significant others, step-parents, child care providers, or other relatives or third parties who pose a risk of harm to the child. While discovery and litigation must not be permitted to become overbroad, the Courts may rely upon the respondents' heavy burden to prove the source of the harm. Then, if petitioners propose measures that do not mollify the concern, judges may consider the undertakings to be insufficient.
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> 3. Third, undertakings must be expedient, permitting no lapse in protection for the child from the moment of a child's return until custody rights have been conclusively resolved.

These proposed standards will make certain that undertakings are more than promises that might not adequately mitigate the risk of harm to a child upon its return. The AAML urges this Court to adopt these proposed standards – requiring undertakings to be enforceable by coercive sanctions, comprehensive in scope and duration, and exigent in their implementation – in adjudicating the efficacy of undertakings to mitigate a grave risk of harm in Hague Abduction Convention proceedings.

CONCLUSION

Our Courts, like the AAML, profess a keen interest in safeguarding children, whether from the perils of cross-border child abduction or the tragedy of child abuse and domestic violence. Reconciling those goals, in the context of a Hague Abduction Convention proceeding involving a grave risk of harm, is not easy. An expedited decision must be made as to whether a child's return will be granted or denied, so that custody proceedings may be commenced or resumed to address issues such as allegations of abuse or domestic violence, the child's best interests, and parenting time. Punctuality is essential, as children's lives do not pause for legal proceedings.

When our Courts determine in some cases that they can provide no greater protection for children than they may obtain at home, children must be promptly returned to their habitual residences. Our

duties to signatory countries under the Hague Abduction Convention require abducted children to be returned, except under Article 13(b), when they cannot be repatriated without exposing them to a grave risk of harm. Our statute, ICARA, shrinks this Article 13(b) exception by elevating the evidentiary bar that must be hurdled to prove a grave risk. Ameliorative measures ("undertakings," or risk mitigation measures) may further reduce the Article 13(b) affirmative defense to an impenetrable fissure if undertakings may be issued without high confidence that they will protect children effectively and without delay.

Undertakings are intrinsic to the judicial discretion conferred by the Hague Abduction Convention to empower the Courts to measure the magnitude of the risk posed by a child's return to its habitual residence. Risk mitigation is an inherent aspect of that judicial discretion, but must be approached with trepidation. Our Courts must challenge petitioners who propose undertakings to prove, under well articulated standards of enforceability, comprehensiveness, and exigency, that undertakings will reduce the risk to a level that is substantially less than "grave." The

protection of children is one of the highest callings of the AAML, and of our Courts.

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