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

REPLY BRIEF FOR THE PETITIONER

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The mandatory consideration of ameliorative measures is nowhere to be found in the text and history of the Hague Convention or its implementing legislation. And the court of appeals' rule requiring consideration of such measures in the context of a grave-risk determination is inconsistent with the purposes of the Convention, the views of the State Department, and the practices of other signatories.

In attempting to defend the court of appeals' rule, respondent collapses the grave-risk determination and the consideration of ameliorative measures into a single analysis. But respondent provides no support for that approach either in law or in logic. It does not follow from the forward-looking nature of the grave-risk determination that a court must consider a hypothetical future in which

it has ordered ameliorative measures. Nor can such an approach be reconciled with the burden of proof Congress imposed on the party seeking to prove the existence of a grave risk. Including ameliorative measures in the analysis would require that party to prove a negative by clear and convincing evidence—a task that would be nearly impossible and contrary to the Convention's purpose of protecting the child. The State Department's consistent interpretation of the Convention over three decades undercuts respondent's argument, as do the practices of other signatories. There is simply no valid justification for the court of appeals' rule.

After rejecting that rule, the Court should reverse the judgment below and bring this case to a close. Such a disposition is warranted because the proceedings have extended far beyond the six weeks the Convention contemplates, and because the district court failed, despite the delay, to ensure adequate protections for B.A.S. The district court coerced the parties to seek, and the Italian court to issue, a protective order with particular terms, yet it did not assess the order's practical enforceability and effectiveness at protecting B.A.S. And the court embroiled itself in custody-related issues despite the clear prohibition both in the Convention and in its implementing legislation.

Respondent's contrary arguments reveal his continued failure to come to grips with his conduct and the grave risk to which he would subject B.A.S. He mischaracterizes the grave-risk determination and goes so far as to contend that ameliorative measures need not be enforceable at all. That position cannot be squared with the Convention and its clear purpose of protecting the child. B.A.S. should be permitted to remain in the United States, where his protection is ensured. The judgment of the court of appeals should be reversed.

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

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

The text of the Convention and ICARA does not mention ameliorative measures, much less mandate their consideration. See Pet. Br. 21-23. Respondent cannot overcome the plain text, and this Court need go no further to determine that the Convention does not mandate consideration of ameliorative measures. See, *e.g.*, *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1511 (2017).

a. Respondent argues (Br. 16-17) that, because the grave-risk exception is "forward-looking," it is not just "appropriate" but "necessary" to consider ameliorative measures. Because the exception focuses on the risk to which the child would be exposed, it is clear that the analysis must assess the conditions in the event of his return. But respondent provides no reason to make the further assumption that the forward-looking analysis necessarily implies a hypothetical future with court-ordered interventions that might ameliorate risk.

Nothing in the text of the Convention or ICARA supports that assumption. The Convention expressly compels consideration of only one factor: the "social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." Hague Convention on the Civil Aspects of International Child Abduction, art. 13, T.I.A.S. No. 11670, 1988 WL 411501 (Oct. 25, 1980). The absence of any other expressly enumerated factor does not suggest that "courts need not consider any other information," Resp. Br. 19; rather, it suggests that those other factors are left to the court's discretion. The court of appeals erred by "insert[ing] an amendment" mandating consideration of an

additional factor. *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989).

b. Respondent's suggestion (Br. 11, 15) that a court must consider ameliorative measures "as part of" the grave-risk inquiry is affirmatively incompatible with ICARA's text. ICARA requires the party opposing return of the child to establish the applicability of the grave-risk exception "by clear and convincing evidence." 22 U.S.C. 9003(e)(2)(A). Through that standard, Congress ensured that the exception would be "narrow." 22 U.S.C. 9001 (a)(4). If ameliorative measures must be considered as part of the grave-risk analysis, however, the text of ICARA would require a party invoking the exception also to prove, by clear and convincing evidence, that no conceivable ameliorative measure could mitigate the grave risk. That would not just narrow the exception but effectively gut it altogether, because the invoking party would have to anticipate and negate (by clear and convincing evidence) all possible combinations of ameliorative measures. There is no indication that Congress sought to impose that burden—much less to do so in such an oblique manner.

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

Requiring consideration of ameliorative measures conflicts with each of the Convention's core purposes. Respondent concedes (Br. 18) that the Convention's purposes should guide a court's exercise of discretion. But because mandatory consideration of ameliorative measures adds significant delay to the adjudication of the petition, risks entangling the court in custody-related issues, and conflicts with the Convention's overarching concern with the child's safety, such a mandate is inconsistent with

those purposes. See Pet. Br. 23-26. Respondent's contrary arguments are unavailing.

a. Respondent first argues (Br. 21-23) that delay is inevitable in any case involving the grave-risk exception, and no "material" additional delay results from the consideration of ameliorative measures. But the history of this case belies that contention. Although respondent broadly claims that the district court considered grave risk and ameliorative measures in the "same trial" (Br. 22-23), the trial focused on the grave-risk exception; only after those proceedings ended did the district court turn to the issue of ameliorative measures, including by ordering additional briefing. See D. Ct. Order (Jan. 30, 2019). And on remand, the further consideration of ameliorative measures (this time enforceable ones) took another nine months. See p. 19, *infra*.

Even if the issues of grave risk and ameliorative measures were considered simultaneously, the court of appeals' rule requires a court to assess the "full panoply" of ameliorative measures and order return of the child "if at all possible." *Blondin* v. *Dubois*, 189 F.3d 240, 242, 248 (2d Cir. 1999). By its terms, therefore, the rule demands an exhaustive assessment of the efficacy of all possible ameliorative measures before a court can exercise its discretion to decline to return a child. That process is incompatible with Article 11 of the Convention, which "prescrib[es] six weeks as [the] normal time for return-order decisions." *Monasky* v. *Taglieri*, 140 S. Ct. 719, 724 (2020).

b. While conceding that "some measures may intrude too far into custody-related matters," respondent claims (Br. 24-25) that a court would effectively abuse its discretion by declining to consider ameliorative measures in any given case. But a mandatory rule requiring consideration

of the "full panoply" of ameliorative measures, and the return of the child "if at all possible," would undoubtedly encourage courts to consider and impose measures that wade into custody-related matters—including through what respondent refers to as "undertakings"—despite the Convention's and ICARA's prohibition. Convention arts. 16, 19; 22 U.S.C. 9001(b)(4). Thus, the State Department's repeatedly expressed concern that courts will stray into custody-related issues by imposing such "undertakings" remains relevant. See U.S. Br. 18-20; U.S. Cert. Br. 1a-20a.

c. Respondent also undervalues (Br. 25-26) the overarching principle 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." Elisa Pérez-Vera, *Explanatory Report* 431 (Hague Permanent Bureau trans. 1982) <tinyurl.com/hagueexplanatoryreport> (*Explanatory Report*). In arguing that the best interests of the child are served by return to the country of habitual residence, respondent ignores that the Convention does not mandate return whatever the circumstances. The Article 13(b) exception recognizes that the general interest in return "gives way before the primary interest of any person in not being exposed to physical or psychological danger." *Id.* at 433.

Thus, while purporting to "harmonize[]" the general return rule and the grave-risk exception (Br. 25), respondent would instead create discord—upsetting the careful balance that the drafters struck and undermining the discretion Article 13(b) provides. Rather than allowing courts to exercise their discretion within the bounds of the Convention, the court of appeals' rule would tie the district court's hands and mandate consideration of measures even when doing so would entangle the court in custody-related issues or cause unwarranted delays.

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 confirm that consideration of ameliorative measures is not mandatory. The explanatory report does not mention ameliorative measures at all. And the concerns expressed by the report—namely, the best interests of the child, the Convention's "coexistence" with the laws of signatory nations, and the importance of the Convention's exceptions—are all incompatible with the notion of mandatory consideration of ameliorative measures. See Pet. Br. 26-28, 33.

The explanatory report makes clear that "[e]ach of the terms used" in Article 13(b) was "the result of a fragile compromise reached during the deliberations of the Special Commission." *Explanatory Report* 461. Indeed, the amicus brief submitted by the United States' delegates to the Convention underscores that, despite extensive discussion about the contours of the grave-risk exception, there is no "mention of mandatory consideration of ameliorative measures *anywhere* in the nearly five hundred pages of preparatory materials, proposals, minutes of deliberations, and reports." Br. 10. And "when there was a proposal to require courts to consider a specific type of evidence in grave-risk cases, the drafters resisted such a requirement." *Ibid.*

Respondent fails to respond to any of those arguments. Instead, he cites only portions of the explanatory report that suggest that the grave-risk exception is narrow, and he notes that the Convention seeks to return a child to the country of habitual residence. See Resp. Br. 20-21, 26. But even if the grave-risk exception is narrow, the Convention "does not pursue" the return of the child "at any cost." *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 16

(2014). And none of the sources cited by respondent suggests that the Convention requires consideration of ameliorative measures in every case.

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

The mandatory consideration of ameliorative measures is also inconsistent with the views expressed by the State Department since the Convention's ratification. See Pet. Br. 28-31; U.S. Br. 17-20.

a. For over three decades, the State Department has taken the position that denying return under Article 13(b) may be proper even absent consideration of ameliorative measures. Indeed, the Department's authoritative legal analysis of the Convention in 1986 suggested circumstances in which return could be denied without mentioning possible ameliorative measures. See Pet. Br. 28-29; U.S. Br. 17-18. A 1995 letter and legal memorandum to the British government expressly noted that ameliorative measures "are not necessary to operation of the Convention," but their limited use "can be consistent with the Convention." U.S. Br. 18-19 (citation omitted); Pet. Br. 29-30. 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 those points. See Pet. Br. 30-31; U.S. Br. 20. And reports on Convention compliance by the State Department have urged signatories not to include undertakings in their return orders, emphasizing that consideration of ameliorative measures is discretionary. See Pet. Br. 31; U.S. Br. 20 n.2.

b. Despite the overwhelming evidence of the State Department's views, respondent contends (Br. 26, 30-31) that those statements either do not speak to the question presented or affirmatively support a "requirement" that

"judges must consider whether there are measures that will mitigate the grave risk." That is incorrect.

i. Respondent argues (Br. 30) that the State Department's 1986 analysis is not instructive. But neither of the reasons respondent offers holds water.

First, respondent contends (Br. 30) that, by "[n]ot mentioning ameliorative measures," the State Department did "not [take] a position" on ameliorative measures. But if the Department had believed that consideration of ameliorative measures was mandatory, the omission of any mention of that key requirement from its authoritative analysis would have been perplexing. As noted by petitioner (Br. 29) and the government (Br. 17), moreover, the grave-risk hypotheticals included in the Department's analysis presumed that return may be denied *without* any consideration of ameliorative measures.

Second, respondent contends (Br. 31) that, because "[t]he State Department's analysis was done before courts had begun to implement the Convention," it was silent on the constraints on the district court's discretion in grave-risk cases. But the State Department *did* address the constraints mandated by the Convention: for instance, it noted that the Convention requires consideration of "information relating to the child's social background provided by the Central Authority or other competent authority in the child's State of habitual residence," in part to "ensur[e] that the court has a balanced record 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 Department did not address how a court's discretion might be constrained by mandatory consideration of ameliorative measures, for the simple reason that the Convention imposes no such constraint.

ii. Respondent next pivots (Br. 31) to the views expressed by the government in an amicus brief filed in *Blondin* v. *Dubois*, 238 F.3d 153 (2d Cir. 2001). But, contrary to respondent's suggestion, the government did not adopt his position in that case.

The disputed issue in *Blondin* was whether "a likelihood of post-traumatic stress disorder constitutes a 'grave risk of psychological harm' within the meaning of Article 13(b)." 238 F.3d at 158. The government took the position that denying return due to the psychological harm that "flow[s] to the children based on the uncertainties of custody proceedings" would "expand[] the 'grave harm' exception to the point where it threatens to undermine the central goal of the Convention." Br. 23. In the government's view, because the district court had expressly found that "the type of 'grave risk' contemplated by the Convention"—that is, the risk of physical harm caused by being in the abusive father's custody—"was ameliorated," the children should be returned. Br. 19-20. The lines from the amicus brief on which respondent latches (Br. 21) are largely descriptive recitations of the Second Circuit's own requirement that courts consider ameliorative measures, as announced in the first appeal in *Blondin* and applied in petitioner's case. The government's statements can scarcely be read as endorsements of that requirement, which was not at issue in the later appeal.

iii. Respondent's sweeping statement (Br. 30) that there is no "instance before this case" in which the State Department has taken the view that courts need not consider ameliorative measures is plainly incorrect. The views of the State Department have remained consistent for more than thirty years. See p. 8, *supra*. Accordingly, the Department's position that ameliorative measures are

not "necessary" to the Convention should be afforded due weight. See *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010).

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

The practices of other signatories support the conclusion that the Convention does not mandate consideration of ameliorative measures. Respondent's contrary arguments are unavailing.

a. The concept of ameliorative measures is not based either in the Convention or in ICARA, but is instead a judicial construct. See Pet. Br. 31-32. All of respondent's amici acknowledge as much. See IAFL Br. 4; CALA Br. 13; Professors Br. 4. Even British courts, which created that construct, 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.). Civil-law jurisdictions either expressly prohibit or simply do not provide for undertakings, while other common-law countries permit (but do not require) their consideration. See Pet. Br. 32-33. Yet neither respondent nor anyone else has suggested that those countries are thereby out of compliance with the Convention.

b. Respondent nonetheless argues (Br. 32) that the practices of other signatories support the mandatory consideration of ameliorative measures. But a review of respondent's examples shows, at most, that some countries—often subject to independent international obligations that do not bind the United States—*permit* their consideration.

i. Respondent starts (Br. 32-33) from the Hague Conference on Private International Law's Guide to Good Practice. By its own terms, however, the Guide is "*not*

intended to direct the interpretation of Article 13(1)(b) in individual cases"; is "purely advisory in nature"; should not "be construed to be binding upon Contracting Parties"; and "is subject to the relevant laws and procedures, including differences due to legal tradition." *1980 Child Abduction Convention: Guide to Good Practice Part VI Article 13(1)(b)* ¶¶ 7-8 (2020) <tinyurl.com/hagueconferenceguide>.

In any event, the Guide does not support the view that anything in the Convention's text, purposes, or drafting history mandates consideration of ameliorative measures. The Guide merely includes evaluation of ameliorative measures as a step in describing the grave-risk exception, while also stating that, "in practice," the Convention contemplates consideration of such measures only as courts may deem "necessary and appropriate." Guide ¶¶ 36, 41, 61.

In discussing the use of ameliorative measures, moreover, the Guide relies upon a separate treaty—the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, *done* Oct. 19, 1996, 2204 U.N.T.S. 95 (entered into force Jan. 1, 2002) (1996 Convention)—as central to ensuring "the efficacy of any [ameliorative measures]." Guide ¶ 48. The 1996 Convention enables ameliorative measures ordered by one signatory state to be enforced in another signatory state after a child's return. See U.S. Br. 23 (citing 1996 Convention arts. 23, 28). But the United States is not a party to that convention. Accordingly, the Guide's discussion of ameliorative measures in that context has little relevance here.

ii. Respondent next cites (Br. 34) the practices of European Union member states, but he recognizes—as he must—that consideration of ameliorative measures by

those countries occurs as a result of Brussels IIa, and not the Convention. After all, if the Convention itself required consideration of ameliorative measures in all cases "as part of a grave-risk analysis" (Br. 11), and if the grave-risk exception did not apply whenever such measures were "available" (Br. 26), there would have been no need for such a provision in Brussels IIa.

What is more, respondent once again fails to mention the relevance of the 1996 Convention, to which the European Union member states are also signatories. Because neither that convention nor Brussels IIa is in effect in the United States, the practices of Convention signatories operating under those provisions should be given little weight.

iii. Respondent's argument on British practices is also unavailing. For one thing, the British decision on which respondent relies (Br. 33) recognizes that undertakings are not generally used in civil-law countries. See *In re E*, [2011] UKSC 27 (H.L.) (U.K.). That suggests that mandatory consideration of such measures would not apply in those countries. As the government has explained, "just as the Convention leaves contracting states free to require a party opposing return to demonstrate grave risk by clear and convincing evidence (as the United States does) or by a mere preponderance (as the United Kingdom does), so too the Convention leaves contracting states free to require, or to not require, consideration of ameliorative measures." U.S. Br. 23-24 (citations omitted). The British approach—finding grave risk only where ameliorative measures are unavailable (Resp. Br. 33)—would be untenable both in civil-law countries that do not recognize such measures and in the United States, given the structure of ICARA. See pp. 3-4, *supra*.

iv. Respondent is left to argue (Br. 34) that, in practice, "[o]ther Convention signatories consider ameliorative measures in determining whether a grave risk exists at all." But that does not get respondent across the finish line. Because the practice of those signatories reflects their exercise of discretion and not their interpretation of the mandates of the Convention, it cannot serve as the basis for a ruling by this Court on the requirements of the Convention.

All of respondent's cherry-picked cases stand for the unremarkable proposition that, in their discretion, some courts have decided to consider ameliorative measures. See Br. 33-34. For instance, in the Irish case that respondent cites, *A.S.* v. *P.S.* (Child Abduction) [1998] 2 IR 244 (Ir.), the court noted that the existence of a grave risk based on the plaintiff's presence near the child "does not determine the matter" because "[t]hat is not the only option," given that "[t]he plaintiff has undertaken to vacate the family home so that the defendant and both children can live there pending the English court's decision on custody." And respondent's New Zealand case, *LRR* v. *COL* [2020] NZCA 209 (N.Z.), takes an even narrower approach, noting only that it is "possible" that "conditions may be imposed by the court where an exception has been made out," but "the court considers that it would be in the best interests of the child to return to the requesting State if certain conditions are satisfied." That hardly rises to the level of a consistent international practice interpreting the Convention's text as mandating consideration of protective measures. See *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 255 (1984).

* * * * *

In short, the text, purposes, and drafting history of the Convention, the views of the State Department, and the

practices of other signatories all support the conclusion that consideration of ameliorative measures is discretionary. In the face of that overwhelming authority, respondent's request that this Court "alter, amend, or add to" the Convention by "inserting" a requirement to consider ameliorative measures in all cases invites "an usurpation of power, and not an exercise of judicial functions." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 22 (1821) (Story, J.). The Court should decline that invitation.

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

The Court should proceed to reverse the judgment below on the ground that the ameliorative measures the district court adopted are inconsistent with the Convention and inadequate to protect B.A.S.

1. While respondent does not contend that the Court lacks the power to consider the effect of its ruling on ameliorative measures if the Court agrees with petitioner's interpretation of the Convention, he argues (Br. 36) that the Court should decline to reach the issue because it is not fairly included in the question presented. For its part, the government contends (Br. 32-33) that the Court should remand the case to allow the lower courts to apply the correct legal standard in the first instance.

The Court has the discretion to apply the legal standard it adopts, and it would be entirely appropriate for it to do so here. If the Court agrees with petitioner on the question presented, the appropriate disposition—reversal or vacatur—turns on whether the ameliorative measures adopted could have been imposed consistent with the Convention. The Court has often decided remedial issues beyond the question presented in order to determine the correct disposition of a case. For example, in *McCoy* v. *Louisiana*, 138 S. Ct. 1500 (2018), the Court resolved the

Sixth Amendment question presented and proceeded to decide whether the trial court's error was structural, in order to determine whether a new trial was required on remand. *Id.* at 1510-1512 & n.4. The Court did so after the petitioner raised the issue in his opening brief and the respondent "explicitly chose not to grapple with it." *Id.* at 1511 n.4. Other cases are to the same effect. See, *e.g.*, *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773, 1781-1782 (2017); *Horne* v. *Department of Agriculture*, 135 S. Ct. 2419, 2431-2433 (2015); *Perdue* v. *Kenny A. ex rel. Winn*, 559 U.S. 542, 557-559 (2010); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 47 & n.34 (1977).

Respondent's suggestion (Br. 36) that petitioner waived any claim to reversal at the certiorari stage is incorrect. In referring to the possibility of a remand, petitioner was merely responding to respondent's claim (repeated here) that the Court could affirm regardless of its holding on the question presented. See Cert. Reply Br. 10. As petitioner explained, if the Court agrees with petitioner on the question presented, it cannot affirm; instead, *at a minimum*, remand would be necessary to allow the lower court to apply the correct legal rule and determine whether (and how) to exercise the discretion it did not believe it had. See *ibid.*

The Court's exercise of its discretion to reverse outright is particularly warranted because expeditious proceedings are at the core of the Convention. Indeed, in *Monasky*, *supra*, the Court rejected the government's position that the Court should remand to allow the lower court to apply the newly announced standard for determining habitual residence. The Court explained that, while it may "[o]rdinarily" take that course, a "remand would consume time when swift resolution is the Convention's objective." 140 S. Ct. at 731. So too here. Given the

grave-risk determination, the swiftest and most appropriate resolution is reversal.

The government attempts to distinguish *Monasky* on the basis that the issue there involved a "non-discretionary determination," "a mixed question of law and fact." U.S. Br. 33. But the appropriateness and sufficiency of the proposed ameliorative measures is likewise a mixed question, and because the record plainly indicates that the measures ordered are inconsistent with the Convention, any exercise of "discretion" holding otherwise would be subject to reversal. In such circumstances, no further delay is warranted, and the Court should bring the case to a close.

2. The limits on ameliorative measures inherent in the Convention require reversal of the return order here. The district court undertook an extraordinary and lengthy process in which it effectively coerced both the parties and the Italian court to adopt various custody-related measures. That process was inconsistent with the Convention, and the resulting measures are insufficient to protect B.A.S. Respondent's contrary arguments are unpersuasive.

a. Respondent first attempts to fault petitioner for the length of the proceedings, arguing that the case should have concluded after the district court's first return order (which included only voluntary undertakings and no protective order). See Br. 37-41. That is a perplexing position, which gives no credence to the need for enforceable ameliorative measures. Respondent has no response to the harrowing reports of domestic-violence perpetrators agreeing to voluntary undertakings, only to violate them immediately upon return. See Pet. Br. 40-42; Domestic Violence Organizations Br. 10-14. Nor does respondent address the district court's findings—based

on his own expert's testimony—that he had "not demonstrated a capacity to change his behavior"; had "minimized or tried to excuse his violent conduct"; and had been unable to "control his anger or his behavior[] or take responsibility for its effect on B.A.S." Pet. App. 66a, 80a. Those findings underscore the need for enforceable measures here.

Indeed, before this Court, respondent continues his pattern of downplaying his abuse and failing to recognize its effect on B.A.S., claiming that the grave-risk determination was based only on "proximity" between petitioner and respondent. See Br. 28.[1] If that were the case, there would have been no need for the district court to prohibit respondent from going near B.A.S. and to mandate supervision for respondent's visitation. See Pet. App. 4a-5a; 19a.

Respondent must take the position that the initial return order was sufficient because otherwise he could not claim that the proceedings in this case were expeditious (given the massive delay that ensued thereafter). And more broadly, while there may be some overlap in considering whether a grave risk exists and how such a risk may be ameliorated, the two questions are distinct. See p. 5, *supra*. The latter question undoubtedly requires a deeper understanding of the cause of the grave risk and the systems available to mitigate it. Where protection for the child upon return to the country of habitual residence

[1] Respondent's position also ignores that domestic abuse does not stop with physical violence and includes emotional, legal, and financial abuse. See Pet. App. 48a; Domestic Violence Survivors Br. 3-6; Child Justice Br. 15-17. Those aspects of respondent's abuse continue to this day, including his refusal to give petitioner a Jewish divorce; his demand for full custody of B.A.S. as a condition of the divorce; the use of private investigators to surveil petitioner; and his refusal to provide any financial support for B.A.S. See D. Ct. Dkt. 118, Ex. A, at 9, 12-13; D. Ct. Dkt. 140, at 2.

must be secured, and where the enforceability of such measures must be taken into account, a court will often be unable to act expeditiously.

This case illustrates the point. The district court ordered the parties to "take the necessary steps to secure the protective order" by a date certain, D. Ct. Dkt. 69, but the parties were unable to do so by the court's deadline, D. Ct. Dkt. 76. But that deadline was quickly overtaken by events, as the district court instructed the parties to "await further instruction from the Court pending [the Italian judges'] review of the case." D. Ct. Dkt. (order dated Aug. 13, 2019).

Thereafter, the district court reported on its communications with the Italian judges and its efforts to obtain information regarding protective orders and to ensure that the Italian court had access to the relevant proceedings in the United States. See D. Ct. Dkts. (orders dated Aug. 13, 2019; Oct. 2, 2019; and Oct. 3, 2019); D. Ct. Dkt. 85; D. Ct. Dkt. 87. That back-and-forth went on for several months, until the district court concluded it had received sufficient information and ordered the parties to submit to the Italian court a protective order with specific terms governing visitation, supervision, and physical custody. See D. Ct. Dkt. 89.

Under objection but in compliance with that order, petitioner submitted an application for a protective order. See D. Ct. Dkt. 93. After the Italian court issued the order, see D. Ct. Dkt. 96, the necessary briefing on the adequacy of the order and other measures went on for another two months, and the district court issued its decision approximately three months later. The nine-month process on remand alone thus lasted approximately six times longer than the "normal time for return-order decisions" of six weeks. *Monasky*, 140 S. Ct. at 724; see Convention art. 11.

The delay here well illustrates the significant difficulties involved in an American court's requiring the parties to seek a protective order from a foreign tribunal. Even accepting the government's position that it may be appropriate for a court to "ask whether the parties have considered" certain measures or to "facilitate" them upon a party's request (Br. 26), the district court went well beyond those bounds.[2] Acting at the direction of the court of appeals, the district court directed the parties to seek a protective order from an Italian court that would include detailed terms, thus effectively conditioning return on the receipt of that order and on the imposition of conditions that veered into custody-related matters.

The government recognizes that "courts should not allow the consideration of ameliorative measures to unduly prolong proceedings," and rightfully criticizes the district court for taking "over nine months to conduct the type of inquiry the court of appeals directed." Br. 28. But the government fails to follow that criticism to its logical conclusion: the delay here was due in large part to the time it took the district court to arrange for—and the parties to negotiate, apply for, and receive—a protective order from an Italian court. Thus, both the time the district court spent and its entanglement with custody-related issues in Italy render its process inconsistent with the Convention.

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[2] The government also states that it is "incorrect" that the "domestic violence context warrants a presumption that ameliorative measures will be ineffective or inappropriate." Br. 31 n.3. Petitioner is not arguing for such a presumption. Instead, petitioner merely acknowledges a practical reality of complex domestic-violence situations, such as the one at issue here: where a court has determined that domestic violence creates a grave risk of exposure to harm, the purposes of the Convention—which the government agrees must govern the court's discretion (Br. 25)—will often conflict with any ameliorative measures that could be adequate.

What is more, even though it spent months addressing the ameliorative measures, the district court failed to analyze the practical operation of the Italian legal system and its enforcement mechanisms. Cf. Italian Organizations Br. 11-13. Respondent contends (Br. 27) that such an analysis would evince a "bias in favor of U.S. courts and a distrust of Italian courts," but a district court cannot return a child to face a grave risk without even attempting to understand how any potential ameliorative measures would operate in practice. The same analysis would be required where a foreign court determines that the child faces a grave risk if returned to the United States. That analyzing the practical adequacy of foreign measures would raise comity concerns is yet another reason that mandatory consideration of ameliorative measures is inconsistent with the Convention.

b. Respondent next claims (Br. 41-42) that petitioner cannot "fault the district court" for ordering certain custody-related measures, on the ground that she sought them out. But petitioner's position throughout this case has been that no ameliorative measures could provide adequate protection while remaining consistent with the Convention. See, *e.g.*, D. Ct. Dkt. 58; D. Ct. Dkt. 70. The district court nevertheless required petitioner to propose such measures. Given the district court's rejection of petitioner's position, petitioner cannot be faulted for seeking to protect B.A.S. to the greatest extent possible.

Changing tack, respondent suggests (Br. 42) that the protective order is not problematic because the Italian court "exercised its own judgment" and that court will preside over the eventual custody proceedings. But that ignores the district court's participation in the process, effectively conditioning return on the issuance of an order with particular terms related to custody and directing the parties to apply for such an order.

c. Finally, respondent argues (Br. 42-43) that reversal here would contravene the Convention by rewarding petitioner for removing B.A.S. from Italy. Once again, respondent's argument gives short shrift to Article 13(b) and the Convention's recognition that "the removal of the child can sometimes be justified." *Explanatory Report* 432. That is the case where there is a grave risk of exposure to harm, as the district court determined here.[3]

Nor should the Italian proceedings have any bearing on this Court's willingness to reverse the judgment below and allow B.A.S. to remain in the United States. The Italian court has been awaiting the resolution of these proceedings. The appointment of a guardian ad litem and scheduled submission dates are simply intended to ensure that any proceedings can commence expeditiously if B.A.S. is returned to Italy. See Tribunale Ordinario di Milano, Sez. Nona (Minori e Famiglia), Dec. 16, 2021, n. 51492/18 (It.). Indeed, the guardian's recent submission stressed that his representation of B.A.S. would be effective only if the child is returned to Italy. See Comparsa di Costituzione [Notice of Appearance], Tribunale Ordinario di Milano, Sez. Nona (Minori e Famiglia), Feb. 28, 2022, n. 51492/18 (It.). The Italian court thus recognizes that holding such proceedings would be premature until the Convention inquiry is complete.

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[3] Petitioner agrees with respondent (Br. 43 n.17) that resolution of the Convention inquiry will not necessarily determine the forum of the custody proceedings. A decision not to return B.A.S. to Italy addresses the child's location during the proceedings and lifts the Convention's prohibition on American courts "decid[ing] on the merits of rights of custody." Art. 16. Jurisdiction over the custody proceedings will turn on questions of New York law and Italian law. See Robert G. Spector, *Memorandum: Accommodating the UCCJEA and the 1996 Hague Convention*, 63 Okla. L. Rev. 615, 623 (2011); see also, *e.g.*, N.Y. Dom. Rel. Law, art. 5-A, §§ 75-D, 76; Council Regulation 2201/2003, art. 12, 2003 O.J. (L 338) 7 (EU).

3. In the event the Court declines to reverse and resolve this case now, it should provide clear guidance on the Convention's limits on appropriate and sufficient ameliorative measures where lower courts have made a grave-risk determination. Those limits include expeditious proceedings that ensure practically enforceable measures without wading into custody-related determinations. See Pet. Br. 35-42. Without such guidance, the lower courts will continue to be at sea as to what types of ameliorative measures are appropriate.

* * * * *

Both sides agree that this case has gone on far longer than the Convention contemplates and that the Court should bring it to a final resolution. The only way to do that, consistent with the Convention, is to reverse the court of appeals and allow B.A.S. to remain in the United States, where he has spent more than half of his life and is indisputably safe from the grave risk of exposure to harm.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 2022