No. 20-1034

IN THE

Supreme Court of the United States

NARKIS ALIZA GOLAN,

Petitioner,

v.

ISACCO JACKY SAADA,

Respondent.

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

AFFIRMATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a District Court, after a finding of grave risk, or as part of a grave risk analysis, is required to examine "the range of remedies" that, in its discretion, would permit the return of children to their habitual residence with sufficient "protection from harm" so that custody proceedings can commence in the country of habitual residence.

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STATEMENT OF THE CASE

The question presented by Petitioner does not warrant this Court's review and this case is not the appropriate vehicle for the point at issue. It is not the appropriate vehicle because the District Court already exercised its discretion in determining that, despite the grave risk finding, ameliorative protective measures would make possible the safe return of the child to his country of habitual residence, Italy. Therefore, this Court's resolution of the question presented will not affect the ultimate outcome of this case. Even if the District Court were not mandated to consider ameliorative protective measures, it is clear the District Court still has the discretion to order ameliorative protective measures in any event. In this present case, the District Court believed ameliorative protective measures to be appropriate or otherwise, it would not have taken the arduous steps to craft specific measures designed to protect the child upon his return to Italy. The District Court simply could have determined that ameliorative protective measures were insufficient to protect the Child and denied the petition for return.

The circuit split discussed by the Petitioner amounts to a distinction without a significant difference. A district court is never mandated to impose ameliorative measures regardless of any mandate within their circuit to consider such measures. While some circuits require district courts, after a finding of grave risk of harm, to consider ameliorative measures prior to denying a petition,

district courts still have discretion to order ameliorative measures before granting a return order. Similarly, courts also have discretion to reject ameliorative measures before denying a petition for return. The consideration of ameliorative measures is simply one tool in utilizing a court's discretion and any slight differences between the circuit approaches are not sufficiently important to warrant review by this Court. Petitioner's ultimate goal is to restrict courts from considering ameliorative measures which will only undermine the goals of the Hague Convention. The Petition for Writ of Certiorari should therefore be denied.

A. Overview of Hague Abduction Convention

The purpose of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, is "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." In the enabling statute for the Hague Convention—the International Child Abduction Remedies Act, Congress expressly declared in § 9001(a)(1) that "[t]he international abduction or wrongful retention of children is harmful to their well-being." *See* Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified at 22 U.S.C. §§ 9001-9011).

The Hague Convention states two primary objectives: "to secure the prompt return of children wrongfully removed to or retained in any Contract-

ing State," and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Convention, art. 1, *Abbott v. Abbott,* 560 U.S. 1, 7, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010). To those ends, the Convention's "central operating feature" is the return of the child. *Id.* at 9. This Court has affirmed that "the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence." *Id.* at 20. This Court recently stated in *Monasky v. Taglieri*, that "[t]he Convention's return requirement is a "provisional" remedy that fixes the forum for custody proceedings. Upon the child's return, the custody adjudication will proceed in that forum." *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020).

B. Factual Background

Mr. Saada, an Italian citizen, was born and currently resides in Milan, Italy. Ms. Golan, an American citizen, currently resides in New York. Mr. Saada and Ms. Golan have one child, B.A.S., who was born in Italy and has dual Italian and American citizenship. The parties met and began a relationship in 2014. On August 25, 2014, Ms. Golan moved to Milan, Italy to live with Mr. Saada. App. at 43a-44a. They were engaged on February 18, 2015 and were married in Tel Aviv, Israel on August 18, 2015. The Child was born in June 2016 while the parties lived in Milan, Italy. *Id.* at 44a-45a.

The parties fought frequently during their relationship, and both engaged in incidents of domestic violence. *Id*. at 43a. In the summer of 2018, Ms. Golan and the Child left Italy to attend her brother's wedding in New York. *Id* at 47a. When she failed to return to Italy with the Child as scheduled, Mr. Saada initiated this proceeding on September 19, 2018. *Id*. at 48a. In Italy, the parties are engaged in an ongoing custody dispute. *Id*. at 17a.

C. Proceedings Below

1. March 22, 2019 District Court Decision

The District Court granted the petition subject to certain ameliorative measures. It found that the grave risk of harm to B.A.S. was caused by "exposure to violence between [Mr. Saada] and [Ms. Golan]." App. at 15a. The Court made a distinct point of stating that B.A.S was never a target of violence. *Id*.

The District Court ordered the return of B.A.S. to Italy subject to ameliorative measures to protect the Child. The Court sought ensure the Child's safety by creating separation between Mr. Saada and Ms. Golan, as their interaction in front of the Child had the potential to cause future harm. *Id*. at 81a-84a. The District Court ordered the return of the Child to Italy subject to the following undertakings/ameliorative measures:

(1) Mr. Saada to give Ms. Golan $30,000 before B.A.S. is returned to Italy for housing accommoda-

tions without restriction on location in Italy, financial support, and legal fees;

(2) Mr. Saada to stay away from Ms. Golan until the Italian courts address this issue;

(3) Mr. Saada to pursue dismissal of criminal charges against Ms. Golan relating to her abduction of B.A.S.;

(4) Mr. Saada to begin cognitive behavioral therapy in Italy;

(5) Mr. Saada to waive any and all rights to legal fees or expenses under the Hague Convention and ICARA for the prosecution of this action;

(6) Mr. Saada to provide the full record of these proceedings, including trial transcripts, court filings, exhibits, undertakings, expert reports, and decisions of this Court to the Italian court presiding over the custody proceeding;

(7) Mr. Saada to provide a sworn statement with the measures he will take to assist Ms. Golan in obtaining legal status and working papers in Italy;

(8) Mr. Saada to drop any current civil actions against Ms. Golan in Italy based on the abduction of B.A.S. and must not pursue any future criminal or civil actions against her in Italy based on the abduction.

Id.

The District Court found that, since the grave risk of harm posed to the Child was based on exposure to possible future domestic violence between

the parties, that its order would "sufficiently ameliorate the risk of harm to B.A.S. upon repatriation" by separating the parties and "eliminating the element of proximity" which will "reduce the occasions for violence." *Id*. at 82a.

2. July 19, 2019 Second Circuit Decision

Ms. Golan appealed the District Court's March 22, 2019 order. The Second Circuit issued a decision on July 19, 2019 (App. at 26a), finding that it would be appropriate to return the Child subject to ameliorative measures so long as they were enforceable or had sufficient guarantees of performance. The case was remanded back to the District Court for that purpose. *Id*. at 36a. The Second Circuit directed the District Court to:

> . . . determine whether there exist alternative ameliorative measures that are either enforceable by the District Court or, if not directly enforceable, are supported by other sufficient guarantees of performance.
>
> In doing so, the District Court may consider, among other things, whether Italian courts will enforce key conditions such as Mr. Saada's promises to stay away from Ms. Golan and to visit B.A.S. only with Ms. Golan's consent.

Id.

3. May 5, 2020 District Court Decision After Remand

On remand, the District Court examined enforceable measures available in in Italy. Over four months, from August to November 2019, the District Court corresponded with an Italian Network Judge (via the International Network of Hague Judges) regarding the case. An Italian judge advised that the Italian court was able to issue an order of protection for Ms. Golan before she or the Child return to Italy, that an order of protection issued by the Italian court would be immediately enforceable in Italy, and that the Italian court was able to order various other relief taking into account the District Court's directives.

On November 15, 2019, the District Court issued another order regarding ameliorative measures. It directed that the parties to obtain an order of protection in Italy, for Mr. Saada to request court-monitored therapy, to update the District Court on the status of the pending Italian criminal charges, for Ms. Golan to take steps to obtain legal status in Italy, and for the parties to confer regarding financial support for Ms. Golan and the Child upon their return to Italy.

On December 17, 2019, an order was issued by the Court of Milan. ECF No. 96-1. The Italian order provides for the following:

(1) An order of protection directing Mr. Saada to stay away from Ms. Golan and the Child's place of residence, her place of work, the Child's school, and

"other places habitually frequented by them," effective immediately upon the return of Ms. Golan and B.A.S. to Italy. Its initial duration is one year and can be extended.

(2) Mr. Saada to submit to cognitive behavioral therapy, parenting classes, and psychoeducational therapy to be overseen by Italian Social Services, with updates on his progress to be periodically provided to the Court. The Court further stated that if Mr. Saada does not comply with the court's or Social Services' directives, such action could be held against him in the custody proceedings.

(3) Supervised parenting time for Mr. Saada.

(4) Financial support for Ms. Golan and the Child of an unspecified amount, to be determined when she and the Child return to Italy.

On May 5, 2020, the District Court issued its second Memorandum Decision and Order granting the Petition and directing the return of B.A.S. to Italy. App. at 11a. The District Court began its analysis by finding that the "Italian courts are willing and able to enforce the conditions necessary to protect B.A.S." *Id.* at 17a. It also recognized that both parties have "obtained legal counsel and are active litigants in an ongoing custody dispute in Italy." *Id.* Regarding the Italian order, the District Court stated that the order of protection put in place by the Italian court was found to be "sufficient to ameliorate the grave risk of harm resulting from [B.A.S.'s] parents' violent relationship." *Id.* at 20a. The District Court succinctly stated that ". . . the

Italian justice system is actively involved with the parties and their disputes, including most significantly, B.A.S.'s welfare." *Id*. at 17a. The District Court was confident to return B.A.S. because "[t]he Italian court has issued a comprehensive order that demonstrates an understanding and respect for this Court's findings, and has imposed measures consistent with B.A.S.'s safe return." *Id*.

The District Court also ordered Mr. Saada to give Ms. Golan $150,000 before her return to cover her and the Child's expenses to "ensure [Ms. Golan's] interim stability pending the Italian custody proceeding." *Id*. at 23a. The District Court found that the ameliorative measures, all of which are now enforceable, are sufficient to mitigate the grave risk of harm to B.A.S. upon his repatriation.

4. October 28, 2020 Second Circuit Decision

Ms. Golan appealed the May 5, 2020 return order premised on an argument that Mr. Saada is so unreliable that he would not obey the Italian court orders, and it was clear error for the District Court to find that the Italian court's oversight is a sufficient guarantee of performance. Her argument was previously considered and rejected by the District Court as unsupported by the record. App. at 21a. The District Court noted that Mr. Saada cooperated with the 2017 Italian Social Services investigation that was prompted by one of the Ms. Golan's calls to the Italian police. *Id*. There was also no evidence

that he obstructed or refused to participate with Italian Social Services. *Id*.

The thrust of Ms. Golan's argument was a character attack against Mr. Saada. However, the District Court found that Ms. Golan "exaggerated at points in her testimony" (*Id.* at 43a), that she was "evasive," and "feigned confusion or failure of memory when confronted with evidence that she perceived to be unhelpful to her position." *Id*. Despite her allegations of spousal abuse, the District Court believed it was "[s]ignificant that Ms. Golan did not see Mr. Saada as a threat to B.A.S." *Id.* at 80a, n.37. Her position that Mr. Saada is an uncontrollable abuser is completely undermined by the fact that she was not concerned at all that Mr. Saada was a danger to the Child.

On October 28, 2020, the Second Circuit, by Summary Order, affirmed the District Court's judgment and found that the measures imposed by the District Court on remand were "either enforceable by the District Court or . . . supported by other sufficient guarantees of performance." App. at 2a. The Second Circuit found that the District Court correctly concluded that there existed sufficiently guaranteed ameliorative measures that would remedy the grave risk of harm to B.A.S. upon his return to Italy. *Id.* at 9a.

5. January 14, 2021 Second Circuit Order

Ms. Golan filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc,* which

was denied by the Second Circuit on January 14, 2021. App. at 86a.

REASONS FOR DENYING THE PETITION

I. Any Circuit Split Does Not Ultimately Impact a District Court's Discretion to Issue Ameliorative Measures

The Eighth Circuit, which does not mandate consideration of ameliorative measures, declared that "[o]nce a district court concludes that returning a child to his or her country of habitual residence would expose the child to a grave risk of harm, it has the discretion to refuse to do so." *Acosta v. Acosta*, 725 F.3d 868, 877 (8th Cir. 2013). The implication of this statement is of course that a district court also has the discretion to order the return of a child despite a finding of grave risk of harm. *See* Convention, art. 18.

Article 13(b), commonly referred to as the "grave risk of harm" exception, states in relevant part, "the judicial or administrative authority of the requested 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 . . ." Convention, art. 13(b) (emphasis added). Pursuant to Article 12, when a child has been wrongfully removed or retained and a period of less than one year has elapsed from the date of wrongful removal or retention, "the [judicial or administrative] authority ***shall*** order the return of the child forthwith." Convention, art. 12 (empha-

sis added). Once a *prima facie* case has been established, courts must return children in the absence of one of the limited exceptions but are not necessarily bound to do so.

However, even when one of the narrow exceptions can be established, courts still retain the discretion to direct the return of children. The U.S. State Department has stated: "Importantly, a finding that one or more of the exceptions provided by Articles 13 and 20 are applicable does not make refusal of a return order mandatory. The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies." U.S. State Department Text & Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986); *see also Friedrich v. Friedrich (Friedrich II)*, 78 F.3d 1060, 1067 (6th Cir. 1996).

In a concurring opinion to this Court's determination in *Lozana v. Montoya Alvarez,* a district court's discretionary authority to order the return of a child despite a finding of grave risk of harm was highlighted to illustrate the Convention's principle "that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence." *Lozano v. Montoya Alvarez*, 572 U.S. 1, 21, 134 S. Ct. 1224, 1238, 188 L. Ed. 2d 200 (2014) (*citing Abbott v. Abbott,* 560 U.S. 1, 20, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010).

This discretion to order the return of a child was properly exercised by the District Court in this case

when it considered the efficacy of very specific ameliorative measures tailored to the facts of the case. This discretion also highlights the fundamental flaw in Petitioner's argument and is the reason why this Court should not grant a writ of certiorari.

The question presented at the beginning of Petitioner's Petition for a Writ of Certiorari asks "Whether . . . a district court is required to consider ameliorative measures that would facilitate the return of the child" in light of a grave risk finding. Petitioner's Petition for Writ of Certiorari at I. However, by the end of the Petition, the question presented seems to shift to "whether courts can require ameliorative measures." *Id*. at 25. The distinction between these two questions demonstrates the lack of consideration Petitioner gives to the broad discretion afforded to district courts to consider and either adopt or reject ameliorative measures regardless of any mandate.

To be clear, none of the Circuits have established a blanket rule that it is inappropriate to consider ameliorative measures within the context of an Article 13(b) grave risk analysis. Absent a mandate to consider ameliorative measures, district courts are still free in their discretion to issue such measures as they deem appropriate. Petitioner has not argued otherwise.

The ultimate issue is one of discretion. District courts in every Circuit, and in every scenario illustrated by Petitioner, still retain discretion to con-

sider ameliorative measures. In the Circuits where the consideration of ameliorative measures is mandated, district courts are also free to reject implementation of such measures. Moreover, they have the discretion, even in the absence of ameliorative measures, to return children to their habitual residence even when a grave risk exception has been found pursuant to Article 18 of the Convention as discussed above.

The same holds true in the Circuits where consideration of ameliorative measures is not mandated. The district courts there may or may not consider ameliorative measures based upon the circumstances of their case. District courts have discretion to determine that ameliorative measures would be appropriate in the context of a return order. Similarly, within these Circuits, district courts may ultimately refuse to impose ameliorative measures and deny the return of children.

Given that underpinning, this Court's determination of the question presented would have no impact on this case and may not significantly affect the outcomes of Hague cases in the various Circuits. Regardless of the outcome, district courts would still be empowered to consider and issue ameliorative measures as appropriate in each case. In situations where ameliorative measures would further the goals of the Convention and offer real protection to children upon repatriation, then district courts can issue such measures in any of the Circuits. In situations where ameliorative measures would not provide sufficient protection to chil-

dren upon repatriation then District Courts can deny the petitions and refuse the return in any of the Circuits.

This Court's determination that such a mandate should or should not exist would not substantially alter the application of the Convention and therefore there is no reason for this Court to grant a writ of certiorari. Even if a different outcome could be demonstrated because of the conflicting standards, Petitioner has not shown that these cases arise with sufficient frequency to warrant this Court's attention.

Petitioner ultimately seeks to eliminate the use of ameliorative measures in the context of grave risk cases. This is contrary to the plain reading of the text of the Convention as well as its the goals and purposes. A district court's discretion to consider and then either apply or reject ameliorative measures is an important tool in balancing the dual interests of securing the prompt return of children while also protecting them from harm.

II. Ameliorative Measures Are A Crucial Component to a Grave Risk Analysis

As the Seventh Circuit has stated, undertakings may "accommodate [both] the interest in the child's welfare [and] the interests of the country of the child's habitual residence." *Van De Sande v. Van De Sande*, 431 F.3d 567, 571-72 (7th Cir. 2005). In *Blondin II*, the Second Circuit remanded the case to the District Court with instructions to "take into

account any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child's repatriation." *Blondin v. Dubois,* 189 F.3d 240, 248 (2d Cir. 1999). The Second Circuit further stated that "[i]n the exercise of comity that is at the heart of the Convention (an international agreement, we recall, that is an integral part of the 'supreme Law of the Land,' U.S. Const., art. VI), we are required to place our trust in the court of the home country to issue whatever orders may be necessary to safeguard children who come before it" and "[t]he Court must examine "the range of remedies that might allow both the return of the child[ ] to [his] home country and [his] protection from harm, pending a custody award in due course by a [court in the country of the child's habitual residence] with proper jurisdiction.*"* *Id.* at 248-49 (internal citation omitted).

Thus, "[i]n cases of serious abuse, before a court may deny repatriation on the ground that a grave risk of harm exists under Article 13(b), it must examine the ***full range of options*** that might make possible the safe return of a child to the home country." *Blondin v. Dubois (Blondin IV)*, 238 F.3d 153, 163 (2d. Cir. 2001) (emphasis added). On remand, the Second Circuit directed the District Court "to exercise its broad equitable discretion to develop a thorough record" and "should feel free to make any appropriate or necessary inquiries of the government of France—especially regarding the

availability of ameliorative placement options in France—and to do so, *inter alia,* by requesting the aid of the United States Department of State, which can communicate directly with that foreign government." *Blondin,* 189 F.3d at 249.

The "full range of options" includes undertakings, "mirror image" orders, "safe harbor" orders, and any other ameliorative measures in general that a district court might consider in determining whether to return a child despite a grave risk finding. Notably, all grave risk cases do not involve domestic violence, so these options are broad in nature and can be molded to the specifications of each case. Undertakings (promises made by one party) may be sufficient in some contexts but not in others if there is a concern of enforcement. However, alternatives such as "mirror image: or "safe harbor" orders do not carry the same concerns as undertakings but may present other concerns such as unnecessary delays in effectuating a prompt return.

Petitioner incorrectly claims that the Second Circuit's approach mandating consideration of ameliorative measures "is inconsistent with guidance issued by the U.S. State Department." Petition for Writ of Certiorari at 18. Regarding undertakings, the State Department "supports their limited use" to facilitate prompt return orders so long as they are limited in scope. Kathleen Ruckman, U.S. Department of State, Undertakings as Convention Practice: The U.S. Perspective (2005) (citing Letter to Mr. Michael Nicholls from Catherine W. Brown,

Assistant Legal Adviser for Consular Affairs, U.S. Department of State, August 10, 1995). Specifically, "[a]greements to assist in the return process or to arrange temporary protective measures appropriately facilitate prompt return and are thus seen as reasonable under the Convention." *Id*. The State Department has provided examples of undertakings that are appropriate, such as "an agreement that the abducting parents return to the country of habitual residence with the child; assignment of costs for the return flight; and interim custody until a court in the country of habitual residence can arrive at a decision." *Danaipour v. McLarey*, 286 F.3d 1, 22 (1st Cir. 2002) (citing Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Dep't of State, to Michael Nicholls, Lord Chancellor's Dep't, Child Abduction Unit, United Kingdom (Aug. 10, 1995).

Mr. Nicholls, formerly of the Central Authority for England and Wales suggested that a better alternative to undertakings could be "safe harbor" orders in the country of habitual residence. *See* Report On Hague Convention Operations by the Lord Chancellor's Child Abduction Unit, Central Authority for England & Wales, November 1995 (note 4). The State Department has also suggested, "[a]s an alternative to undertakings, . . . 'safe harbor' orders, entered by a court in the country of habitual residence at the behest of the left-behind parent, *prior* to the entry of the return order." *Danaipour v. McLarey*, 286 F.3d 1, 22 (1st Cir. 2002) (citing Letter from Catherine W. Brown,

Assistant Legal Adviser for Consular Affairs, United States Dep't of State, to Michael Nicholls, Lord Chancellor's Dep't, Child Abduction Unit, United Kingdom (Aug. 10, 1995).

"Safe harbor" orders are "orders secured from the courts of the habitual residence that set forth the safeguards necessary to allow the U.S. court to make an order of return" which "[t]ypically . . . are consented to by both parties, and counsel for one or both of the parties arrange to issue the order in the foreign jurisdiction." Federal Judicial Center, J. Garbolino, The Use of Undertakings in Cases Arising Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (2016), p. 10. "When that order is in place, the U.S. court may order the child's return based on establishment of a 'safe harbor' for the child and perhaps for one parent as well." *Id.*

This mechanism for obtaining a "safe harbor" order is precisely what was accomplished in this instant case where the parties jointly requested and received various orders from the Italian court designed to protect not only the child, but the abducting parent upon her return to Italy. This mechanism, which is advocated for by the State Department is also considered a vitally important piece of any grave risk analysis by the Hague Conference on Private International Law and foreign courts alike.

The use and efficacy of ameliorative measures was a subject of discussion in the recently pub-

lished 1980 Child Abduction Convention Guide to Good Practice Part VI, Article 13(1)(b) issued by the Hague Conference on Private International Law in 2020 ("Guide to Good Practice"), which is intended "to provide guidance to judges, Central Authorities, attorneys and other practitioners working in the field of international family law and who are faced with the application of Article 13(1)(b) of the 1980 Hague Abduction Convention." *See* Foreword of "Guide to Good Practice" (available to download at https://www.hcch.net/en/publications-and-studies/details4/?pid=6740).

The Hague Conference advised that "[e]ven where the facts asserted are of such a nature that they could constitute a grave risk the ***court must still determine whether protective measures could address the risk*** and, if so, the court would then be bound to order the return of the child." *Id*. at ¶61 (emphasis added). Regarding the process of evaluating ameliorative measures, the Hague Conference mentioned that "Courts commonly assess the availability and efficacy of protective measures at the same time as they examine the assertions of grave risk; alternatively, they do so only after the existence of a grave risk and an understanding of its nature has been established by the party objecting to return." *Id*. at ¶45.

Petitioner's argument here, that courts should not be mandated to consider ameliorative measures at all goes against the recent suggestions of the Hague Conference and the stated goals of securing a prompt return of children to their country of

habitual residence. The Hague Conference suggests that protective or ameliorative measures should be considered as early as possible within the proceedings:

> Ideally, given that any delays could frustrate the objectives of the Convention, ***potential protective measures should be raised early in proceedings*** so that each party has an adequate opportunity to adduce relevant evidence in a timely manner in relation to the need for, and enforceability of, such measures. In some jurisdictions, in the interests of expedition, where the court is satisfied in a particular case that adequate and effective measures of protection are available or in place in the State of habitual residence of the child to address the asserted grave risk, the court may order the return of the child without having to enter into a more substantive evaluation of the facts alleged.

Id. (emphasis added).

Rather than taking the position that undertakings or ameliorative measures should not be considered in a grave risk context, the Hague Conference takes the position that they should be considered as early as possible in the process, possibly avoiding a lengthy trial on grave risk of harm. The Hague Conference Guide to Good Practice highlights the differences between the various ameliorative measures further demonstrating that

it is vital to consider the "full range of options" as part of any grave risk of harm analysis:

> Whether in the form of a court order or voluntary undertakings, the efficacy of the measures of protection will depend on whether and under what conditions they may be rendered enforceable in the State of habitual residence of the child, which will depend on the domestic law of this State. One option may be to give legal effect to the protective measure by a mirror order in the State of habitual residence—if possible and available. But the court in the requested State cannot make orders that would exceed its jurisdiction or that are not required to mitigate an established grave risk. It should be noted that voluntary undertakings are not easily enforceable, and therefore may not be effective in many cases. Hence, unless voluntary undertakings can be made enforceable in the State of habitual residence of the child, they should be used with caution, especially in cases where the grave risk involves domestic violence.

Id. at ¶47.

If the exercise of comity is at the heart of the treaty, then requiring courts to examine ameliorative measures in domestic violence cases is imperative to achieving the basic purpose of the Convention—to return children to their country of habitual residence for custody proceedings. Ms.

Golan's position, that consideration of ameliorative measures should not be mandated, would hollow out the treaty.

The District Court in this case was an exemplar of using the tools at hand to correctly apply the law and further the goals of the Hague Convention. The District Court took approximately nine months to determine with great detail what was available and enforceable in Italy to protect B.A.S. and then issued orders in line with its findings.

In the primary source of interpretation for the Convention, the Explanatory Report, Professor E. Perez-Vera noted that "[t]he practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them—those of the child's habitual residence are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration." Elisa Perez-Vera, Explanatory Report: Hague Conference on Private International Law in 3 Acts and Documents of the Fourteenth Session ("Explanatory Report"), 34 at 22-23.

The Second Circuit, in *Blondin II*, 189 F.3d at 242, stated that the "careful and thorough fulfillment of our treaty obligations" not only protects children abducted to the U.S. but also serves "to protect American children abducted to other nations whose courts, under the legal regime created by this treaty, are expected to offer reciprocal protection." Therefore, it is critical to provide district courts a robust set of tools to further the goals of the Convention and effectuate safe returns if possible.

III. Sister Signatories Mandate Consideration of Ameliorative Measures

This Court has stated that "ICARA expressly recognizes 'the need for uniform international interpretation of the Convention' (internal citations omitted)" and that "[t]he understanding that the opinions of our sister signatories to a treaty are due 'considerable weight,' this Court has said, has 'special force' in Hague Convention cases." *Monasky v. Taglieri*, 140 S. Ct. 719, 727-28 (2020) (citations omitted). In *Lozano,* this Court stated that "[i]t is our 'responsibility to read the treaty in a manner 'consistent with the shared expectations of the contracting parties.'" *Lozano v. Montoya Alvarez*, 572 U.S. 1, 12, 134 S. Ct. 1224, 1233, 188 L. Ed. 2d 200 (2014) (citations omitted).

Several sister signatory countries also mandate consideration of ameliorative measures as part of an Article 13(b) grave risk of harm analysis. In *Re E. (Children) (Abduction: Custody Appeal)* [2011]

UKSC 27, the United Kingdom Supreme Court detailed the process by which Article 13(b) grave risk of harm cases should be analyzed and ultimately mandated consideration of protective measures before denying return petitions for return. The UK Supreme Court considered the full range of options that would be available for consideration and suggested a flexible approach.

Regarding protective measures, specifically undertakings, the UK Supreme Court remarked that "the courts in common law countries are too ready to accept undertakings given to them by the left-behind parent; yet these undertakings are not enforceable in the courts of the requesting country. . . ." *Id.* at ¶ 7. The Court went on to state:

> Yet the parties also understand that there is no easy solution to such problems. The first object of the Convention is to deter either parent (or indeed anyone else) from taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any dispute can be determined there. The left-behind parent should not be put to the trouble and expense of coming to the requested state in order for factual disputes to be resolved there. The abducting parent should not gain an unfair advantage by having that dispute determined in the

> place to which she has come. And there almost always is a factual dispute, if not about the primary care of the children, then certainly about where they should live, and in cases where domestic abuse is alleged, about whether those allegations are well-founded. Factual disputes of this nature are likely to be better able to be resolved in the country where the family had its home.

Id. at ¶8.

Considering the goals of the Hague Convention in the context of a grave risk of harm analysis, the UK Supreme Court went on to state that "the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home." *Id*. at ¶35. They continued by saying:

> Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, ***the court must then ask how the child can be protected against the risk***. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation

> between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues.

Id. at ¶36 (emphasis added).

This mandate to consider protective or ameliorative measures is also followed in most of the European Union. The Brussels IIa Regulation, which is in force in the vast majority of European countries, reinforces the principle that children "shall always be returned if she/he can be protected in the Member State of origin." European Commission, "Practice Guide for the Application of the Brussels IIa Regulation", at 54 ("EC Practice Guide"), available at https://op.europa.eu/en/publication-detail/-/publication/f7d39509-3f10-4ae2-b993-53ac6b9f93ed. The Brussels IIa Regulation obligates a court to order the return of a child even in cases of grave risk of harm if "it is nevertheless established that adequate arrangements have been made to secure the protection of the child after the return." *Id.* at 55.

The UK and EU approaches mirror that of the Second Circuit in *Blondin* which was applied in this case. These approaches balance the Convention's goal to secure the prompt return of children to their country of habitual residence with a concern for the wellbeing of a child in grave risk of harm cases as well. Mandating consideration of ameliorative measures, especially early on in the proceedings, provides a valuable tool to district

courts to use in a broader Article 13(b) grave risk of harm analysis as part of its equitable discretionary authority.

CONCLUSION

Answering the question set forth in the petition will not resolve any significant issue regarding the Hague Convention. Whether or not district courts are mandated to consider the full range of remedies available to facilitate a safe return in grave risk cases, they nevertheless may do so in an exercise of their discretionary powers.

District courts should be mandated to consider all available remedies available to return children safely, if possible. Such a mandate does not disturb a district court's discretion in finding that there are no available remedies that would sufficiently protect a child upon his or her return. If, however, the goal of the Hague Abduction Convention is to secure the prompt return of children to their country of habitual residence then mechanisms should be put in place to allow district courts to exhaust all possibilities of return before denying petitions and permitting parents to abduct children unilaterally.

For the foregoing reasons, this Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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