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

BRIEF OF *AMICUS CURIAE* FREDERICK K. COX INTERNATIONAL LAW CENTER IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Frederick K. Cox International Law Center at Case Western Reserve University School of Law is one of the world's premier institutions dedicated to scholarly publications and projects that foster the rule of international law. There are thirty-four full time and adjunct faculty experts in international law associated with the Cox Center. They hold leadership positions in prestigious international law-related professional organizations, including the Council on Foreign Relations, the Public International Law and Policy Group, the Canada-U.S. Law Institute, the International Law Association, and the American Society of International Law. They have testified before the Senate Foreign Relations Committee and been cited in the opinions of this Court, the International Court of Justice and International Criminal Tribunals. They have won three national book-of-the-year awards. And the Chief Prosecutor of the United Nations Special Court for Sierra Leone nominated the work of the Cox Center for the Nobel Peace Prize in 2008 for the invaluable assistance the Center provided to the Office of the Chief Prosecutor.

The Cox Center's overarching mission is the advancement of international law. This amicus brief is submitted in furtherance of that mission.

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[1] Pursuant to Rule 37.2(a), counsel for all parties received timely notice of the Cox Center's intent to file this brief and consented in writing. No counsel for any party authored this brief in whole or in part, and no person or entity other than the Cox Center and its counsel made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

The child B.A.S. was two years old when this case began. He is now almost five and in danger of being returned to a country that is foreign to him. In the proceedings below, B.A.S.'s mother showed by clear and convincing evidence that returning B.A.S. to Italy would subject the child to a grave risk of harm, because of the extensive ways in which B.A.S.'s father "physically, psychologically, emotionally and verbally abused" B.A.S.'s mom. (Pet. App. 48a, 80a.)

Under the text of the Hague Child Abduction Convention, and under the text of the Convention's implementing legislation in the United States, this showing should have ended the matter. *See* Conv. Art. 13(b); 22 U.S.C. § 9003(e)(2)(A).

In the Second Circuit, however, it did not. Instead, the case ping-ponged between the district court and the appellate court for nearly two years, as the lower courts analyzed certain "protective undertakings" that B.A.S.'s father might or might not take, that might or might not ameliorate the already-proven grave risk of physical and psychological harm to B.A.S., and that the Italian legal system might or might not enforce. This analysis of protective undertakings is required by Second Circuit precedent (Pet. 8-9), in direct conflict with the precedent of other United States Courts of Appeals (*id.* at 10-18).

This Court has been a global leader in hearing and deciding Child Abduction Convention cases over the course of the past decade. *See Monasky v. Taglieri*, 140 S. Ct. 719, 725 (2020) (granting certiorari to "clarify the standard for habitual residence, an important question of federal and international law,

in view of differences in emphasis among the Courts of Appeals"); *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014) (granting certiorari to resolve circuit split over whether Hague Convention Article 12 is subject to equitable tolling); *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (granting certiorari to analyze mootness questions for Hague Convention appeals); *Abbott v. Abbott*, 560 U.S. 1, 7 (2010) (granting certiorari to resolve circuit split over whether *ne exeat* parental rights constituted a "right of custody" under Hague Convention Article 3(b)).

The Court should take the same step here, to answer this important and unsettled question of international law: to what extent should protective measures be allowed to negate the Article 13(b) grave risk defense?

This is an issue that has divided central authorities from the inception of the Convention. *See* Report on Hague Convention Programs by the Child Abduction Unit, The Lord Chancellor's Child Abduction Unit Central Authority for England & Wales (Nov. 1995) (correspondence between Central Authority for England and Wales and the United States Department of State debating the use of undertakings in Hague Convention cases). The practice is further questioned by leading Child Abduction Convention authorities. *See* Paul R. Beaumont & Peter E. McEleavy, The Hague Convention on International Child Abduction (Oxford Univ. Press 1999), at pg. 165 (questioning extensive use of protective undertakings because "the safety of the child" must always prevail; thus also, "the court should not exercise its discretion to return the child unless enforcement of the undertakings can be guaranteed").

Child Abduction Convention cases place federal courts in a unique position: they are charged with determining the fate of a child in accordance with the provisions of one of the most important and successful international private law treaties of all time. *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, ¶ 85 (Sup. Ct. Can. 2018) (granting review in Convention case; noting that, "[w]hen international agreements come before the courts, performance of Canada's obligation to apply and interpret them according to the rules of treaty interpretation falls to Canada's judges"). And there is no country in the world whose judicial system is confronted with Hague Convention cases more often than the United States. Noah L. Browne, *Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers under the Hague Convention on International Child Abduction*, 60 Duke L.J. 1193, 1194 (Feb. 2011) (noting that "[m]ore children are abducted into or out of the United States than any other party to the Hague Convention on the Civil Aspects of International Child Abduction, the international treaty that governs child abductions between contracting states").

In this case, this individual importance is nestled into the arms of a broader claim: the Second Circuit's protective undertakings rule impedes the effective operation of the Convention in the United States, in more ways than basic division alone. (*See* Pet. 10-18 (analyzing circuit split on this question).)

As we explain in this brief, the specific exceptions to the Convention's general return requirement are as an important part of the Convention as the return requirement itself. Judicial fiat should not limit or

modify them; as this case shows, those judicial modifications delay Convention petition proceedings and embroil district courts in child custody disputes, both of which contravene elemental Convention goals. More importantly, the Second Circuit's rule places the safety of children subject to Convention petitions in the United States at risk. As we have seen in other contexts, inherent institutional pressures lead federal courts to defer too readily to the willingness of foreign domestic courts to order undertakings that an abusive parent—already shown to pose a grave risk of harm to the child—may or may not honor. Rather than ensuring the protection of children who come before our courts, the rule casts their safety into tenuous waters upon which federal judges cannot also tread.

The Court should thus grant the petition, and in doing so analyze whether the Court really wants United States courts in the undertakings business.

ARGUMENT

1. The Hague Convention on the Civil Aspects of International Child Abduction Convention proceeds from the general premise that a State contracting party should promptly return an abducted child to the child's country of habitual residence. *See* Conv. Art. 12; 22 U.S.C. § 9003(d); *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020).

But return is not always appropriate. Articles 12, 13 and 20 of the Convention provide exceptions to this general return requirement. Conv. Art. 12 (petition filed more than one year after abduction and child now settled in new environment); Art. 13(a) (left-behind parent was not actually exercising custody

rights at time of abduction); Art. 13(b) ("there is a grave risk that his or return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation"); Art. 13 (child objects to the return and "has attained an age and degree of maturity at which it is appropriate to take account of its views"); Art. 20 (return is not permitted "by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms").

These specific exceptions to the general return requirement further the fundamental purpose of the treaty: to protect the physical and emotional well-being of children. *See, e.g.,* Perez-Vega "Explanatory Report," in Permanent Bureau of the Hague Conference on Private International Law (ed), *Actes et documents de la Quatorzieme session 6 au 25 octobre 1980* (1982), vol 3, 426, at pg. 432, ¶ 24 (noting that Convention cases "must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests"); *see also* Dep't of State, Hague International Child Abduction Convention, Text and Legal Analysis, 51 Fed. Reg. 10494, 10510 (Mar. 26, 1986) (noting that in cases "in which a custodial parent sexually abuses the child," and the "other parent removes or retains the child to safeguard it against further victimization," "the court may deny the petition").

2. In this case, the district court expressly found that the petitioner had shown the Convention's grave risk exception was met. (Pet. App. 80a ("Accordingly, Ms. Golan established by clear and convincing evidence that returning the child to Italy would subject the child to a grave risk of harm.").)

Notwithstanding this fact, the district court nonetheless ruled that the child B.A.S. should be returned to Italy, twice, based on an atextual analysis of protective undertakings required by Second Circuit caselaw. (*Id.* at 12a-13a, 81a-84a.)

As shown by the petitioner, the Second Circuit's rule requiring the analysis of protective undertakings in Article 13(b) cases is in direct conflict with other Courts of Appeals. (Pet. 10-16.) The Court should review the petition not only for this reason, but also because the Second Circuit's rule impedes the effective operation of the Child Abduction Convention in the United States.

a. To begin, the rule is founded on an inappropriate interpretation of the Child Abduction Convention. According to the Second Circuit, the requirement to consider protective undertakings is necessary to further the general "'important treaty commitment' articulated in the Hague Convention to allow custodial determinations to be made—if at all possible—by the court of the child's home country." (Pet. App. 14a (quoting *Blondin v. Dubois*, 189 F.3d 240, 248 (2d Cir. 1999)); *see also Blondin v. Dubois*, 238 F.3d 153, 156 (2d Cir. 2001) ("because the aim of the Convention is to ensure the 'prompt return' of abducted children, *see* Hague Convention preamble, we held that further proceedings were required in order to determine whether any arrangements might be made that would mitigate the risk of harm to the children, thereby enabling their return to France").)

This mode of treaty interpretation—to look at the overall purpose of the treaty first and work backward from there—confuses a court's role. As this Court has held: "A treaty is in the nature of a contract between

nations." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984); *see also, e.g., Air France v. Saks*, 470 U.S. 392, 399 (1985) (noting "our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties"). Norms of contract interpretation provide that "specific terms and exact terms are given greater weight than general language," and that "separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated." Restatement (Second) of Contracts § 203(c), (d) (1981) (Standards of Preference in Interpretation).

Applying these basic principles, it is therefore "a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists." *Jogi v. Vorges*, 480 F.3d 822, 834 (7th Cir. 2007); *Faber v. United States*, 157 F. 140, 142 (S.D.N.Y. 1907) (Hay, Gen. Appr.) ("It is a principle of the law of contracts, equally applicable, we think, to a treaty, that, where two stipulations of a contract or agreement in writing shall conflict, the one which is the more specific shall control.").

The Child Abduction Convention contains specific exceptions to the return requirement that are plain on their face. Conv. Arts. 12, 13, 20. These exceptions are "as much a part of the philosophy of the Convention as prompt return and respect for rights of custody and access between Contracting States." Rhona Schuz, *The Doctrine of Comity in the Age of Globalization: Between International Child Abduction and Cross-Border Insolvency*, 40 Brook. J. Int'l Law 33, 68 (2014). So "refusal to return, in cases where one of the exceptions is established, is actually

compliance with the Convention—not departure therefrom." *Id.*; *see also* Perez-Vera Explanatory Report at pg. 432, ¶ 25 (noting that "it has to be admitted that the removal of the child can sometimes be justified by objective reasons," and thus also "the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained").

b. Application of these interpretative principles is particularly appropriate here. In its implementing legislation, Congress demanded a higher burden of proof of parties invoking the grave-risk exception than our treaty partners demand in their courts: the party invoking the exception must prove the existence of a grave risk "by clear and convincing evidence." 22 U.S.C. § 9003(e)(2)(A); Rhona Schuz, The Hague Child Abduction Convention: A Critical Analysis, *Interpretation and Application of the Grave Risk Defence* (Hart Publ. 2013), at pg. 273 ("it should be noted that the US implementing legislation imposes a higher standard of proof for proving the Article 13(1)(b) and Article 20 defences. These defences have to be proven by clear and convincing evidence; instead of the usual preponderance of evidence."); Brenda Hale, Taking Flight-Domestic Violence and Child Abduction, *Current Legal Problems*, Vol. 70, No. 1 (2017) at 12 (noting that "[t]he USA also have stricter rules of evidence and a higher standard of proof than most other countries, requiring 'clear and convincing evidence' in Article 13(1)(b) cases.").

Courts in Canada and the United Kingdom have acknowledged this heightened evidentiary standard but have nonetheless continued to apply the lower

preponderance of the evidence standard. *Achakzad v. Zemaryalai*, 2010 Ont. Ct. of Just. 318 [Can. LII], ¶ 10 ("In Canada, the Supreme Court has made it clear that, in civil cases – regardless of the stakes – there is only one standard of proof applicable, proof on the balance of probabilities."); *E (Children) (FC)*, [2011] UKSC 27, ¶ 32 (Lady Hale and Lord Wilson, delivering judgment) (person opposing return order has the burden of proof, but "[t]here is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities"); *KG v. CB & others*, [2012] ZASCA 17, ¶ 38 (S. Afr.) (same).

The question then becomes this: Why, when the United States already has a higher standard of proof than other signatories for showing that a party has met the textual grave risk exception, should we judicially impose an additional hurdle for domestic-violence victims in opposing a return order, in the form of requiring an atextual analysis of protective undertakings?

The Second Circuit's opinions do not answer this question. This Court should, particularly in light of the established principle that "to alter, amend, *or add* to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part and usurpation of power, and not an exercise of judicial functions." *The Amiable Isabella*, 19 U.S. 1, 22 (1821) (Story, J.) (emphasis added); *see also Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134-35 (1989) (same; stating in the context of treaty interpretation, "where the text is clear, as it is here, we have no power to insert an amendment," because to do so "'would be to make, and not to construe a treaty'") (quoting *The Amiable Isabella*, 19 U.S. at 22).

c. The Second Circuit also mistakenly grounds its protective undertakings mandate in alleged comity interests. *See Blondin*, 189 F.3d at 248-49 ("In 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."); Pet. App. 8a (same)).

These comity interests cut both ways. *See, e.g., Danaipour v. McLarey*, 286 F.3d 1, 23 (1st Cir. 2002) (recognizing that the use of extensive undertakings "would smack of coercion of the foreign court"); *Diaz-Alarcon v. Flandez-Marcel*, 944 F.3d 303, 314 (1st Cir. 2019) (same); *Baran v. Beaty*, 526 F.3d 1340, 1350 (11th Cir. 2008) (recognizing the extensive use of undertakings as an "unenforceable imposition" on foreign domestic courts).

And it certainly does not further comity interests to have United States courts openly criticizing their foreign domestic peers. *E.g., Davies v. Davies*, 2017 WL 361556, at *21 (S.D.N.Y. Jan. 25, 2017), *aff'd* 717 F. App'x 43, 49 (2d Cir. 2017) ("the Court finds the legal system in St. Martin to be inadequate to protect Ms. Davies and K.D. from Mr. Davies's abuse").

In any event, even assuming their validity, these comity interests do not support the judicial imposition of the Second Circuit's protective-undertakings rule for Child Abduction Convention cases. In this context, "it is morally indefensible to sacrifice the interests of a particular child for the sake of diplomatic relationships or even in the hope that this will prevent other children from being abducted." Schuz,

The Doctrine of Comity in the Age of Globalization, 40 Brook. J. Int'l Law at 68; *see also Van De Sande v. Van De Sande*, 431 F.3d 567, 572 (7th Cir. 2005) ("Concern with comity among nations argues for a narrow interpretation of the 'grave risk of harm' defense; but the safety of children is paramount.").

These child-safety interests are implicated in three ways. *First*, "[i]nstitutional pressures will predictably cause judges to overestimate the safety that will exist upon return." Letter from Merle H. Weiner, Esq., Philip H. Knight Professor of Law, University of Oregon to Michael Coffee, U.S. Dep't of State (Sept. 2, 2017), at pg. 6. As Professor Weiner explains: "Not only do institutional dynamics give the entities in the child's habitual residence reason to minimize the uncertainties and problems with protective measures, but institutional dynamics also give judges adjudicating petitions reason to accept without question the information provided." (*Id.*)

We have frequently seen evidence of this over-deference phenomenon in the *forum non conveniens* context. Here, notwithstanding "general accusations of corruption, delay, or other problems with the alternative forum's judicial system," federal courts "appear reluctant to look closely at the quality of justice or competence of judicial personnel in the alternative forum." Arthur R. Miller, 14D Fed. Prac. & Proc. Juris. § 3828.3 (4th Ed., Oct. 2020 Update). And, "by categorically rejecting generalized accusations of corruption, delay, and other inadequacies in foreign judicial systems, or imposing too high a level of proof on these points, federal courts ignore the realities of the nature of the justice systems of many nations." *Id.*; *see also* Virginia A. Fitt, Note,

The Tragedy of Comity: Questioning the American Treatment of Inadequate Foreign Courts, 50 Va. J. Int'l L. 1021, 1044 (2010) (concluding that "[t]he reality of systemic corruption inherent in some foreign courts," "as well as challenges to the logic underpinning the current practice of American comity," "justifies adherence to a less dogmatic form of judicial deference").

This concern is particularly acute with respect to the Child Abduction Convention, where not only is the life of a child at stake, as opposed to the venue for a potential contractual dispute, but the actual evidence shows a demonstrated pattern of non-compliance among many of our treaty partners. *See* Report on Compliance, April 2020, United States Dep't of State, at pgs. 12-27 (detailing countries demonstrating a pattern of noncompliance under the Child Abduction Convention, including Argentina, Brazil, and Ecuador); *see also id.* at 12 (noting specifically that "the Argentine judicial authorities failed to regularly implement and comply with the provisions of the Convention," and "[a]s a result of this failure, 25 percent of requests for the return of abducted children remained unresolved for more than 12 months"; "[o]n average, *these cases were unresolved for more than nine years and 10 months*") (emphasis added).

Second, United States district courts have no mechanism to ensure that foreign domestic courts will enforce their undertaking orders. *See, e.g., Danaipour v. McLarey*, 286 F.3d 1, 25 (1st Cir. 2002) (noting "[t]he district court had no authority to order a forensic evaluation done in Sweden, or to order the Swedish courts to adjudicate the implications of the evaluation for the custody dispute").

This fact distinguishes United States courts from some of our other treaty partners. Countries that subscribe to the Brussels IIa regulations, for example, are required to enforce protective undertakings entered in the courts of sister European members. *See* Eur. Reg. 606/2013, on the *Mutual Recognition of Protection Measures in Civil Matters*. Because of that enforcement guarantee, there is a greater likelihood that protective measures will work in grave risk cases involving contracting parties to Brussels IIa, which regulations in fact mandate their consideration. *See* Regulation (EC) No 2201/2003 of 27 November 2003, Art. 11(4) (providing that "[a] court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return").

By contrast to our European counterparts, a United States court ordering protective undertakings, and premising the return of a child on the strength of them, leaves enforceability entirely in the discretion of a foreign domestic court. This court may or may not agree with them or be willing to enforce them, thus leaving their enforceability questionable at best. This is so even when the United States court devotes extensive resources (and delays resolution of the case) to assess the enforceability of any protective orders the court might enter. (Pet. App. 12a-13a.) For this reason, case law from the United Kingdom and other State parties to Brussels IIa should not be viewed as subsequent State practice affirming an interpretation of the Hague Convention that requires resort to protective measures in grave-risk cases. *See* Vienna Convention on the Law of Treaties, Art. 31(3)(b).

Third, the ultimate effectiveness of any proposed undertakings inevitably falls into the hands of the left-behind parent to abide by them—an individual who has already been shown, by clear and convincing evidence in the United States, to have caused a grave risk of harm to his or her child in the first instance. 22 U.S.C. § 9003(e)(2)(A); Schuz, *A Critical Analysis*, at pg. 293 (Protective Measures) (noting that, "[i]n particular, in non-common law jurisdictions, the concept of undertakings is unfamiliar," and thus "the abductor is effectively dependent on the left-behind parent's willingness to keep his word or on the possibility of obtaining appropriate protection quickly from the courts of the requesting State").

Not surprisingly, the empirical evidence shows that protective undertakings are not likely to be followed by individuals who have shown no regard for the law, and for the safety of their own child, by committing repeated acts of domestic violence and abuse in the first instance. *See* Reunite International, *The Outcomes for Children Returned Following an Abduction*, at pgs. 31-34 (2003) (finding undertakings were broken in eight out of twelve cases; when the undertaking involved non-molestation or violence commitments, it was broken in all six cases); Jeffrey Edelson & Taryn Lindhorst, *Multiple Perspectives on Battered Mothers and their Children Fleeing to the United States for Safety: A Study of Hague Convention Case*s (2010), at pgs. 168-70, 254-59 (reporting the experience of children and parents subject to return orders from United States courts and finding that in seven of twelve cases either the children or parent were subject to "continuing physical harm" following return, notwithstanding protective undertakings).

As one of these studies concluded: "Most of the attorneys on both sides agreed that undertakings established in U.S. courts were of limited use in other countries and that mirror orders issued by both countries was a practice that was preferable but also seldom enforced." Edelson, *Multiple Perspectives*, at pg. 255; *compare* Reunite International, *Outcome for Children*, at pg. 33 (noting that "[s]ome left-behind fathers have stated that they were advised by their lawyers to agree to the undertakings which were being sought by the Court in the requested State because the laws in the home State were different and 'the undertakings mean nothing.'").

3. This case is an ideal vehicle for the Court to analyze the Second Circuit's protective undertakings requirement. The factual record below illustrates the inherent problems with the lower court's protective undertakings rule in several ways.

a. The case swung back and forth between the Second Circuit and the district court for nearly two years, solely to address this protective undertakings question. (Pet. App. 4a, 8a-9a, 17a-23a, 39a-40a.) And ultimately, upon remand, the district court was forced to engage in a nine-month back-and-forth exchange with Italian authorities before concluding that the court's protective undertakings might be effective, if not enforceable. (*Id.*, 17a-21a.)

This lengthy history directly contravenes one of the Convention's overarching goals—that child abduction petitions are ruled on promptly, so that a child's life does not remain in legal limbo for any longer than is absolutely necessary. *See Monasky*, 140 S. Ct. at 730 (noting that the Convention places a "premium on expedition"); *Chafin*, 568 U.S. at 179 (same; noting

that Convention "[c]ases in American courts often take over two years from filing to resolution; for a six-year-old such as E.C., that is one-third of her lifetime"); Conv. Art. 2 ("Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention," and that "[f]or this purpose they shall use the most expeditious procedures available").

Indeed, the Convention itself contemplates that petitions would be ruled upon within six weeks from filing. *See* Conv. Art. 11. Requiring an analysis of protective undertakings in Article 13(b) defense cases makes it impossible to achieve that goal. *See* Kathleen Ruchman, Deputy Director, Office of Children's Issues, Dep't of State, *Undertakings as Convention Practice: The U.S. Perspective* at 3 ("As a matter of practice, elaborate conditions undermine the purpose of prompt return and cause hardship for parents as well as Central Authorities, who must act as intermediaries with left-behind parents to negotiate the terms of return, many of which are beyond the control of either Central Authorities or parents."); Special Commission on the practical operation of the 1980 and 1996 Hague Conventions, at ¶ 3 (Oct. 17, 2017) ("The Special Commission acknowledges that globally there is still a severe problem of delays that effect the efficient operation of the Convention."); *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, ¶ 36 (Sup. Ct. Can. 2018) (reviewing case in part to address the issue of delay in Canadian Hague Convention proceedings).

b. The factual record below shows another problem with the Second Circuit's protective undertakings requirement: the scope of the undertakings that were

ultimately required to address the grave risk of harm to B.A.S. enmeshed the district court in ongoing child custody proceedings in the return state. (Pet. App. 17a (noting "[i]t is undisputed that both parties have obtained legal counsel and are active litigants in an ongoing custody dispute in Italy").)

This contravenes another overarching Convention goal, that operates in tandem with the Convention's goal for expeditious proceedings: a clear line of demarcation between Convention proceedings and the parents' underlying child custody dispute. *See* Conv. Art. 16 (providing that "the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained *shall not decide* on the merits of rights of custody") (emphasis added); *see also, e.g.,* Dep't of State, Text and Legal Analysis, 51 Fed. Reg. at 10,509 (discussing Article 16 of the Convention, which "bars a court in the country to which the child has been taken or in which the child has been retained from considering the merits of custody claims").

The Department of State has repeatedly warned against the extensive use of protective undertakings for this reason. In particular, the Department has set forth its position that any use of "undertakings should be limited in scope and further the Convention's goal of ensuring the prompt return of the child to the jurisdiction of habitual residence, so that that jurisdiction can resolve the custody dispute." Report on Hague Convention Programs by the Child Abduction Unit, The Lord Chancellor's Child Abduction Unit Central Authority for England & Wales (Nov. 1995) (emphasis added).

As the Department concluded: "*Undertakings that do more than this would appear questionable under the Convention, particularly when they address in great detail issues of custody, visitation, and maintenance*." *Id.* (emphasis added); *see also* United States responses to Questionnaire Concerning the Practical Effect of the 1980 Convention (setting forth the position of the United States that "we believe there needs to be discussion regarding limiting the use of protective measures contemporaneous with a child's return," as "[t]he extensive use of protective measures may impermissibly raise issues beyond the purview of the Convention, such as those that are not directly related to the safe return of the child").

This case illustrates the Department of State's stated concern with protective undertakings. Not only did the district court become enmeshed in child custody proceedings in Italy, the two proceedings were not even close to distinct. In order to meet the district court's protective undertakings requirements, the Italian court entered "a protective order against the petitioner and an order directing Italian social services to oversee his parenting classes and psychoeducational therapy." (*Id.*) And the district court also made a substantial property allocation as between husband and wife, ordering Mr. Saada to pay the petitioner $150,000.00 to ensure "the respondent's financial independence from the petitioner and his family" upon their return from Italy, at least while the Italian courts figured out the remainder of the child custody dispute. (Pet. App. 22a.) These extensive orders went well above and beyond a limited use of undertakings to ensure the safe return of a child to his or her country of habitual residence.

CONCLUSION

For the above-stated reasons, this case provides the Court with an ideal opportunity to permit the United States to speak with one voice on this important and unsettled question of international law: to what extent should protective measures be allowed to negate the Article 13(b) grave risk defense?

Respectfully submitted,

Dated: March 1, 2021

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