No. 20-1034

IN THE

Supreme Court of the United States

NARKIS ALIZA GOLAN,

Petitioner,

v.

ISACCO JACKY SAADA,

Respondent.

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

BRIEF OF HAGUE CONVENTION DELEGATES JAMISON SELBY BOREK & JAMES HERGEN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[*]

Amici Jamison Selby Borek and James Hergen served as delegates from the United States to the Fourteenth Session of the Hague Conference on Private International Law, which drafted the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89 ("Convention"). As delegates to the Fourteenth Session, *amici* negotiated and drafted the terms of the Convention. They have a clear recollection of the intent of the delegates and the result the drafters aimed to accomplish in negotiating the Convention's terms. They have an interest in ensuring that the drafters' intent—as manifested in the Convention's text, purpose, and negotiating history—is preserved and effectuated.

SUMMARY OF ARGUMENT

Article 13(b) of the Convention nowhere requires courts to consider ameliorative measures after determining that there is a grave risk that returning a child would expose the child to harm. That is reason enough to reject the inflexible rule applied by the court below. Considering the Convention's negotiating history and purpose, as the Court has done in the past, bolsters that conclusion.

I. This Court should consult the Convention's negotiating history and purpose, as the Court has repeatedly done when interpreting other provisions of

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[*] Pursuant to this Court's Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief 's preparation or submission. All parties have consented to the filing of this brief.

the Convention. Examination of the Convention's history and purpose would be particularly helpful here because of the thorough preparatory materials and reports accompanying the Convention, as well as the authoritative insight provided by *amici*—both of whom featured prominently in the Convention's drafting and can speak clearly to the drafters' intent.

II. The Convention's drafters never discussed—and certainly did not adopt—mandatory consideration of ameliorative measures following a grave-risk finding. That lack of discussion is meaningful because the delegates spent considerable time and effort drafting the Convention and deliberating over its provisions—with particularly careful attention given to Article 13(b).

Moreover, requiring courts to consider ameliorative measures is at odds with the Convention's goal of advancing the child's best interests. The Convention's negotiating history and Preamble confirm that the removed child's interests were of "paramount importance." Convention pmbl. By requiring courts to consider ameliorative measures that might facilitate the child's return—even where return threatens harm to the child—the Second Circuit's rigid rule improperly elevates the left-behind parent's interests over the child's own safety.

That rule likewise undermines the Convention's purpose of ensuring "prompt" adjudication of return petitions. Convention art. 1(a). Forcing courts to consider ameliorative measures substantially slows the decision-making process and thereby delays any return to the child's country of habitual residence. Indeed, this case illustrates how seriously the lower

court's rule impairs speedy returns: B.A.S. has lived in the United States for more than three years, and the parents still do not know whether he must return to Italy.

ARGUMENT

I. THE COURT SHOULD CONSIDER THE CONVENTION'S HISTORY AND PURPOSE.

In construing the meaning of a treaty—including the very Convention at issue here—this Court often has looked to the treaty's negotiating history and purpose. The Court should do so again here especially because *amici* provide authoritative insight into the Convention's drafting history and fundamental goals.

A. This Court Often Interprets Treaties In Light Of Their History And Purpose.

Although "[t]he interpretation" of the Convention, "like the interpretation of a statute, begins with its text," *Abbott* v. *Abbott*, 560 U.S. 1, 10 (2010), it is well settled that "negotiation and drafting history" are valuable "'aids to [a treaty's] interpretation,'" *Medellin* v. *Texas*, 552 U.S. 491, 507 (2008) (quoting *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)).

This Court thus routinely relies on negotiating history and purpose when interpreting international agreements. *See*, *e.g.*, *GE Energy Power Conversion France SAS, Corp.* v. *Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645–46 (2020) (using "negotiating and drafting history" of the New York Convention to "confirm" the Court's "interpretation of the Convention's text"); *Zicherman*, 516 U.S. at 226 (con-

sidering statements made during the Warsaw Convention's drafting); *Societe Nationale Industrielle Aerospatiale* v. *U.S. District Court for S. District of Iowa*, 482 U.S. 522, 534 (1987) (rejecting interpretation as "inconsistent with the language and negotiating history of the Hague Convention").

In fact, when interpreting the very agreement at issue here—the 1980 Hague Convention on the Civil Aspects of International Child Abduction—this Court has often consulted the Convention's negotiating history, including the Explanatory Report by Elisa Pérez-Vera, and the Convention's purposes. *See*, *e.g.*, *Monasky* v. *Taglieri*, 140 S. Ct. 719, 727 (2020) (using the Explanatory Report to construe "habitual residence" in Article 12 of the Convention); *Abbott*, 560 U.S. at 19–22 (examining the Explanatory Report and the Convention's "objects and purposes").[1]

As this Court has explained, Hague Convention reports and views expressed by "member[s] of the United States delegation . . . most closely involved in the drafting of the Convention" can be "especially helpful in ascertaining [the Convention's] meaning." *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1511 (2017) (relying on delegates' views and Rapporteur's

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[1] *See also* Elisa Pérez-Vera, *Explanatory Report*, *in* 3 Acts and Documents of the Fourteenth Session, Child Abduction (1982) ("*Explanatory Report*"). The Explanatory Report "is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it." U.S. Dep't of State, *Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10,494, 10,503 (Mar. 26, 1986).

report to shed light on a Hague Convention's meaning); *see also Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 700–01 (1988) (examining final report, proposed amendments, and comments made by delegates).

This rich tradition confirms that the Court should consider the views of the delegates, along with the Convention's Explanatory Report and other preparatory materials, in construing Article 13(b). Such consideration would be especially appropriate here because the court of appeals derived its rule mandating consideration of ameliorative measures not from Article 13(b)'s text, but from principles that it thought to be reflected in the Explanatory Report. *See Blondin* v. *Dubois*, 189 F.3d 240, 248–49 (2d Cir. 1999). Because the rule at issue was based on the Convention's drafting history and purpose, a closer review of the negotiating record is warranted.

Consideration of the Convention's negotiating history, moreover, would accord with the guidelines for treaty interpretation set forth in the Vienna Convention on the Law of Treaties ("Vienna Convention"). Under the Vienna Convention, "the preparatory work of the treaty and the circumstances of its conclusion" can help "confirm" a treaty's ordinary meaning. Vienna Convention on the Law of Treaties, May 23, 1969, art. 32, 1155 U.N.T.S. 331. Although not yet ratified by the United States, the Vienna Convention is generally considered an authoritative guide to treaty interpretation. *See Fujitsu Ltd.* v. *Fed. Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001); *see also Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting) (citing the Vienna Convention when interpreting a treaty).

Accordingly, the Court should consider the drafting history and purpose of Article 13(b) of the Convention when evaluating the court of appeals' mandatory approach to ameliorative measures.

B. As Delegates, *Amici* Provide An Authoritative Voice On The Convention's Negotiating History And Purpose.

Because *amici* played critical roles in the Convention's drafting, their views on the Convention's drafting history and purpose are uniquely authoritative.

The Convention's terms reflect a long history of careful deliberation by several delegations. Efforts to develop an international legal framework for child abduction began in 1978 when the Hague Permanent Bureau sent member nations a detailed study and questionnaire on the problem. *See* Brigitte M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 Fam. L.Q. 99, 101 (1980). In March 1979, a Special Commission comprising nearly forty members spent ten days developing a consensus about key provisions for any future agreement. *See* Special Commission, *Conclusions Drawn from the Discussions of the Special Commission of March 1979 on Legal Kidnapping*, *in* 3 Acts and Documents of the Fourteenth Session, Child Abduction 162–65 (1982) ("*Special Commission Conclusions*").

After sixteen more negotiation sessions, the Special Commission developed a preliminary draft of the Convention, and member nations then issued formal written input on that draft. Elisa Pérez-Vera, *Report of the Special Commission*, *in* 3 Acts and Documents of the Fourteenth Session, Child Abduction 176 (1982)

("*Special Commission Report*"); *Comments of the Governments on Preliminary Document No 6*, *in* 3 Acts and Documents of the Fourteenth Session, Child Abduction 215–51 (1982) ("*Comments of the Governments*").

These efforts culminated in October 1980, when delegations from twenty-three member countries convened for nearly three weeks of additional deliberations at the Fourteenth Session of the Hague Convention. The United States sent five delegates to this session: *amici* James Hergen and Jamison Selby Borek, along with Peter H. Pfund, Patricia Hoff, and Lawrence H. Stotter. *See Members of the First Commission*, *in* 3 Acts and Documents of the Fourteenth Session, Child Abduction 254 (1982).

Amici played important roles during these deliberations. Representing the U.S. State Department, Ms. Borek served as the lead spokesperson for the United States' delegation to the Fourteenth Session. In that role, she actively led discussions among the delegations and attended all proceedings. She has clear recollections about the matters discussed in this submission. Mr. Hergen participated at the March 1979 Special Commission and served as a delegate at the October 1980 Fourteenth Session. At the Fourteenth Session, he participated in all proceedings and served on a special subcommittee tasked with crafting model forms. *See Explanatory Report* 427 n.6. Mr. Hergen also has clear recollections about the matters discussed in this submission.

Finally, after nearly a month of meetings that included both Ms. Borek and Mr. Hergen, the Convention was adopted by a unanimous vote of the delegates

from the twenty-three member states present at the Fourteenth Session. *See Explanatory Report* 426; *Convention Adopted by the Fourteenth Session and Signed on the 25th of October 1980*, *in* 3 Acts and Documents of the Fourteenth Session, Child Abduction 413–22 (1982) ("*Final Convention*").

Given *amici*'s substantial involvement in the drafting of the Convention, their understandings of the drafters' intent should be given considerable weight.

II. THE DRAFTERS DID NOT INTEND TO REQUIRE COURTS TO CONSIDER AMELIORATIVE MEASURES WHEN THERE IS A GRAVE RISK THAT RETURN WOULD EXPOSE THE CHILD TO HARM.

Despite years of drafts and detailed negotiations, the drafters of the Convention *never* discussed requiring courts in signatory states to consider ameliorative measures in grave-risk cases. And the drafters never would have intended such an inflexible mandate because it would frustrate two of the Convention's fundamental goals—namely, serving the child's best interests and ensuring prompt adjudication of return petitions.

A. The Drafters Thoroughly Discussed Every Provision Of Article 13.

Over the course of two years of comprehensive research, drafting, and negotiations, the delegates crafted the Convention's language meticulously after thorough debate. *Amici* recall that the drafters exhaustively discussed the Convention's provisions—often in excruciating detail. And *amici* specifically re-

member that the drafters closely scrutinized the circumstances in which a court would not be required to order the return of a child to his or her country of habitual residence.

Detailed comments from the states party to the Convention confirm that the drafters gave "special attention" to the "grounds for refusal." *Comments of the Governments* 214–15, 216 (Federal Republic of Germany); *id.* at 218 (Australia); *id.* at 219 (Austria); *id.* at 220–21 (Belgium); *id.* at 232–34 (Canada); *id.* at 238–39 (Denmark); *id.* at 242–43 (United States); *id.* at 250 (United Kingdom); *id.* at 251 (Sweden); *see also Special Commission Report* 202–05 (summarizing discussions about the draft article). These exceptions—including when "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation"—were eventually codified in Article 13. Convention art. 13(b).[2]

In fact, out of the eighty-three working documents considered by the drafters, more than a dozen addressed the exceptions later codified in Article 13. As the Explanatory Report sets forth, "[e]ach of the terms

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[2] The grounds for refusing to return a child—including the exception based on a grave-risk finding—were originally located in Article 12 of the draft Convention, but were codified in Article 13 of the final Convention. *Compare Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera*, *in* 3 Acts and Documents of the Fourteenth Session, Child Abduction 168 (1982), *with Final Convention* 416. Any discussion that took place regarding draft Article 12 thus provides insight into the exceptions ultimately set forth in Article 13 of the ratified Convention.

used" in Article 13(b) thus was thoughtfully considered and agreed upon as "the result of a fragile compromise reached during the deliberations of the Special Commission." *Explanatory Report* 461.

Had the drafters intended to require courts to consider ameliorative measures in grave-risk cases, there is no doubt that they would have discussed that requirement at length and reflected that requirement in the Convention's terms.

B. The Drafters Neither Discussed Nor Adopted A Requirement To Consider Ameliorative Measures.

Despite these detailed negotiations, the drafters never discussed any proposal to require courts to consider ameliorative measures in grave-risk cases. *Amici* can confirm, based on their personal recollections, that no such discussion happened. Nor is there any mention of mandatory consideration of ameliorative measures *anywhere* in the nearly five hundred pages of preparatory materials, proposals, minutes of deliberations, and reports. The topic simply did not come up.

To the contrary, 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. The United States proposed that a grave-risk finding must be supported by evidence "supplied by the Central Authority of the State of origin or other competent authorities or persons of that State." *Working Documents Nos 4 to 13*, *in* 3 Acts and Documents of the Fourteenth Session, Child Abduction 263 (1982). But that amendment was voted down largely

because the delegations did not want to constrain judicial discretion about what evidence a court could consider. *See Procès-verbal No 8*, *in* 3 Acts and Documents of the Fourteenth Session, Child Abduction 301 (1982) ("Finland would have difficulty in accepting any provision which served to restrict the wide discretionary powers vested in Finnish judges."); *id.* (comment from the Chairman "stress[ing] that evidential matters should not be included in the Convention"); *see also id.* at 300 (comment from the United Kingdom that "[a] court should not be constrained from having regard to particular evidence concerning prospective harm to the child, on the basis of its provenance").

The drafters ultimately agreed to require consideration of only one type of evidence—and that requirement applies to all Article 13 cases, not grave-risk cases specifically. *See* Convention art. 13 ("In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."). Even that general requirement, moreover, generated substantial discussion among the delegates. *See*, *e.g.*, *Comments of the Governments* 217 (Federal Republic of Germany); *id.* at 234 (Canada); *id.* at 243 (United States). Thus, had the drafters intended to require consideration of ameliorative measures in grave-risk cases, they would have thoroughly discussed and explicitly enacted such a requirement. That the drafters did neither demonstrates that they intended no such requirement.

Subsequent views expressed by signatories further confirm that the drafters never intended to require consideration of ameliorative measures. *Cf. Zicherman*, 516 U.S. at 227–28 (looking to the "postratification conduct of the contracting parties"). In the 1990s, the State Department opined that considering "undertakings"—another term for "ameliorative measures," Pet. App. 3a—"can be *consistent* with the Convention," but is "not *necessary* to operation of the Convention," Letter from Catherine W. Brown, Ass't Legal Adviser for Consular Affairs, U.S. Dep't of State, to Michael Nicholls, Lord Chancellor's Dep't, Child Abduction Unit, United Kingdom (Aug. 10, 1995) (emphases added). The State Department never would have needed to opine on whether consideration of ameliorative measures was "*consistent* with the Convention" had the Convention, in fact, *required* consideration of those measures. Other signatories likewise permit, but do not require, consideration of ameliorative measures. *See* Hague Conference on Private International Law, *Enforcement of Orders Made Under the 1980 Convention—An Empirical Study* 49–50 (Oct. 2006) (Germany and Slovakia).

C. Requiring Consideration Of Ameliorative Measures Conflicts With The Drafters' Aim To Protect Children.

The Convention's negotiating history and stated purpose underscore that Article 13(b) should promote the child's best interests. Because the Second Circuit's rule mandating consideration of ameliorative measures does just the opposite, *amici* are confident that the drafters never would have intended to impose such a rule.

Amici affirm that the overarching goal shared among the drafters was protecting the best interests of the child. Several aspects of the Convention's negotiating history confirm that recollection:

First, the drafting history amply demonstrates that the Convention's guiding principle is the best interests of the child. The Special Commission thought it "obvious that the efforts made by the Hague Conference" to develop an international agreement were "inspired by a desire to protect the interests of [removed] children." *Special Commission Report* 182; *see Explanatory Report* 431 ("it is precisely because of [the conviction that the interests of children are paramount] that they drew up the Convention"). As Sweden put it, "[t]he underlying principle of the draft Convention is *undoubtedly* the protection and the welfare of the child." *Comments of the Governments* 244 (emphasis added).

Second, and as a result, the drafters declared in the Convention's Preamble that "the interests of children are of paramount importance in matters relating to their custody." Convention pmbl. Importantly, that language was absent from the preliminary draft and was added only after the drafters voiced strong support for explicitly declaring the importance of the child's interests. *See Procès-verbal No 9*, *in* 3 Acts and Documents of the Fourteenth Session, Child Abduction 304 (1982) (comment from Israel that, "[s]ince the best interests of the child were the paramount consideration, [the delegate] could not conceive how the Convention would fail to mention them at some point"); *Procès-verbal No 15*, *in* 3 Acts and Documents of the Fourteenth Session, Child Abduction 360 (1982) (comment from United Kingdom that the Convention

"ought expressly to refer to the welfare of the child"). The Preamble thus affirms that the Convention "must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests." *Explanatory Report* 431.

Third, the drafters specifically intended that Article 13(b) safeguard the child's best interests. *See Comments of the Governments* 233 (stating that the exception under *b* "is obviously aimed at protecting the child rather than the abductor"); *Explanatory Report* 433 ("paragraphs 1*b* and 2 of the said article 13 contain exceptions which clearly derive from a consideration of the interests of the child"). The premise of the return exception is that the child's interests are better served by refusing to put him or her at grave risk of exposure to harm. After all, "the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability" must "giv[e] way before the primary interest of any person in not being exposed to physical or psychological danger." *Explanatory Report* 433.

The court of appeals' approach obliterates this fundamental purpose. By forcing judges to consider ameliorative measures *even in domestic violence cases with a grave-risk finding*, the court shifted the focus away from the child and onto the left-behind parent. The entire purpose of mandating consideration of ameliorative measures is to find a way to return the child to his or her country of habitual residence—even though there is a grave risk that the child will suffer physical or psychological harm. The lower court's rule turns the Convention on its head by risking harm to the child when the child's "primary interest" obviously is in his or her own safety. *See Explanatory Report*

433. The drafters never contemplated, much less intended, this upside-down result.

D. Requiring Consideration Of Ameliorative Measures Conflicts With The Drafters' Aim Of Prompt Adjudication Of Return Petitions.

The drafters never would have intended to adopt the court of appeals' rigid rule for a second reason: It frustrates the Convention's goal of "secur[ing] the prompt return of children wrongfully removed" from their country of habitual residence. Convention art. 1(a).

Prompt adjudication matters because, as the drafters explained, the longer the child spends away from home, the more likely the child will be to develop ties to the new country that would be severed if a court later issued a return order. *See Comments of the Governments* 232 (comments from Canada); *see also Explanatory Report* 435 ("[W]here the removal of a child is concerned, the time factor is of decisive importance. In fact, the psychological problems which a child may suffer as a result of its removal could reappear if a decision on its return were to be taken only after some delay.").

Time and again, the drafters emphasized the need for a speedy process. The Special Commission, for example, recommended that "[c]ases involving an application for return of a child . . . be resolved under the most expeditious procedures possible." *Special Commission Conclusions* 164. And the drafters designed the petition process to result in "a speedy and immediate" decision. *Id.* at 179; *see also id.* at 187 ("the Convention wishes above all to insure the immediate

return of removed children"). To that end, the drafters rejected proposals that would have delayed the issuance of return orders. *See Comments of the Governments* 232–33 (explaining the Special Commission did not adopt a "public policy" exception because it "did not wish" to "increase the number of ways of impeding the child's return"); Rhona Schuz, The Hague Child Abduction Convention—A Critical Analysis 270 (2013) ("It was clear to [the drafters] that a general 'welfare' or 'public policy' defense would to a large extent defeat the whole purpose of the Convention because return would invariably be delayed until all the necessary information was brought to the court.").

The drafters especially worried that Article 13's exceptions would unduly extend return proceedings. The United States warned that "broad exceptions will tend to turn virtually every return proceeding into an adversary contest on the merits of the custody question"—an outcome that jeopardized the "'prompt return' principle." *Comments of the Governments* 242. The Federal Republic of Germany likewise opposed consideration of expert opinions, second opinions, and "investigations of fact," as those could "result in a considerable delay of the return" and thereby frustrate the Convention's purpose. *Id.* at 216. In short, the drafters intended the Convention to create a swift process for adjudicating return petitions, and they carefully crafted return exceptions so as not to swallow the general principle of "prompt return." Convention art.1(a).

The court of appeals' rule flatly undermines the goal of efficient and prompt adjudication of return petitions. Mandating that courts consider ameliorative measures despite a grave risk of exposure to harm

necessarily complicates, and thus prolongs, the decision-making process in multiple respects. *First*, it requires courts to go through the added step of reviewing and assessing potential ameliorative measures. That inquiry often involves expert testimony, *see*, *e.g.*, *Jacquety* v. *Baptista*, 538 F. Supp. 3d 325, 379–81 (S.D.N.Y. 2021), which takes time to prepare and present to the court. *Second*, the viability of ameliorative measures may depend on the voluntary cooperation of authorities from the home country—which takes additional time to secure. *Finally*, mandatory consideration introduces another complex variable into appellate review of cases already complicated by a grave-risk finding. Delay for any of these reasons frustrates the Convention's objective of a "prompt" return.

These are not hypothetical concerns. On remand in this case, the district court spent *nine months* on an "extensive examination" of possible ameliorative measures. Pet. App. 12a. During that time, the district judge contacted the Representative of the U.S. Federal Judiciary for the International Judicial Network under the Hague Convention and corresponded with the Italian Central Authority and the Italian Ministry of Justice about B.A.S. *Id.* The judge further held "multiple conferences" with the parties and ordered numerous "status reports and briefs" on the "sufficiency of various ameliorative measures." *Id.* In addition, the Second Circuit heard two separate appeals on whether the district court had sufficiently considered ameliorative measures. More than three years after respondent's petition was filed, B.A.S. continues to develop connections to the United States that would ultimately be severed if the decision below were affirmed.

Adjudicating this return petition thus has been anything but "prompt," and the delay caused by the lower court's inflexible rule risks inflicting the very harm that the Convention's drafters sought to avoid.

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Amici recall—and all available independent evidence confirms—that the drafters of the Convention never so much as mentioned mandatory consideration of ameliorative measures. If such a rule had been proposed, *amici* are confident that the delegations would have swiftly rejected it. Indeed, such a requirement plainly works against the child's best interests, both by facilitating the child's return to a harmful environment and by fostering delay that makes any return that much more disruptive to the child's life.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 26, 2022