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 FOR *AMICI CURIAE* INDIVIDUALS AND ORGANIZATIONS ADVOCATING FOR VICTIMS OF DOMESTIC VIOLENCE IN SUPPORT OF PETITIONER

CAROLYN F. CORWIN
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
ccorwin@cov.com

RYAN R. ROBERTS
COVINGTON & BURLING LLP
3000 El Camino Real
5 Palo Alto Square
Palo Alto, CA 94306
(650) 632-4700
rroberts@cov.com

SHAILEE DIWANJI SHARMA
Counsel of Record
CATHERINE M. CARULAS
COVINGTON & BURLING LLP
The New York Times Bldg.
620 Eighth Avenue
New York, NY 10018
(212) 841-1000
ssharma@cov.com
ccarulas@cov.com

Counsel for Amici Curiae

January 26, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTERESTS OF *AMICI CURIAE*

Amici are non-profit organizations and individuals with extensive experience providing services to and advocating for victims of domestic violence in the United States and abroad. Based on this first-hand experience, *amici* have gained valuable insight into the impact of the Second Circuit's interpretation of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1988 WL 411501 ("Hague Convention" or "Convention"), on children and their caregiver parents who have fled domestic violence. A list of *amici* appears in the Appendix to this brief.

In *amici's* experience, the decision below and the Second Circuit's approach in Hague Convention cases involving grave risk findings have had (and will continue to have) a lasting detrimental effect on children and their caregiver parents who flee to escape domestic violence. *Amici* therefore submit this brief in support of Petitioner Ms. Golan.[1]

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. *Amicus* Sanctuary for Families, a non-profit organization that provides a range of services to domestic violence victims, has provided Petitioner with various services, including limited legal advice on matters not at issue in this case. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Hague Convention makes children's physical and psychological safety central to the adjudication of abduction disputes.[2] The Convention's Article 13(b) "grave risk" exception to return of a child to the country of habitual residence represents, in theory, an important protection for caretaker parents and their children fleeing domestic violence.[3] Because the U.S. implementing legislation requires the parent opposing return to prove the grave risk exception by the exacting clear and convincing evidence standard,[4] a finding of grave risk signifies a perilous situation.[5] When considering Article 13(b)'s requirements, courts must prioritize the safety of B.A.S. and other children in

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[2] Elisa Pérez-Vera, *Explanatory Report* 433, ¶ 29 (Hague Permanent Bureau trans. 1982) (explaining that "the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation"); *see also* Convention pmbl. ("[T]he interests of children are of paramount importance in matters relating to their custody.").

[3] Article 13(b) allows a court to decline to return a child to the child's country of habitual residence if the parent opposing return establishes "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

[4] 22 U.S.C. § 9003(e)(2)(A).

[5] As explained in Section I.A of the *amicus* brief of the National Association of Social Workers, et al., even where abuse is directed primarily at the caretaker parent, that abuse will harm the child because the welfare of the child and the caretaker parent are inextricably intertwined. *See also* Lynn Hecht Schafran, *Domestic Violence, Developing Brains, and the Lifespan: New Knowledge from Neuroscience*, 53 Judges' J. 32, 33–34 (2014).

such cases and recognize that the Article 13(b) exception was designed to keep children in the safest place pending a custody adjudication.

Unfortunately, the Second Circuit (along with the Third and Ninth Circuits) puts unwarranted faith in so-called "ameliorative measures" as a means to minimize the harm to children like B.A.S. while ordering them returned to their country of habitual residence despite a grave risk finding under Article 13(b). Faith in ameliorative measures—which are nowhere mentioned in the text of the Convention, its negotiating history, or the U.S. implementing legislation—is dangerously misplaced when the grave risk finding is based on a history of domestic violence.

Over the last forty years, the scientific, medical, and legal communities' understanding of domestic violence, responses to it, and its effect on children has evolved dramatically. In 1980, when the Hague Convention was negotiated, research and scholarship addressing domestic violence were in their infancy, and there was little awareness of the danger posed by domestic violence perpetrators or the magnitude of harm domestic violence inflicts on adult victims and children who witness it. As described below, however, today a consensus exists across disciplines that domestic violence encompasses a wide range of behaviors that are profoundly injurious, both physically and psychologically, to adult victims and their children. There is also recognition that many abusers are loath to relinquish control over their victims and are frequently recidivists. This reality necessitates a carefully crafted response from courts and other stakeholders, beginning with an in-depth assessment of danger and lethality, followed by individualized safety planning and ongoing provision of services.

While many courts in the United States embrace a more sophisticated and scientifically informed understanding of domestic violence, Hague Convention jurisprudence is unfortunately lagging. Requiring reliance on ameliorative measures to facilitate return *despite* a grave risk finding reflects a failure to grasp the complexity of domestic violence and the heightened needs of its victims—both caretaker parents and their children—leading courts to put children in real danger. Given the reality of domestic violence, the imposition of ameliorative measures will never protect a child as effectively as declining to return the child due to a grave risk of exposure to harm.

Courts that embrace ameliorative measures in domestic violence cases fail to account for: the dangerousness, unpredictability, and complexity of domestic violence; the propensity for abusers to continue their violence; the inability of U.S. courts to reliably assess the efficacy of ameliorative measures in a foreign country, especially in an expedited jurisdictional proceeding; and the high probability that the ameliorative measures ordered will be useless due to non-compliance by abusers and unenforceability in the country of habitual residence. Given the many reasons why ameliorative measures will not protect children or their caregiving parents, this Court should hold that such measures are never appropriate when the grave risk determination arises from something as complex and dangerous as domestic violence, and that a return order in reliance on such measures would be flatly inconsistent with the Article 13(b) exception's goal of protecting children.

ARGUMENT

I. COURTS IN HAGUE CONVENTION PROCEEDINGS CANNOT ACCURATELY PREDICT AND PROTECT AGAINST FUTURE HARM USING AMELIORATIVE MEASURES WHERE A GRAVE RISK DETERMINATION RESTS ON FINDINGS OF DOMESTIC VIOLENCE.

Domestic violence serious enough to form the basis of a grave risk finding necessarily involves an abuser who is simultaneously dangerous and determined to maintain control over the victim for as long as possible, even at the cost of the child's well-being. At this stage, the caretaker parent has already established by clear and convincing evidence that there is a grave risk return will expose the child to harm. The critical question, then, is not *if* children will be exposed to harm upon return (they will), but rather how perpetrators will continue targeting their victims in the future.

Domestic violence that meets the grave risk standard inevitably involves complex coercive control tactics that make it impossible for a judge to foresee the ways in which an abuser will continue to cause harm to the victims—both the caretaker parent and children. These same dynamics suggest that an abuser will ignore ameliorative measures ordered by a U.S. court once the abuser and child have left the country and are therefore beyond the U.S. court's jurisdictional reach. Due to the inability to predict and effectively mitigate future harm, the prevalence of post-separation violence, and the untrustworthiness of abusers, return of a child in reliance on ameliorative measures amounts to an unacceptable gamble with the child's safety.

A. Abusers' Use of Coercive Control Tactics and Their Escalation of Violence Make It Impossible for a Court to Develop Effective Ameliorative Measures.

Ameliorative measures cannot be effective in cases like Ms. Golan's because domestic violence is not merely a series of discrete, time-limited acts of physical abuse that a court can easily neutralize. *See* Evan Stark, *Looking Beyond Domestic Violence: Policing Coercive Control*, 12 J. Police Crisis Negots. 199, 201, 203, 212 (2012). Domestic violence almost invariably involves an insidious pattern of recurring and escalating physical and psychological violence marked by ongoing power and control aimed at both the micro- and macro-levels of victims' lives. *See* Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* 5 (2007). This destructive pattern, known as *coercive control*, encompasses multiple manipulative tactics by abusers intended to "establish a formal regime of domination/subordination" over their victims. Stark, *Looking Beyond Domestic Violence*, *supra*, at 206.[6] Abusers use a combination of physical, sexual, psychological, emotional, economic, immigration, religious, and legal abuse to satisfy their need for dominance over their victim. *See, e.g.*, Evan Stark, *Coercive Control*, Nat'l Domestic Violence Fatality Rev. Bull. (Sept. 2, 2010, 11:30 PM), https://angelzfury.wordpress.com/2010/09/02/coercive-control-national-domestic-violence-fatality-review-initiative-fatality-review-bulletin-spring-2010/.

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[6] *See also United States v. Castleman*, 572 U.S. 157, 164–66 (2014) (recognizing domestic violence "is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context").

Mr. Saada's abuse constituted coercively controlling behavior. *See* Pet. App. 42a, 79a–80a. Specifically, the district court found he was "physically, psychologically, emotionally, and verbally" abusive to Ms. Golan and that these incidents occurred "repeatedly" throughout their relationship. *Id.* at 79a. The court further found that "B.A.S. was present for much of [the abuse]," demonstrating Mr. Saada attempted to exert control over Ms. Golan despite the harm to their child. *Id.* Mr. Saada's on-going abuse was intense and dangerous. For example, he strangled Ms. Golan until she lost consciousness, *id.* at 55a; forced her to have sex (on one occasion, while B.A.S. was in bed with them), *id.*; beat her when she was pregnant with B.A.S., *id.* at 51a–54a; sent her threatening messages, *id.* at 64a; threatened to kill her and to harm B.A.S., *id.* at 63a n. 31, J.A. 39; limited her movements and social interactions, J.A. 35–36; withheld money from her, J.A. 35–36; and isolated her by relocating her to a foreign country where she did not speak the language, could not work, and had no support system, J.A. 36.

Perpetrators like Mr. Saada who use coercive control tactics will continue their abuse—and often escalate it—if the child is ordered returned.[7] Research suggests such abusers are very likely to seek to reestablish control once they regain access to their victims after separation. *See, e.g.*, Emma Katz et al., *When Coercive Control Continues to Harm Children: Post-Separation Fathering, Stalking, and Domestic*

[7] *See* Laurel B. Watson & Julie R. Ancis, *Power and Control in the Legal System: From Marriage/Relationship to Divorce and Custody*, 19 Violence Against Women 166, 167 (2013) ("The tactics of power and control . . . often continue to manifest during the dissolution of the relationship and pervade legal proceedings.").

Violence, 29 Child Abuse Rev. 310, 312 (2020) (noting "[s]eparation often produces neither safety nor freedom, with perpetrators continuing and intensifying their coercive control post-separation" or using contact with children as "opportunities to continue their abuse of children and ex-partners"); *see also, e.g.*, *Davies v. Davies*, 717 F. App'x 43, 49 (2d Cir. 2017) (denying return and noting abuser escalated threats after caretaker parent and child fled). The risk of continued violence and even death tends to increase after separation as the abuser seeks to punish the caretaker parent for seeking independence. *See* Peter G. Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 Juv. & Fam. Ct. J. 57, 59 (2003); *see also, e.g.*, Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. Pub. Health 1089, 1090 (2003) (a woman's separation from her abusive partner puts her at a greater risk of murder by the abuser).

Moreover, persuasive evidence suggests that after separation abusers may also begin to target the child even if they had not previously done so. *See, e.g.*, April M. Zeoli et al., *Post-Separation Abuse of Women and Their Children: Boundary-setting and Family Court Utilization Among Victimized Mothers*, 28 J. Fam. Violence 547, 548 (2013) (noting that "[i]n 30% to 60% of homes with [intimate partner violence], child abuse also occurs" and that perpetrators "may use opportunities presented by physical custody arrangements or parenting time to victimize children post-separation"). This can occur both because of abusers' general propensity for violence and because abusing the child is one way to inflict the maximum amount of psychological pain on the caretaker parent.

In one case, for example, a Maryland father drowned his three young children in the bathtub of the hotel room where he was having court-ordered visitation. *Maryland v. Castillo*, No. 108119017-22 (Balt. Cir. Ct. filed Mar. 31, 2008) (guilty plea entered Oct. 14, 2009). Before the murder, the father had told the mother the best way to hurt her would be to kill the children and let her live. *Family Law–Protective Orders–Burden of Proof: Hearing on H.B. 700 Before the H. Comm. on the Judiciary*, 2010 Leg., 427th Sess. (Md. 2010) (statement of Amy Castillo), https://www.washingtonpost.com/wp-srv/metro/pdf/HB_700_Testimony_Amy_Castillo.pdf.[8] In another case (involving the Hague Convention), a father who had not previously been violent towards his children obtained their return pursuant to the Convention, and then later shot them both after a court adjudicating custody determined the children should, in fact, be sent to live with their mother.[9]

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[8] *See also U.S. Divorce Child Murder Data (2008-Present)*, Ctr. for Jud. Excellence, https://centerforjudicialexcellence.org/cje-projects-initiatives/child-murder-data/ (last visited Jan. 24, 2022) (collecting stories of children murdered by a divorcing/ separating parent).

[9] Specifically, in this case the Canadian court conducting the Convention proceeding had ordered the children returned to their father in Texas pursuant to the Convention. Although it is unclear whether the mother—their primary caretaker—asserted grave risk under the Convention, the court noted that the father had not previously been violent towards the children, although he was "far from perfect." Some months after a Texas court adjudicating custody ordered that the children be sent back to Canada, the father took the children hostage before shooting them, killing one and seriously injuring the other. Graeme Hamilton, *Children Caught in the Middle: Montreal Family's Custody Battle Takes Deadly Turn*, Nat'l Post (Can.), Dec. 16, 2010, at A1, https://www.pressreader.com/canada/national-post-latest-edition/20101216/281492157736497; *see also Family*

The complexity of coercive control dynamics and the likelihood of escalating post-separation violence toward both the caretaker parent and the child mean that judges who find a grave risk due to domestic violence cannot possibly predict with any accuracy the myriad ways an abuser will continue to cause harm once the child is returned. Courts can never accurately identify effective solutions to avoid all of the likely future harm, rendering ameliorative measures essentially useless and return of the child far too risky.

B. Ameliorative Measures Will Be Ineffective Because Domestic Violence Perpetrators Are Untrustworthy and Unlikely to Comply with These Measures.

Courts cannot rely on an abuser's compliance with an order imposing ameliorative measures. Such reliance perversely places the effectiveness of the measures on the very person whose conduct necessitated the protection in the first place.

When findings of domestic violence have satisfied the exacting grave risk standard, the perpetrator has already been found to show deep disregard for the law, for societal norms, and for the safety of his family. He has deliberately defied laws against physical abuse, sexual abuse, and/or related laws protecting domestic violence victims from the many harms perpetrators inflict. It is wishful thinking to believe an abuser will abruptly reform and comply with court-ordered measures after he and the child are beyond the U.S.

Mourns Montreal Boy's Death in Texas, CBC News (Dec. 15, 2010, 11:59 AM), https://www.cbc.ca/news/canada/montreal/family-mourns-montreal-boy-s-death-in-texas-1.878443.

court's jurisdiction, despite all evidence to the contrary.

Research shows that abusers are highly prone to recidivism and are likely to ignore or defy interventions (such as court orders) intended to mitigate the recurrence of abuse. One study found that 60% of domestic violence offenders revert to their abusive behavior within ten years following law enforcement intervention. *See* Andrew R. Klein & Terri Tobin, *A Longitudinal Study of Arrested Batterers, 1995–2005: Career Criminals*, 14 Violence Against Women 136, 144 (2008); *see also* Julian Farzan-Kashani et al., *Anger Problems Predict Long-Term Criminal Recidivism in Partner Violent Men*, 32 J. Interpersonal Violence 3541, 3551 (2015).

This pattern of disregard for protective measures extends to measures entered in Hague Convention proceedings. A 2003 survey of twenty-two Hague Convention cases found that in the six cases in which courts ordered return subject to compliance with measures prohibiting violence (including in court orders entered in the country of habitual residence), abusers violated such measures in *every* case. Reunite Rsch. Unit, T*he Outcomes for Children Returned Following an Abduction* 31–33 (2003), http://takeroot.org/ee/pdf_files/library/freeman_2003.pdf. In some cases, the abuser's own statements revealed "that the failure to [honor] was deliberate and premeditated." *Id.* at 32. Another study of Hague Convention cases found that many mothers and children faced renewed violence against them after being sent back by U.S. courts, even though ameliorative measures had been imposed in some of the cases. Jeffrey L. Edleson et al., *Multiple Perspectives on Battered Mothers and their Children Fleeing to the United States for Safety: A*

Study of Hague Convention Cases 163–64, 181–85 (2010). Other reports from caretaker parents in Hague Convention proceedings confirm that ameliorative measures have not prevented their abusers from committing physical violence and deploying other abusive and controlling tactics following the child's return. *See* Br. for Domestic Violence Survivors as *Amici Curiae* Supporting Petitioner, filed in this docket, Jan. 26, 2022, at § III.

The consequences of courts' misplaced reliance on ameliorative measures can be devastating. The case of Cassandra Hasanovic is a stark example. After her husband's conviction for sexual assault in 2007, Ms. Hasanovic fled from England with her children to the safety of her family in Australia. An Australian court in a Hague Convention proceeding ordered the couple's children returned to England, and Hasanovic, the primary caretaker parent, "felt forced" to return with them. Paola Totaro, *Following a Court Order Killed Her*, Sydney Morning Herald (May 4, 2009, 12:00 AM), https://www.smh.com.au/world/following-a-court-order-killed-her-20090503-ard1.html.

Although Ms. Hasanovic secured full custody and a protective order following return, her husband violated those orders multiple times. Sandra Laville, *Woman's Murder Could Have Been Prevented, Says Jury*, The Guardian (Feb. 26, 2014, 6:13pm), https://www.theguardian.com/society/2014/feb/26/cassandra-hasanovic-murder-domestic-violence. In the months following her return, the police were called to intervene in several violent confrontations involving her husband. Totaro, *supra*. Eventually, she attempted to flee with her children to a women's shelter, but her husband chased her, dragged her from her car, and fatally stabbed her in front of their children. *Id.* The

prosecutor overseeing the ensuing murder trial observed: Ms. Hasanovic "obeyed the court [return] order at the cost of her life." *Id.* Ms. Hasanovic's case illustrates the deadly consequences that can result when a court in Hague Convention proceedings mistakenly places trust in an abuser to comply with ameliorative measures.

The record here certainly does not support the district court's trust in Mr. Saada to abide by the ameliorative measures it imposed in connection with B.A.S.'s return to Italy. Dr. Alberto Yohananoff, Mr. Saada's expert psychologist at trial who had evaluated Mr. Saada for eleven cumulative hours, testified that Mr. Saada was in control of neither his anger nor his behavior. Pet. App. 66a. Mr. Saada's lack of restraint is corroborated by the very public nature of his repeated assaults on Ms. Golan. *See, e.g.*, *id.* at 61a–62a (Mr. Saada striking Ms. Golan at a wedding), 52a–53a (at a hospital), 56a–57a (after a Shiva mourning event), 49a–50a (outside the couple's apartment), 53a n.18 (in front of security guards), 59a–60a (in Central Park). The district court even found it "clear that Mr. Saada has to date not demonstrated a capacity to change his behavior." *Id.* at 80a. What's more, despite being under court scrutiny in pending proceedings in both Italy and the United States, Mr. Saada delayed for nearly six months starting the therapy the district court ordered, confirming his unwillingness to follow the court's orders. *See* Pet. Br. 13. He also continues to refuse to grant Ms. Golan a *Get*—an essential divorce document under Jewish law that must be given by a husband to his wife and without which a Jewish woman cannot remarry or bear children who are not considered "illegitimate" under Jewish law. *See id.* *Get* refusal is a form of domestic violence and another way for an abuser to maintain power and

control over a victim.[10] Mr. Saada's inexcusable refusal to grant the *Get* shows that Mr. Saada will find new and creative ways to continue to abuse Ms. Golan.

Where, as here, the record demonstrates that an abuser has engaged in a pattern of violence and coercive control, and lacks the capacity to change or relinquish that control, even the most carefully crafted and theoretically promising ameliorative measures can never protect the child from exposure to harm following return.

II. COURTS IN HAGUE CONVENTION PROCEEDINGS ARE IN AN ESPECIALLY POOR POSITION TO ATTEMPT TO DEVELOP EFFECTIVE AND ENFORCEABLE AMELIORATIVE MEASURES.

For the reasons discussed above, reliance on so-called ameliorative measures to facilitate return is fundamentally irreconcilable with the child's future safety. The Second Circuit's mandate forces district courts handling Hague Convention proceedings to attempt an impossible task—*i.e.* to craft measures that are somehow impervious to perpetrators' need to maintain control, their propensity for post-separation abuse, and their inability to abide by laws and court orders. It requires district courts to craft measures in an expedited jurisdictional proceeding and without the ability to enforce them once the child leaves the United States. This set of facts creates a high degree of risk for the child and belies the so-called "protections" used

[10] Keshet Starr, *Scars of the Soul: Get Refusal and Spiritual Abuse in Orthodox Jewish Communities*, 31 Nashim: J. of Jewish Women's Studs. & Gender Issues 37, 37 (2017) ("[*G*]*et* refusal, in many cases, may be viewed as a form of spiritual abuse, in which faith is turned into a weapon of power and control in an abusive relationship.").

to justify return after the finding of a grave risk of exposure to harm based on domestic violence.

A. It Is Especially Unrealistic to Expect that Courts Could Craft Effective Ameliorative Measures in Expedited Hague Convention Proceedings.

On its face, the Hague Convention provides for a limited proceeding: courts are instructed to move expeditiously to determine a safe and appropriate jurisdiction in which to hear issues of custody, keeping the child's safety always at the forefront but refraining from wading into any custody-related determinations.[11] This mandate to proceed expeditiously does not allow for the kind of thorough, evidence- and research-intensive, trauma-informed analysis that a court must conduct if it is serious about trying to prevent future harm to the child in a case based on a grave risk of exposure to harm grounded in findings of domestic violence.

Due to the complexity of domestic violence and the serious danger it presents, described above, attempting

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[11] Specifically, the Convention instructs state parties to "use the most expeditious procedures available." Convention Art. 2; *see also id.* Arts. 11 (directing state parties to "act expeditiously" and permitting requests for "statement[s] of the reasons for [a] delay" when proceedings last for more than six weeks); 19 (providing that decisions of courts in Convention proceedings "shall not be taken to be a determination on the merits of any custody issue"); *Monasky v. Taglieri*, 140 S. Ct. 719, 730 (2020) (noting the Convention and its implementing legislation direct courts to "act expeditiously" (citation omitted)); 22 U.S.C. § 9001(a)(4), (b)(4) (providing procedures for "prompt determinations," but noting U.S. courts are empowered only "to determine . . . rights under the Convention and not the merits of any underlying child custody claims").

to assess and craft ameliorative measures in such cases requires, at a minimum: (i) analysis of the abuser's characteristics and propensity to continue and escalate physical and psychological violence; (ii) a detailed assessment of the risk of lethality; (iii) a determination regarding the likelihood of compliance by an untrustworthy abuser; (iv) evaluation of the potential effectiveness of measures given the nature of the specific abuse and abuser at issue; (v) investigation of the law and institutions of the country of habitual residence; (vi) coordination with U.S. and foreign authorities; (vii) assessment of expert reports and testimony on the potential for certain ameliorative measures to protect the child; and (viii) a thorough understanding of the potential harm to the child, including the child's existing trauma and likelihood that return and possible separation from the caregiving parent (due to death or non-return of that parent) will compound the trauma. Such an endeavor is not feasible—and certainly cannot be done effectively—in the compressed timeframe of a Hague Convention proceeding.

This case exemplifies the shortcomings inherent in a Convention proceeding that results in ameliorative measures. The district court here moved relatively swiftly to schedule a trial in which the parties presented significant evidence from seventeen witnesses (including seven experts), Pet. App. 42a, which enabled the court to make detailed findings that Mr. Saada had engaged in serious domestic violence, had no "capacity to change," and that B.A.S. would face a grave risk of exposure to harm if returned to Italy. *Id.* at 48a–64a, 79a–80a. Instead of immediately denying return (satisfying the Convention's dual goals of promoting the interests of the child and expediency), the district court requested additional briefing on the issue of ameliorative measures, ordered certain undertakings,

and then took an additional nine months following remand to further develop ameliorative measures to justify return. *Id. at* 12a. Despite this additional period, the court failed to hold a further evidentiary hearing or otherwise examine many issues critical to determining whether its measures would be effective.

For example, the court assumed harm to B.A.S. would be greatly reduced by the Italian protective order, which "prohibits [Mr. Saada] from going near [Ms. Golan] or B.A.S." *Id.* at 19a–20a. But this assumption disregards (i) the extensive social science research showing that abusers are chronic recidivists whose need for control is not cabined by threat of legal sanctions, (ii) the many forms of profoundly injurious non-physical abuse that domestic violence entails, (iii) the propensity of abusers to escalate violence post-separation, and (iv) the ease with which Mr. Saada could move to modify or vacate the Italian protective order as soon as B.A.S. is returned to Italy. *See* Section II.C, *infra.* Considering these factors in the context of the serious domestic violence that Mr. Saada perpetrated, the court's reliance on a protective order issued by the Italian court is too risky—if the district court is mistaken and Mr. Saada seeks to modify or violate the order (as research and experience indicate is likely), the consequences could be deadly. *See* Section I.B *supra*.

As another example, the district court relied on the Italian order directing that Mr. Saada undergo therapy, which the court believed would address experts' concerns "about his lack of insight into his behavior and its effect on B.A.S." Pet. App. 20a. There is no indication the court considered or even was aware of research finding that interventions such as therapy *do not* reduce the high recidivism rates for

perpetrators of domestic violence. *See, e.g.*, Christopher I. Eckhardt et al., *The Effectiveness of Intervention Programs for Perpetrators and Victims of Intimate Partner Violence*, 4 Partner Abuse 196, 209, 220, 225–26 (2013).

Moreover, federal courts, which handle most Convention proceedings in the United States,[12] face particular difficulties in evaluating and crafting ameliorative measures in a short period of time given their inexperience in "basic family law matters," including family relationships involving domestic violence, which are typically the province of state family courts presiding over custody, visitation, and protection order matters.[13] Nor are U.S. judges experts in the nuances of foreign legal systems or the domestic violence outcomes for victims within a particular foreign legal system. Judges' lack of familiarity with these issues requires them to engage in a more deliberate and extensive inquiry that is simply inconsistent with the Convention's mandate to "act expeditiously."

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[12] *See* Merle H. Weiner, *Shrinking the Bench: Should United States' Federal Courts Have Exclusive or Any Jurisdiction to Adjudicate ICARA Cases*, 9 J. Comp. L. 192, 193, 198 (2014).

[13] *See* Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects on International Child Abduction*, 33 Colum. Hum. Rts. L. Rev. 275, 282–84 & nn.20–23 (2002); *see also, e.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689, 695–97 (1992).

B. Courts Cannot Be Assured that Any Ameliorative Measures Will Be Effective in the Country of Habitual Residence.

For several reasons, courts handling Hague Convention proceedings are not in a position to determine how, or even whether, any ameliorative measures they impose actually will be performed following return of the child.

First, U.S. courts are likely to receive a one-sided view of the efficacy of the protections available in the country of habitual residence. Assurances from authorities in the country of habitual residence that protective orders or other measures will effectively protect the child are likely to be overly optimistic. A government official's statement that his country would be unable to protect the child "would be embarrassing and tantamount to conceding that the country violates public international law. In addition, such an admission would reduce the number of children returned to the jurisdiction, contrary to politicians' interests" in having a high rate of return under the Convention. Merle H. Weiner, *You Can and You Should: How Judges Can Apply the Hague Abduction Convention to Protect Victims of Domestic Violence*, 28 UCLA Women's L.J. 223, 285–86 (2021).

Second, while most countries have "laws on the books" designed to protect a child from exposure to domestic violence, "[t]here is a difference between the law on the books and the law as it is actually applied and nowhere is the difference as great as in domestic relations." *Van De Sande v. Van De Sande*, 431 F.3d 567, 570–71 (7th Cir. 2005). For example, in *amici's* experience and as reflected in research reports, family courts worldwide, regardless of the "laws on the

books," re-victimize abused parents by deeming mothers "unfit" when they report that the father is abusive. *See* Council of Eur., *Mid-Term Horizontal Review of GREVIO Baseline Evaluation Reports* ¶¶ 326–38 (2021). Italy is no exception.[14] A study of Italian women, social workers, and mental health professionals found, *inter alia*, that victims of domestic violence were often "blamed by professionals during the child custody proceedings," and that there was a pervasive and unfounded belief that the mothers "invented or exaggerated abuse" allegations. Mariachiara Feresin, *Parental Alienation (Syndrome) in Child Custody Cases: Survivors' Experiences and the Logic of Psychosocial and Legal Services in Italy*, 42 J. Soc. Wel. & Fam. L. 56, 64–65 (2020).[15] This problem is magnified by courts' tendency to evince significant bias in favor of their own national. *See* Rhona Schuz, *The Influence*

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[14] *See* Council of Eur., *supra*, ¶¶ 329–31 (noting several problems specific to Italy, including "lack of expertise and understanding of violence against women of court-appointed experts whose contributions are relied upon by judges to reach their decisions" and that women who raise domestic violence in custody proceedings are often labeled "uncooperative" and "unfit for parenting").

[15] *See also* U.N. CEDAW, Concluding Observations of the Committee on the Elimination of Discrimination Against Women ¶¶ 50–51 (2011) (expressing concern over Italy's law forcing shared custody and "reports of suspicion towards claim[s] of child abuse in custody cases"); Gaia Pianigiani, *For Italy's Abused Women, a Legal Labyrinth Compounds the Wounds*, N.Y. Times (Aug. 11, 2018), https://www.nytimes/com/2018/08/11/world/europe/italy-abused-women.html (citing the high number of women killed in Italy by abusive partners and emphasizing that although "Italy has ratified international conventions on curbing violence against women, . . . women who do raise their voices are often ground up for years in Italy's infamously Byzantine legal system and countless deferments, while their partners often threaten to sue them for defamation, stalk them or continue to abuse them").

of the CRC on the Implementation of the Hague Child Abduction Convention, 3 J. Fam. L. & Prac. 45, 47 (2010) ("[T]he fact that the abducting parent is perceived to be the guilty party is liable to affect the way in which the court treats the abductor's arguments in relation to the child's interests.").

A court's optimistic predictions about a country's ability to protect children upon return are likely to be wrong, sometimes with tragic results. *See* Weiner, *You Can and You Should*, *supra*, at 285–86. For example, in the Hasanovic case discussed above, the Convention judge refused to "presume the authorities in the United Kingdom would not protect the mother and children" upon return. Dep't of Cmty. Servs. & Hadzic [2007], FamCA 1703 ¶¶ 6, 9 (Nov. 30, 2007). Yet, the judge was wrong—even though Ms. Hasanovic secured full custody and a protective order following return, the U.K. authorities could not prevent her murder and, in the preceding months, had even declined to arrest the father for contacting Ms. Hasanovic in violation of a court order. *See* Michael Salter, *Getting Hagued: The Impact of International Law on Child Abduction by Protective Mothers*, 39 Alt. L.J. 19, 21 (2014); *see also* Laville, *supra*.

Finally, a domestic violence victim in the position of attempting to rebut overly sanguine representations by a foreign country's authorities has an extremely difficult task. As one court recognized, requiring a caretaker parent "to adduce evidence regarding the condition of the legal and social service system in a country she has fled creates difficult problems of proof,"[16] and such evidence may be "discounted for lack

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[16] *See Baran v. Beaty*, 526 F.3d 1340, 1348 (11th Cir. 2008). These difficulties are compounded by the fact that the caretaker

of specificity." Weiner, *You Can and You Should*, *supra*, at 286. The proof required to sufficiently challenge the effectiveness of ameliorative measures in a foreign country requires additional fact-finding and expert testimony, both of which require time—in contravention of the mandate to resolve Convention cases "expeditiously." Such proof also requires significant financial resources on the part of the victim, putting an effective rebuttal out of reach for most victims.

Victims often begin these proceedings with drained finances as a result of ongoing financial abuse, a common tactic used by abusers (and one that Mr. Saada employed),[17] costs incurred in their flight from abuse, and the resources already expended to litigate grave risk.[18] Requiring a victim to try to find additional funds to disprove the effectiveness of ameliorative measures does not serve the interests of justice or of protecting the child. *See* Roxanne Hoegger, *What if She Leaves? Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 Berkeley Women's L.J. 181, 196–98 (2003) (abusive partners often seek to control the finances of

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parent likely will be unable to cross examine the foreign authorities. Weiner, *You Can and You Should*, *supra*, at 287.

[17] Stark, *Looking Beyond Domestic Violence*, *supra*, at 211 (in a survey of over 500 domestic violence victims, 79% reported being denied access to money or having it taken from them); J.A. 35–36.

[18] Ms. Golan (who has limited personal resources) was fortunate to find top-notch counsel willing to represent her on a pro bono basis over nearly four years. In *amici's* experience most caretaker parents are not as lucky and will be unable to pay for competent counsel to litigate effectively both the grave risk exception and the inadequacy of ameliorative measures.

abused parents and make litigation more onerous); Merle H. Weiner, *The Article 13(b) Guide to Good Practice*, 25 Dom. Viol. Rep. 7, 21 (2019) ("[Litigating 'protective measures'] puts an additional burden on a survivor who is already disadvantaged in many ways in the litigation . . . ."). For all these reasons, courts are unlikely to be able to fashion ameliorative measures that will actually operate effectively in the country of habitual residence.

C. Courts Cannot Ensure Enforcement of Ameliorative Measures to Be Performed in the Country of Habitual Residence.

Once a child and the child's abusive parent are outside the United States, a U.S. court is powerless to enforce conditions it imposed, and courts in the country of habitual residence are not bound to enforce the U.S. court's orders.[19] Given this lack of enforcement authority, a court gambles with a child's safety when it orders return subject to ameliorative measures.[20]

In this case, the district court concluded the Italian protective order would be enforced, noting that Mr. "Saada knows he will face consequences in Italy, in

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[19] The Convention imposes no obligation on other countries to recognize and enforce ameliorative measures ordered by a U.S. court. As described in Section 2 of the *amicus* brief of the Cox International Law Center, unlike many of our treaty partners, the United States is not party to any agreement providing for enforcement of its courts' Hague Convention orders.

[20] Several courts of appeals have cited the impossibility of enforcement in declining to require district courts to consider ameliorative measures. *See, e.g.*, *Simcox v. Simcox*, 511 F.3d 594, 606–07 (6th Cir. 2007); *Baran*, 526 F.3d at 1350.

terms of both contempt of court and B.A.S.'s custody and visitation determination, if he violates the Italian court's protective order." Pet. App. 9a. But this conclusion ignores abusers' disregard of legal consequences, as explained *supra* in Section I.B. Abusers frequently violate protective orders and Mr. Saada is not trustworthy.[21] The district court's confidence mirrors the confidence of the Australian judge in the Hasanovic case, even though the U.K. court's custody and protective orders proved no deterrent for Ms. Hasanovic's husband, who repeatedly confronted her following return before ultimately killing her.

There is also no guarantee that Mr. Saada will not ask the Italian court to modify or vacate the protective order or seek to terminate Ms. Golan's custody and visitation rights the minute B.A.S. is returned to Italy. Indeed, litigation abuse is a classic coercive control tactic that abusers use to continue tormenting their victims long after separation, especially when children are involved. And controlling abusers like Mr. Saada are "likely to use children as proxies for control post-separation. . . ." Brittany E. Hayes, *Indirect Abuse Involving Children During the Separation Process*, 32 J. Interpersonal Violence 2975, 2978 (2017). Repeated attempts to eliminate the victim's custody and/or visitation rights,[22] can negatively impact the caregiver's parenting and harm the child.

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[21] *See also Achakzad v. Zemaryalai* [2011] W.D.F.L. 2, July 20, 2010, Ontario Ct. of Just. (Can.) [INCADAT Reference: HC/E/CA 1115] (returning child to the United States posed a grave risk that could not be mitigated by a U.S. safe harbor order given the father's violent tendencies and lack of credibility).

[22] *See* Leora N. Rosen & Chris S. O'Sullivan, *Outcomes of Custody and Visitation When Fathers Are Restrained by Protection Orders: The Case of the New York Family Courts*, 11 Violence

A U.S. court must also thoroughly assess whether the caretaker parent will be in a position to enforce a protective order in the event the abuser violates the order and the caretaker parent survives the violence. In reality, once the caretaker parent returns with the child, the power dynamic inevitably shifts heavily in favor of the abuser, impeding the caretaker parent's ability to pursue vigorous enforcement of ameliorative measures. The child and caretaker parent are again within the abuser's sphere of control, isolated from the caretaker's support system in her home country and likely impoverished from years of financial abuse and with resources drained from litigation. *Amici* have seen this scenario repeatedly. When "courts force victims to return to countries of [the child's] habitual residence, where they are immigrants, judges may unwittingly enable [abusers] to control their victims more effectively. . . . [Abusers] can easily isolate and take advantage of victims' marginalized status." Hoegger, *supra*, at 196–97. Caretaker parents are likely to lack financial resources and face "language barriers, cultural differences and possibly levels of racism" upon return, all of which make enforcement of ameliorative measures difficult.[23] In fact, a study of

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Against Women 1054, 1069 (2005) ("There is certainly much anecdotal evidence that abusive husbands use the threat of loss of child custody as a way of exerting control over their victims."); Nat'l Council of Juv. & Fam. Ct. Judges, *Batterer Manipulation of the Courts to Further Their Abuse, and Remedies for Judges*, 12 Synergy 12 (2008) (perpetrators themselves often identify "the use of custody proceedings [as] a strategy . . . to control or harass former partners").

[23] *See* Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women and Children are Being Returned by Coach and Four*, 13 Int'l J.L. Pol'y & Fam. 191, 194 (1999); *see also* Reunite, *supra*, at 33–34 (reporting on a study of Convention cases, including one woman who "stated that she did

Hague Convention cases confirms that "it has proven extremely difficult [for caretaker parents] to enforce . . . undertakings in the home jurisdiction." Reunite, *supra*, at 34. For example, in one case the father "successfully sought to dismiss his obligations under the return Order" when the caretaker parent attempted enforcement. *Id.*

Here, if B.A.S. is returned to Italy, he and Ms. Golan would be separated from their extensive familial, social, educational, legal, social service, and medical support system in New York. They would instead be forced back to a country where Ms. Golan does not have a job, secure immigration status, a work permit, or any employment history. She does not speak the language, is unfamiliar with the legal system, and lacks a support system. She and B.A.S. would be in physical proximity to a dangerous abuser with a distinct home court advantage. Pet. Br. 46. The district court dismissed these concerns, finding that its order that Mr. Saada pay Ms. Golan $150,000.00 would effectively "alleviate [Ms. Golan's] asserted concerns about her vulnerability as a non-citizen with limited Italian language skills." Pet. App. 23a. However, this arbitrary lump sum payment cannot protect B.A.S. from harm upon a violation of an order before enforcement, help Ms. Golan communicate with police in a moment of crisis, or help her navigate an unfamiliar and byzantine foreign court system. These shortcomings are particularly problematic given that

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not do anything about the undertakings given and broken by the father because legal aid is not widely available in the home jurisdiction and she did not have funds to pursue litigation"); Edleson, *supra*, at 185–87 (discussing the economic difficulties faced by several abused women following return to the country of habitual residence).

the lump sum payment fails to ensure enforcement of the court's other measures. The payment also fails to address the many hurdles Ms. Golan will face seeking financial and housing independence in Italy, making it likely that she may still "need to interact with Saada regarding B.A.S.'s expenses", presenting the risk of further violence. *See id.* at 8a n.2. In these circumstances, it is highly unlikely that Ms. Golan will be in a position to enforce the Italian protective order effectively or to resist Mr. Saada's likely efforts to modify it.

III. THIS COURT SHOULD MAKE CLEAR THAT ONCE A COURT FINDS RETURN WOULD POSE A GRAVE RISK THAT A CHILD WILL BE EXPOSED TO HARM FROM DOMESTIC VIOLENCE, ORDERING RETURN IN RELIANCE ON AMELIORATIVE MEASURES WOULD BE INCONSISTENT WITH THE CONVENTION'S CENTRAL GOAL OF PROTECTING CHILDREN.

When a court finds, based on a history of domestic violence, that returning the child would put the child at a grave risk of exposure to harm under Article 13(b), the court should never order return in reliance on inherently speculative and unenforceable ameliorative measures. The preceding sections demonstrate why such measures cannot effectively mitigate the risk of harm to a child when a dangerous and untrustworthy domestic violence perpetrator creates that risk. Ordering return is far too great a gamble with the child's safety, and ordering return in reliance on ameliorative measures essentially eviscerates the grave risk exception and undermines the Convention's paramount concern with the safety of children.

The U.S. State Department has stated, on at least one occasion, that instead of attempting to fashion extensive ameliorative measures and thereby delay resolution of the case, the better course is simply for the court to deny return. *See* Br. for the United States as *Amicus Curiae*, filed in this docket Oct. 27, 2021, at App. 16a (Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, U.S. Dep't of State, to Michael Nicholls, Lord Chancellor's Dep't, Child Abduction Unit, U.K.). Because return in reliance on ameliorative measures cannot effectively protect the child who faces a grave risk of exposure to harm from domestic violence, this common sense conclusion best serves not only the Convention's goal of expeditious proceedings, but also its goal of protecting children from physical and psychological harm.

CONCLUSION

For all the reasons discussed above, the Court should reject the Second Circuit's requirement that federal district courts consider ameliorative measures once they find grave risk based on domestic violence. To assist the courts below in this case, and all federal and state courts that are called on to rule on future Hague Convention petitions, the Court should also hold that issuance of a return order in reliance on ameliorative measures in domestic violence grave risk cases is inconsistent with the important Convention goal of protecting children from harm.

Respectfully submitted,

CAROLYN F. CORWIN
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
ccorwin@cov.com

RYAN R. ROBERTS
COVINGTON & BURLING LLP
3000 El Camino Real
5 Palo Alto Square
Palo Alto, CA 94306
(650) 632-4700
rroberts@cov.com

SHAILEE DIWANJI SHARMA
Counsel of Record
CATHERINE M. CARULAS
COVINGTON & BURLING LLP
The New York Times Bldg.
620 Eighth Avenue
New York, NY 10018
(212) 841-1000
ssharma@cov.com
ccarulas@cov.com

Counsel for Amici Curiae

January 26, 2022

APPENDIX

APPENDIX

List of *Amici Curiae*

Amici Curiae are the following organizations and individuals with extensive experience providing services to and advocating for victims of domestic violence in the United States and abroad.[1]

1. **Sanctuary for Families, Inc.**
2. **Battered Mothers Custody Conference**
3. **Day One New York Inc.**
4. **Her Justice, Inc.**
5. **Joan Meier**, Professor of Clinical Law and Director, National Family Violence Law Center at the George Washington University Law School
6. **Lawyers Committee Against Domestic Violence New York**
7. **Legal Momentum, The Women's Legal Defense and Education Fund**
8. **Merle Weiner**, Philip H. Knight Professor, University of Oregon School of Law
9. **National Network to End Domestic Violence, Inc.**
10. **New York Legal Assistance Group Inc.**

[1] Individuals' institutional affiliations are included for identification purposes only and do not constitute or reflect institutional endorsements.

11. **New York State Coalition Against Domestic Violence Inc.**
12. **Partners for Women and Justice, Inc.**
13. **Safe Horizon, Inc.**