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

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BRIEF FOR *AMICI CURIAE* FORMER JUDGES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction requires that a child wrongfully removed from a country in which he or she was habitually resident must be returned to that country for an adjudication of custody rights unless, inter alia, there is a grave risk that return would expose the child to physical or psychological harm. The question presented is:

Whether, upon determining that return to the country of habitual residence places a child at grave risk, a district court is required to consider ameliorative measures that would facilitate the return of the child despite the grave-risk determination.

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INTERESTS OF *AMICI CURIAE*[1]

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[1] Pursuant to Rule 37.6, *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. All parties consented in writing to the filing of this brief.

York Supreme Court, New York County, and the Civil Court of the City of New York; the Hon. **William Royal Furgeson, Jr.**, Member of FurgesonMalouf Law PLLC, and formerly of the United States District Court for the Western District of Texas; the Hon. **Nancy Gertner**, Senior Lecturer on Law at Harvard Law School, and formerly of the United States District Court for the District of Massachusetts; the Hon. **John Gleeson**, Partner at Debevoise & Plimption LLP, and formerly of the United States District Court for the Eastern District of New York; the Hon. **Timothy K. Lewis**, Counsel at Schnader Harrison Segal & Lewis LLP, and formerly of the United States Court of Appeals for the Third Circuit and the United States District Court for the Western District of Pennsylvania; the Hon. **Richard J. Holwell**, Partner at Holwell Shuster & Goldberg LLP, and formerly of the United States District Court for the Southern District of New York; the Hon. **A. Howard Matz**, Senior Counsel at Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, P.C., and formerly of the United States District Court for the Central District of California; the Hon. **Stephen M. Orlofsky**, Partner at Blank Rome LLP, and formerly of the United States District Court for the District of New Jersey; the Hon. **Ernst H. Rosenberger**, Of Counsel at Stroock & Stroock & Lavan LLP, and formerly of the New York Supreme Court Appellate Division, First Department and the New York Supreme Court, New York County; the Hon. **Shira A. Scheindlin**, Of Counsel at Stroock & Stroock & Lavan LLP, and formerly of the United States District Court for the Southern District of New

York; the Hon. **Jacqueline W. Silbermann**, Special Counsel at Dobrish, Michaels, Gross LLP, and formerly of the New York Supreme Court, New York County; and the Hon. **Thomas I. Vanaskie**, Of Counsel at Stevens & Lee, and formerly of the United States Court of Appeals for the Third Circuit and the United States District Court for the Middle District of Pennsylvania.

Amici are concerned that the Second Circuit mandate that trial courts consider ameliorative measures in all Hague Convention cases in which they make a "grave risk" finding will force courts to engage in conduct beyond their jurisdiction and experience and wade into the underlying merits of the custody dispute, in contravention of the treaty, its implementing legislation, and the basic structure of our adversarial system. *Amici* are further concerned that it will put unnecessary strain on US court dockets and prevent expeditious resolution of Hague Convention cases. *Amici* therefore submit this brief in support of Petitioner Golan.

SUMMARY OF ARGUMENT

The Second Circuit mandate that trial courts consider crafting ameliorative measures after making a "grave risk" determination in Hague Convention[2] cases involving domestic violence obligates US courts to wade into the underlying custody determination. Not only does this contravene the language and intent of the Convention, it: (i) forces US judges into a role that exceeds the bounds of their traditional jurisdiction and interaction with foreign law; (ii) requires US judges to perform non-judicial tasks that they are ill-equipped to fulfill; and (iii) wastes scarce judicial resources.

First, federal district courts are courts of limited subject matter jurisdiction, constrained by Article III and federal legislation. In certain limited circumstances, they determine matters of foreign law. But US courts never step into the role of a foreign civil law judge by proactively investigating and resolving the non-judicial issues surrounding foreign custody disputes.

Second, most US courts lack familiarity and experience with the family law issues implicated in cases such as the one at bar. Even in domestic cases, federal district courts lack experience with state family law issues, due to the domestic relations exception and abstention doctrines. US courts have even less experience in handling family law matters based on the law and institutions of other countries.

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[2] The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, reprinted in 51 Fed. Reg. 10,494 (Mar. 26, 1986) [hereinafter Hague Convention].

Finally, mandatory consideration of ameliorative measures prevents the expeditious resolution of cases as contemplated by the Convention. It also puts unnecessary strain on the dockets of busy courts and forces judges to expend resources on non-judicial issues surrounding the safety of minors, including custody determinations, that will eventually be relitigated abroad. Even if US courts had the ability to craft ameliorative measures in a timely and efficient manner, they most often lack the jurisdiction to enforce the ameliorative measures they spend so much time crafting.

For these reasons, this Court should adopt the discretionary model, advanced by the First, Eighth, and Eleventh Circuits, as well as the US State Department and the United States as *amicus curiae*.[3] Discretion would permit courts to forgo the protracted and improper consideration of ameliorative measures in domestic violence cases such as the one at bar. At the same time, discretion would permit courts to craft ameliorative measures in cases in which the measures (i) would not require the court to wade into the underlying custody dispute, (ii) would not force the court into an improper investigation of non-legal foreign institutions, and (iii) would be enforceable. In addition, it would permit courts to act promptly and efficiently to resolve Hague Convention cases, as

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[3] *See Danaipour v. McLarey*, 286 F.3d 1, 21 (1st Cir. 2002); *Acosta v. Acosta*, 725 F.3d 868 (8th Cir. 2013); *Baran v. Beaty*, 526 F.3d 1340, 1349 (11th Cir. 2008); Brief for the United States as Amicus Curiae [hereinafter U.S. Cert. Br.] at 1a–20a (Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Dep't of State, to Michael Nicholls, Child Abduction Unit, Lord Chancellor's Dep't, United Kingdom (Aug. 10, 1995)); U.S. Cert. Br. at 8, 11–14, 18–19.

contemplated in the treaty. Therefore, this Court should reject the mandatory consideration of ameliorative measures and instead leave it to the discretion of the trial courts.

ARGUMENT

I. Mandating Judicial Analysis of Ameliorative Measures Forces US Courts Beyond their Traditional Jurisdiction and Interactions with Foreign Law

Requiring courts to consider and impose ameliorative measures in cases such as this one forces courts to delve into the merits of the underlying custody dispute,[4] and thereby obligates them to make judgments regarding the effectiveness of foreign social and legal institutions. This represents a significant deviation from the ordinary interactions with foreign law by US courts.

Federal courts have the power to utilize "any relevant material or source" to resolve "question[s] of law" related to the application of foreign law.[5] Courts may "undertake [their] own research" in learning and applying such law[6] and may reject interpretations of foreign law provided by the foreign government itself.[7] Recently, district courts have analyzed and

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[4] *See* Brief for the Petitioner [hereinafter Pet. Br.] at 38–40; U.S. Cert. Br. at 16a.

[5] Fed. R. Civ. P. 44.1.

[6] *Compania Sud Americana De Vapores, S.A. v. I.T.O. Corp. of Baltimore*, 940 F. Supp. 855, 861 (D. Md. 1996).

[7] *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1868 (2018) ("[A] federal court is neither bound to adopt the foreign government's characterization [of its own law] nor required to ignore other relevant materials.").

applied a diverse array of foreign laws, including Indian contract law,[8] the premises liability law of St. Kitts and Nevis,[9] the negligence standards of Colombia,[10] and the damage mitigation law of the Netherlands.[11] Deciding questions of foreign law also parallels the process district courts undertake in reaching conclusions of domestic law, including considering briefs from the parties, the opinions of experts, and legal treatises. There can thus be no question that US federal judges have the training, expertise, and experience to resolve questions of foreign law.

But interpreting foreign law is plainly a far different task than the research and crafting of non-legal ameliorative measures in Hague Convention cases, which often involve complex assessments of the foreign social and healthcare institutions involved in the protection of the child. Interpreting foreign law is also categorically different than mastering the intricate practical operations of foreign legal systems.

As the trial court's extensive actions in this case show, in order to ensure that ameliorative measures are adequate in a case involving domestic abuse, a court must first become intimately familiar with the operative facts in relation to a range of diverse topics in the foreign jurisdiction. These topics

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[8] *See M.A. Mobile Ltd. v. Indian Inst. of Tech. Kharagpur*, 400 F. Supp. 3d 867 (N.D. Cal. 2019).

[9] *See Clarke v. Marriott Int'l, Inc.*, 403 F. Supp. 3d 474 (D.V.I. 2019).

[10] *See Mayaguez S.A. v. Citigroup, Inc.*, No. 16-CV-6788, 2021 WL 1799653 (S.D.N.Y. Apr. 30, 2021).

[11] *See Euroboor B.V. v. Grafova*, No. 2:17-CV-02157, 2021 WL 4325694 (N.D. Ala. Sept. 23, 2021), *reconsideration denied*, No. 2:17-CV-2157, 2021 WL 5085952 (N.D. Ala. Nov. 2, 2021).

can include: (i) protective orders, (ii) criminal proceedings, (iii) immigration, (iv) social service investigations, (v) behavioral and psychoeducational therapy, (vi) parenting classes, and (vii) special education needs—just to name those directly implicated by the measures ordered here.[12] Affirming the Second Circuit's mandate would force courts to engage in a similar inquiry every time they found a "grave risk" to the child[13] in cases involving domestic abuse.

US judges are rarely, if ever, asked to perform independent investigations of domestic non-legal institutions. Judges are not domestic social workers, mental health professionals, therapists, special education specialists, or law enforcement officers. *A fortiori*, they should not be asked to take on such roles or become experts with respect to such institutions in foreign jurisdictions.

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[12] *See Saada v. Golan*, No. 18-CV-5292, 2019 WL 1317868, at *20 (E.D.N.Y. Mar. 22, 2019), *aff'd in part*, *vacated in part*, *remanded*, 930 F.3d 533 (2d Cir. 2019) [hereinafter *Saada I*] (outlining initial ameliorative measures); *Saada v. Golan*, No. 18-CV-5292, 2020 WL 2128867, at *2–6 (E.D.N.Y. May 5, 2020), *aff'd*, 833 F. App'x 829 (2d Cir. 2020), *cert. granted*, No. 20-1034, 142 S. Ct. 638 (2021), *and motion for relief from judgment denied*, No. 18-CV-5292, 2021 WL 1176372 (E.D.N.Y. Mar. 29, 2021), *aff'd*, No. 21-876-CV, 2021 WL 4824129 (2d Cir. Oct. 18, 2021) [hereinafter *Saada II*] (outlining updated ameliorative measures).

[13] *See* Hague Convention art. 13 ("Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that – . . . (b) 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.").

However, not all cases necessarily present the issues raised in this case and others involving domestic abuse. There may instead be other factors, unrelated to the custody dispute, that would create a "grave risk" of exposure to harm for the child. Indeed, courts frequently state that it would place a child in grave risk of exposure to harm within the meaning of the Hague Convention if they were to be returned "to a zone of war, famine, or disease."[14] In such cases, a court might be able to mitigate the risk of harm to the child by crafting ameliorative measures that would neither intrude into the custody determination nor require courts to engage in extensive consideration of foreign social and legal institutions.

Petitioner provides an example of such a hypothetical case in which the child's "country of habitual residence is facing an outbreak of a contagious disease but preventative medications are available in the United States."[15] In such a case, Petitioner argues, "the court could issue an order conditioning the child's return on receipt of the medications."[16] This would neither require the court to wade into the underlying custody dispute nor obligate it to investigate the various social, healthcare, and legal institutions of the foreign jurisdiction.

Adoption of the discretionary model would thus allow US courts the option to decline crafting ameliorative measures in certain cases they deem to be inappropriate, such as the one at bar. Instead, courts could craft appropriate ameliorative measures

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[14] *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996); *Blondin v. Dubois*, 238 F.3d 153, 162 (2d Cir. 2001).

[15] Pet. Br. at 38.

[16] *Ibid.*

only where they deem it possible to do so while maintaining their traditional role of interpreting and applying foreign law, rather than engaging in time-consuming and perhaps fruitless interactions with foreign legal and non-legal institutions.

a. Civil Law Judges Perform Investigatory Functions; Common Law Judges Do Not

In considering the limited role of the US judge within the common law adversarial system, it is instructive to contrast that role with the more expansive and inquisitorial function that civil law judges perform. Under various civil law systems, judges assume the primary responsibility for investigating the underlying facts and developing the record following the commencement of the action.[17] Civil law judges may perform tasks including (i) calling and examining witnesses; (ii) appointing experts; (iii) interrogating suspects; (iv) ordering further investigations; and (v) preparing written summaries of the evidence.[18] This stands in sharp

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[17] *See Inquisitorial System*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A system of proof-taking used in civil law, whereby the judge conducts the trial, determines what questions to ask, and defines the scope and the extent of the inquiry. This system prevails in most of continental Europe, in Japan, and in Central and South America.").

[18] *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 560 (1987) (Blackmun, J., concurring in part) ("The civil-law system is inquisitional rather than adversarial and the judge normally questions the witness and prepares a written summary of the evidence."); Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 1015 (2009)

contrast with the US adversarial system in which it is the role of parties and their counsel to uncover and present the facts. US judges serve only as neutral arbiters or "umpires."[19]

Mandating that US judges (i) determine whether ameliorative measures are sufficient to overcome grave risk concerns, and (ii) if they so

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(explaining that in civil law systems: "After a case is filed, the judge examines any documents the parties have submitted, requests further evidence, and undertakes investigatory hearings. If an issue requires expertise, it is the judge that hires the experts."); JAMES G. APPLE & ROBERT R. DEYLING, FEDERAL JUDICIAL CENTER, A PRIMER ON THE CIVIL-LAW SYSTEM 27–28 (1995) (explaining that in civil law systems, with respect to civil cases, "[t]he judge supervises the collection of evidence and preparation of a summary of the record on which a decision will be based"; and that with respect to criminal cases "[t]he examining judge plays an active role in the collection of evidence and interrogation of witnesses").

[19] *See* Dean Roscoe Pound, *Proceedings in Commemoration of the Address*, 29 A.B.A. Rep. 395 (1906), reprinted in 35 F.R.D. 241, 273–91, 281 (1964) ("The sporting theory of justice, the 'instinct of giving the game fair play,' as Professor Wigmore has put it, is so rooted in the profession in America that most of us take it for a fundamental legal tenet. . . . [I]n America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interest of justice."); U.S. Courts, *Chief Justice Roberts Statement – Nomination Process* <https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process> ("Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.").

determine, to craft such measures, erodes their neutral arbitral role and forces them to perform quasi-investigatory functions which are at odds with our adversarial system. For example, on remand, and in compliance with the Second Circuit's mandate, the district court in this case conducted a nine-month "extensive examination of measures available to ensure B.A.S.'s safe return to Italy."[20] This examination—led primarily by Judge Donnelly as opposed to the parties—included direct correspondence between Judge Donnelly and "the Italian Central Authority and the Italian Ministry of Justice on matters concerning B.A.S., the petitioner and the respondent."[21] This independent, proactive role minimizes the guidance of the parties and is more akin to that of a civil law judge.

This is not the role envisioned for judges in our adversarial system of law. Thus, the Second Circuit's mandate that trial courts examine the legal and factual circumstances in foreign jurisdictions in order to craft ameliorative measures in all cases can force US judges into an improper investigatory role that bleeds into the merits of the custody dispute. And even were the investigation into foreign social and legal institutions to be primarily led by the parties, it would still cause the court to extend its role beyond the usual boundaries with respect to foreign law. Moreover, extensive ameliorative measures can raise international comity concerns.[22]

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[20] *Saada II*, 2020 WL 2128867, at *1.

[21] *Ibid.*

[22] *See Danaipour v. McLarey*, 286 F.3d 1, 23–25 (1st Cir. 2002) ("Conditioning a return order on a foreign court's entry of an order, as the district court did here, raises serious comity

II. Federal District Courts Have Limited Family Law Experience

As courts of limited subject matter jurisdiction, federal district courts may only adjudicate cases or controversies authorized by both Article III and a federal jurisdictional statute.[23] Accordingly, federal courts are relatively unfamiliar with certain areas of the law which have historically been viewed as the province of the states; family law is one such area.[24] In addition to these constitutional and statutory limitations, federal courts are further constrained in their experience with family law by common law abstention doctrines, which exist to reinforce this allocation of jurisdiction.

This Court has long recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the

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concerns. The Department of State has stated that it 'does not support conditioning the issuance of a return order on the acquisition of [an] order from a court in the requesting state,' presumably because such a practice would smack of coercion of the foreign court. . . . In sum, the district court offended notions of international comity under the Convention by issuing orders with the expectation that the Swedish courts would simply copy and enforce them.").

[23] *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 552 (2005).

[24] *See Mansell v. Mansell*, 490 U.S. 581, 587 (1989) ("[D]omestic relations are preeminently matters of state law."); *Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern."); *Thompson v. Thompson*, 484 U.S. 174, 185 (1988) ("[F]ederal enforcement of state custody decrees would . . . entangle the federal judiciary in domestic relations disputes with which they have little experience and which traditionally have been the province of the States.").

states and not to the laws of the United States."[25] So strong is the Court's deference to state law in this area that it has formally recognized a "domestic relations exception" to federal subject matter jurisdiction.[26]

The Supreme Court first articulated the domestic relations exception in 1858 in *Barber v. Barber*, a diversity suit brought by a wife to enforce a New York state court alimony award against her husband who had moved to Wisconsin in an attempt to escape the jurisdiction of the New York court.[27] In *dicta*, the Court noted, "[w]e disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony."[28] Over the next century, the Court addressed the reach of the exception in a variety of circumstances.[29] Then, in 1992, in *Ankenbrandt v. Richards*, this Court contracted the scope of the

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[25] *Ex parte Burrus*, 136 U.S. 586, 593–594 (1890).

[26] *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

[27] *Barber v. Barber*, 62 U.S. (21 How.) 582, 583–84 (1858).

[28] *Id.* at 584. The Court specifically noted at the outset that "this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction. The [district] court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud." *Ibid.*

[29] *See, e.g.*, *Burrus*, 136 U.S. at 591 (noting that child custody cases generally do not fall within the jurisdiction of federal courts); *Simms v. Simms*, 175 U.S. 162, 167–68 (1899) (holding that the state law domestic relations considerations raised in *Burrus* had "no application to the jurisdiction of the courts of a territory, or to the appellate jurisdiction of this court over those courts"); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930) (holding that federal jurisdiction did not extend to disputes over "divorces and alimony").

exception, concluding that it "divests the federal courts of power to issue divorce, alimony, and child custody decrees" in cases before the court on diversity jurisdiction.[30] However, the Court did not discuss the exception's application to federal questions.[31] As such, lower courts remain split on the exact reach of the exception.[32]

While the outer bounds of the domestic relations exception remain unsettled, even in circumstances in which the exception may not apply, the domestic relations abstention principle often acts to limit federal courts' involvement in matters of family law.[33] This principle, like other abstention doctrines, allows district courts to refuse to hear a case if doing so would improperly intrude on the powers of another court.[34] The combination of limited subject matter jurisdiction, along with these doctrines, has thus limited the experience of federal courts with matters of family law, and more specifically, with custody decrees.[35] For Hague Convention cases that involve domestic violence, this

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[30] *Ankenbrandt*, 504 U.S. at 703–04.

[31] *Id.* at 693–704.

[32] *Compare Williams v. Lambert*, 46 F.3d 1275, 1284 (2d Cir. 1995) (holding that the exception does not apply to cases "before this Court on federal question jurisdiction"), *with Kowalski v. Boliker*, 893 F.3d 987, 995 (7th Cir. 2018) (holding that "the domestic-relations exception . . . appl[ies] to both federal-question and diversity suits").

[33] *See Deem v. DiMella-Deem*, 941 F.3d 618, 621–25 (2d Cir. 2019).

[34] *See American Airlines, Inc. v. Block*, 905 F.2d 12, 14 (2d Cir. 1990) ("[E]ven if subject matter jurisdiction lies over a particular matrimonial action, federal courts may properly abstain from adjudicating such actions in view of the greater interest and expertise of state courts in this field.").

[35] *Ankenbrandt*, 504 U.S. at 703.

lack of experience can jeopardize the child's well-being.

When evaluating ameliorative measures, a court must "satisfy itself that the child[] will in fact, and not just in legal theory, be protected" if returned to their home country.[36] But district courts "do not have staffs of social workers, and there is too little commonality between family law adjudication and the normal responsibilities of federal judges to give them the experience they would need to be able to resolve domestic disputes with skill and sensitivity."[37] Given the Convention's focus on protecting children,[38] and the custody concerns inherent in cases of domestic violence, this lack of experience could cause significant problems.[39]

As this case illustrates, courts may be forced to evaluate the effectiveness of behavioral therapies and other such protections as part of the ameliorative measures analysis.[40] Unfortunately, as research

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[36] *Van De Sande v. Van De Sande*, 431 F.3d 567, 571 (7th Cir. 2005).

[37] *Lloyd v. Loeffler*, 694 F.2d 489, 492 (7th Cir. 1982); *accord Danaipour v. McLarey*, 286 F.3d 1, 21 (1st Cir. 2002) (courts must "recognize the limits" of their abilities in Hague Convention cases).

[38] The preamble to the Convention states that "the interests of children are of paramount importance in matters relating to their custody." Hague Convention Preamble. Furthermore, the existence of Article 13's grave risk exception indicates a desire to protect the child's safety. Hague Convention art. 13(b).

[39] *See* Henry J. Friendly, *Reactions of a Lawyer-Newly Become Judge*, 71 YALE L.J. 218, 223–24 (1961) (discussing how a lack of judicial expertise may cause problems when judges are confronted with "a question for which accepted judicial techniques afford no satisfactory answer").

[40] *See Saada I*, 2019 WL 1317868, at *19.

indicates, domestic abusers often have little regard for such protections, violating them nearly as often as not.[41] As a result, even within the field of child welfare itself, there are questions as to the efficacy of such measures.[42] To affirm the Second Circuit's mandate would force courts to delve into unsettled psycho-behavioral issues, among many others, a task they are simply not qualified to perform.

III. Mandatory Consideration of Ameliorative Measures Protracts Hague Convention Cases and Saps Judicial Resources

a. Crafting Ameliorative Measures Prevents Courts from Resolving Hague Convention Cases in an Expedited Manner, As Required by the Convention

The Hague Convention's text elucidates several animating principles, paramount of which is the well-being of the child.[43] Where there is no "grave risk" to the child, the Convention urges the prompt return of the child to her home country.[44] It is for that reason that Hague Convention cases are intended to

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[41] *See* Pet. Br. at 41–42; *see also* Christopher T. Benitez, MD et al., *Do Protection Orders Protect?*, 38 J. AM. ACAD. PSYCH. LAW 376, 384 (2010) (discussing the mean rate of 40% violation of protective orders found throughout a series of published studies).

[42] *See* Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529, 542–43 (2004).

[43] Hague Convention Preamble.

[44] *Ibid.*; *id.* art. 1.

proceed on "expedit[ed]" timelines[45] and are primarily designed to determine solely which jurisdiction should serve as the forum for resolving the custody dispute.[46] Mandating that courts undertake an ameliorative measures analysis in all cases contravenes these stated policy goals.

Crafting ameliorative measures is often an extremely time-consuming process. As discussed above, the courts' lack of experience in crafting custody decrees means that judges must conduct "extensive examination[s]," liaising with international authorities to determine the adequacy and enforceability of the measures imposed.[47] This

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[45] Hague Convention art. 2 ("Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.") *Id.* art. 11 ("The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. . . ."); *see also Chafin v. Chafin*, 568 U.S. 165, 179 (2013) ("[W]hether at the district or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible . . . .").

[46] *See* Department of State, *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction* 36–37 (Apr. 2010) <tinyurl.com/2010haguecompliance>; Hague Permanent Bureau, *Report on the Fifth Meeting of the Special Commission* 56 (Mar. 2007) ("The Permanent Bureau stated that suggestions had been made to limit the use of undertakings to . . . respect the jurisdictional nature of the Convention by not intruding on custody issues to be determined by the court of the habitual residence.") <tinyurl.com/hcchfifthmeeting>. Courts are also expressly instructed not to determine the underlying "merits" of the custody dispute. *See* Hague Convention arts. 16, 19; 22 U.S.C. § 9001(b)(4).

[47] *Saada II*, 2020 WL 2128867, at *1–4.

process is "time-consuming and complicated," and can "slow down proceedings."[48]

The Hague Convention sets out a baseline expectation for a return decision to be made within six weeks following the commencement of the proceeding.[49] However, when courts are mandated to first consider and craft ameliorative measures, and thereby wade into the merits of the custody case, resolution of the forum issue becomes protracted and the benefits of an expedited process are lost.[50]

This case is a prime example of how the issue of ameliorative measures can turn an expedited preliminary determination on proper forum into a years-long de facto adjudication of the merits—in direct contravention of the mandates of the Convention and its implementing legislation.[51] This

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[48] 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, 201 (2003).

[49] Hague Convention art. 11; *Monasky v. Taglieri*, 140 S. Ct. 719, 724 (2020) (noting the "normal" six week timeframe outlined in the Convention); *see also* HON. JAMES D. GARBOLINO, FEDERAL JUDICIAL CENTER, THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR JUDGES 161–65 (2d ed. 2015) (discussing use of expedited discovery, briefing, and appeals in US Hague Convention cases) <https://findmyparent.org/wp-content/uploads/2021/08/Hague-Convention-Guide.pdf>.

[50] *See* Pet. Br. at 35–38, 43–44.

[51] *See* Hague Convention art. 16 ("[T]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 until it has been determined that the child is not to be returned under this Convention . . . ."); 22 U.S.C. § 9001(b)(4) (barring US courts from engaging with the "merits of any underlying child custody claims").

case was first filed in the district court on September 20, 2018.[52] After a nine-day bench trial in January, 2019, the district court issued its first Memorandum and Order on March 22, 2019.[53] Thereafter, due to the Second Circuit's mandate, the parties spent the next *three years* litigating the sole issue of ameliorative measures, appearing twice before the Second Circuit[54] and now before this Court. No doubt this time would have been better spent from the perspective of the parties, B.A.S., and the US and Italian courts resolving the underlying custody dispute in the proper forum.

Accordingly, the Second Circuit's mandate that courts consider ameliorative measures in all cases frustrates the expeditious resolution of the forum issue which lies at the heart of the jurisdiction of US courts adjudicating Hague Convention cases.[55]

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[52] *See* Joint Appendix at 8.

[53] *Saada I*, 2019 WL 1317868.

[54] *See Saada v. Golan*, 930 F.3d 533 (2d Cir. 2019) (remanding to district court for further consideration of ameliorative measures); *Saada v. Golan*, 833 F. App'x 829 (2d Cir. 2020), *cert. granted*, No. 20-1034, 142 S. Ct. 638 (2021) (summary order affirming return of B.A.S. based on district court's revised ameliorative measures).

[55] This is not the only Hague Convention case in which resolution has taken multiple years. *See* JEFFREY L. EDLESON, PH.D., ET AL., MULTIPLE PERSPECTIVES ON BATTERED MOTHERS AND THEIR CHILDREN FLEEING TO THE UNITED STATES FOR SAFETY: A STUDY OF HAGUE CONVENTION CASES, FINAL REPORT 163–65 (2010).

b. The Second Circuit's Mandate Would Further Strain Court Dockets, Delaying Resolution of Other Cases in Favor of Crafting Unenforceable Orders

The significant growth in the number of cases handled by the federal judiciary reveals that if the Second Circuit's mandate is adopted, it may well contribute to a delay in the resolution of other cases.

In 2020, combined filings in US district courts in civil cases and by criminal defendants increased by thirteen percent, while terminations held steady.[56] This continues a multi-year increase in case filings in federal district courts, which have increased by over twenty-one percent since 2016.[57] The declining overall termination-to-filing rate demonstrates that new case filings may be delaying the resolution of older matters.

Requiring courts to always conduct an ameliorative measures analysis after making a finding of grave risk of harm would compound this issue. Courts are instructed to prioritize cases under the Convention, and often move those cases to the front of their dockets.[58] Thus, if the court makes a

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[56] U.S. Courts, *Federal Judicial Caseload Statistics 2020* <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020>.

[57] *Id.*

[58] *See, e.g.*, *Holder v. Holder*, 392 F.3d 1009, 1023 (9th Cir. 2004) ("[W]e urge courts to give docket priority to Convention petitions and to seek means of expediting the petitions to the extent possible and practicable."); *March v. Levine*, 249 F.3d 462, 474 (6th Cir. 2001) (holding that courts are to "fast track" cases brought under the Hague Convention and use "the most expeditious procedures available") (internal

finding of "grave risk," and then must spend time investigating and coordinating protective measures, it will detract from the time available to the court to address other cases.

For example, as noted above, in this matter the district court spent nine months crafting its protective measures, engaged in multiple conversations with Italian officials, and conducted several case management conferences with the litigants.[59] This underscores the time and burden involved in coordinating basic protections with foreign judicial and social institutions. With case filings continuing to increase, it stands to reason that adding a time-consuming mandate would only serve to further impede the resolution of other cases and affect the ability of the judges to manage their own dockets.

Such a delay might be worthwhile if it would guarantee the safety of the child. But even intricately crafted protective measures may fail once the child leaves the United States, for the simple reason that courts often cannot enforce their orders in other

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citations omitted); *Onrust v. Larson*, No. 15-CV-122, 2015 WL 6971472, at *1 (S.D.N.Y. Nov. 10, 2015) (shifting docket priority to Hague Convention case to expedite it "[o]ut of respect for the priority that the Convention places on prompt resolution of claims of abduction"); *Journe v. Journe*, 911 F. Supp. 43, 44 (D.P.R. 1995) (setting a merits hearing for a Hague petition filed in June for August of the same year to facilitate "expeditious resolution of the proceedings"); Timothy L. Arcaro, *Think Fast: Post Judgment Considerations in Hague Child Abduction Cases*, 23 SUFFOLK J. TRIAL & APP. ADVOC. 237, 243 (2018) ("Abduction cases filed under the Convention are generally given priority on court dockets by administrative order in compliance with the dictates of [the Convention's domestic implementing legislation] and the Convention goals.").

[59] *Saada I*, 2019 WL 1317868, at *1.

jurisdictions.[60] The Hague Convention does not require that ratifying countries afford each other's domestic judiciaries "full faith and credit," nor does it mandate that one country implement the judicially crafted measures for protection of a child once that child returns to his or her habitual residence. As the Eleventh Circuit explained, courts that "enter conditional return orders . . . retain no power to enforce those orders across national borders."[61]

Affirming the Second Circuit's mandatory approach, therefore, would (i) prevent the expeditious resolution of Hague Convention cases, (ii) detract from the federal judiciary's ability to manage their own dockets, and (iii) delay resolution of other cases—all without any assurance that the ameliorative measures would be enforceable abroad.

CONCLUSION

The Second Circuit's mandate that courts finding a "grave risk of harm" to children in Hague Convention cases then consider crafting extensive

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[60] *See* Pet Br. at 17–18, 31–33.

[61] *Baran v. Beaty*, 526 F.3d 1340, 1350 (11th Cir. 2008); *see also* Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 678 (2000) ("[T]here is currently no remedy for the violation of an undertaking. Contrary statements by some courts are simply wrong."); *cf.* Restatement (Third) of Foreign Relations Law § 403 (1987) ("Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."); *United States v. Hitachi Am., Ltd.*, 20 C.I.T. 193 (1996) (noting that there is no power to subpoena or compel actions of foreign nationals living abroad).

ameliorative measures in all cases forces US judges to take actions beyond their traditional role. It requires them to move beyond serving as neutral umpires resolving issues of foreign law, into an investigatory role of uncovering facts relating to a myriad of legal and non-legal institutions in foreign jurisdictions. In cases involving domestic abuse such as the one at bar, the mandate further obliges trial courts to engage in custody and other family law issues that they are ill-equipped to resolve. Finally, mandatory consideration of extensive ameliorative measures in such cases thwarts the Convention's purpose in resolving the threshold issue of identifying the proper forum in an expeditious manner, and instead forces courts to engage in a lengthy analysis of the underlying custody dispute in order to craft measures they will ultimately be unable to enforce.

In contrast, the discretionary approach adopted by the First, Eighth, and Eleventh Circuits, and advanced by the State Department and the United States as *amicus curiae*, is preferable. Under such an approach, in cases involving domestic abuse, courts would be given the discretion to recognize that crafting ameliorative measures would necessarily entangle them in the custody merits dispute which they are ill-suited to handle. It would also relieve them of the obligation to undertake a time-consuming investigation of various foreign social and legal institutions that goes well beyond the limited role of determining foreign law. Avoiding this process in such cases would also preserve precious judicial resources and allow for the requisite expeditious resolution of Hague Convention cases.

We acknowledge that there are unique circumstances in which ameliorative measures would

not transgress these boundaries, such as in cases of war, famine, or disease, as outlined above. However, leaving resolution of these unique circumstances to the discretion of the trial courts in the first instance is the more prudent approach, and the one that this Court should adopt.

Respectfully submitted,

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