NO. 20-1034

In the Supreme Court of the United States

NARKIS ALIZA GOLAN,

Petitioner,

v.

ISACCO JACKY SAADA,

Respondent.

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

BRIEF OF AMICI CURIAE, PROFESSORS OF LAW LINDA J. SILBERMAN, ROBERT G. SPECTOR, AND LOUISE ELLEN TEITZ, IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE[1]

Amici Linda J. Silberman,[2] Robert G. Spector,[3] and Louise Ellen Teitz[4] are Professors of Law who teach and write about Private International Law and Family Law, and who have extensive experience working with the Hague Conference on Private International Law ("Hague Conference"). Professor Silberman and Professor Spector have served on numerous U.S. Department of State delegations to the Hague Conference, including to the several Special Commissions on the Operation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction Convention ("Hague Child Abduction Convention," or "the Convention"), as well as the Special Commissions charged with negotiating and drafting the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("Hague Child Protection Convention").

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[1] Pursuant to Rule 37.6, amici curiae 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. Both parties have filed blanket consent to file amicus briefs.

[2] Professor Silberman is the Clarence D. Ashley Professor of Law, and Co-Director of the Center on Transnational Litigation and Arbitration at the New York University School of Law.

[3] Professor Spector is the Glenn R. Watson Centennial Professor Emeritus at the University of Oklahoma College of Law.

[4] Professor Teitz is Professor of Law at the Roger Williams University School of Law.

Professor Silberman was also part of the State Department Working Group that developed the implementing legislation for the Hague Child Abduction Convention, while Professor Spector was the Official Reporter for the Uniform Child Custody Jurisdiction and Enforcement Act, and more recently for the Uniform Law Commission's draft of a Uniform Law to implement the 1996 Hague Child Protection Convention.

Professor Teitz served as First Secretary to the Hague Conference from 2011-2014, and, in that role, was responsible for all issues arising from the operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, including responsibility for the Part II Sixth Special Commission on the practical operation of the 1980 and 1996 Conventions (January 2012) and for the Working Group on the *Guide to Good Practice on Article 13(1)(b).*

SUMMARY OF THE ARGUMENT

The "core premise" of the Hague Child Abduction Convention is "that the interests of children in matters relating to their custody are best served when custody decisions are made in the child's country of habitual residence." *Monarsky v. Taglieri,* 140 S.Ct. 719, 723 (2020). The objects of the Convention are, therefore: "(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." The Hague

Convention on the Civil Aspects of International Child Abduction, Art. 1 (October 25, 1980). To these ends, the signatory countries "shall cooperate with each other and promote cooperation" to secure "the prompt return of children," including by providing "such administrative arrangements as may be necessary and appropriate to secure the safe return of the child." *Id.,* Art 7(h).

There are certain narrow exceptions to the return mandate, including if "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." *Id.,* Art. 13(1)(b).[5] Even if an exception is established, however, the court still retains discretion to order the child's return. *Id.,* Art. 18. The return order is simply a "provisional" remedy that reflects the principle that child custody disputes should be adjudicated in the child's habitual country of residence. It is not a determination on the merits of the custody issue. *Id.,* Art. 19.

The question presented here is how to implement the "grave risk" exception without doing harm to the principle that the child's custody is best adjudicated in its country of habitual residence. The answer lies in the scope of the analysis the court in the requested country should be required to conduct to determine whether the abducting parent has established—in the United States, by clear and convincing evidence—that there is a "grave risk" of harm to the child if it is returned to the requesting country.

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[5] The grave risk defense, although referred to in the United States as the Article 13(b) exception, is identified in most Hague Conference documents and by many treaty partners as Article 13(1)(b).

By definition, the "grave risk" assessment is forward-looking. In conducting this "grave risk" assessment, consistent with the primary purpose of the Convention to return the child to its country of habitual residence, the court must consider whether there are sufficient protective measures to ensure the child's safety upon its return. Simply put, if the child can be sufficiently protected from harm upon its return, then, under the Convention, it does not, in fact, face a "grave risk" of harm. Consideration of ameliorative measures is, thus, integral to the determination of whether there is a grave risk of harm to the child.

The requirement that a court must consider whether ameliorative measures are sufficient to protect the child's safety is inherent in the nature of the question, itself; supported by the operational framework of the Convention and the accompanying Explanatory Report; adopted in the *Recommendations and Conclusions of the Hague Special Commissions* and the Hague *Good Practice Guides*; and implemented by the courts in other signatory countries. In this case, the Court should require courts in the United States to evaluate possible ameliorative measures in determining whether there is a grave risk to the child if it is returned to its country of residence.

ARGUMENT

I. CONSIDERATION OF AMELIORATIVE MEASURES IS INTEGRAL TO DETERMINING WHETHER A CHILD FACES A "GRAVE RISK" OF HARM IF IT IS RETURNED.

A. The "Grave Risk" Analysis Requires Consideration of Whether Sufficient Ameliorative Measures Exist to Protect the Child.

When interpreting a treaty, the analysis begins "with the text of the treaty and the context in which the written words are used." *Air France v. Saks*, 470 U.S. 392, 397 (1985). The central operating feature of the Hague Child Abduction Convention is the return remedy. *Abbott v. Abbott*, 560 U.S. 1, 9 (2010). The Convention's Explanatory Report makes clear that an exception to return is to "be interpreted in a restrictive fashion if the Convention is not to become a dead letter," and that "a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration." E. Pérez-Vera, Explanatory Report in 3 *Acts and Documents of the Fourteenth Session*, ¶ 34 (1982) ("Pérez-Vera").

The question here is whether, in determining whether a "grave risk" of harm to the child has been established, the court is required to consider whether there are sufficient protective measures to ameliorate

the risk to the child upon its return. Both the text and the operational framework of the Convention make clear that consideration of ameliorative protective measures is within and part of any "grave risk" analysis. The Convention's *Explanatory Report*, as well as the Hague Conference's *Special Commissions* and *Guides to Good Practice*, confirm that whether there is a "grave risk" or not must include and reflect the assessment of any ameliorative measures. *See, e.g.,* Pérez-Vera; *Guide to Good Practice Under the Child Abduction Convention*–Part VI–Article 13(1)(b), ¶ 59.

"Grave risk" of harm is not a determination about harm or behavior that may have created a "grave risk of harm" to the child *in the past*, although that may be an indication of the potential for a "grave risk" of harm if the child is returned. As with any risk assessment, the determination of whether the child faces a "grave risk of harm" is an effort to predict a future outcome. Here the risk assessment looks *forward* to evaluate the child's probable circumstances *if* it is returned, including, therefore, whether the child will be adequately protected *against future harm*. As a result, under the Convention, a "grave risk" of harm constituting an exception to the principle of return exists only when it is clear that the child cannot be returned safely.

The Convention requires that the "grave risk" assessment be conducted in light of its primary objective, which is the return of the child. Thus, it is impossible to evaluate a "grave risk" to the child without also considering the protective measures that may be put in place to ameliorate that risk.

A "grave risk" of harm sufficient to bar the child's return exists when it has been established that the

child is exposed to serious harm *upon its return*, and the court and authorities in that country cannot or will not adequately protect the child. *See Friedrich v. Friedrich,* 78 F.3d 1060, 1069 (6th Cir. 1996). Determining whether a "grave risk" has been established thus *necessarily* includes an inquiry into the circumstances the child will face if it is returned. Determining whether the circumstances are sufficient to ameliorate any risk of harm to the child upon its return *necessarily* requires an assessment of the protective measures that may be in place to safeguard the child. In other words, a determination that there is such a "grave risk" of harm to the child such that it should not be returned must incorporate a finding, either that measures sufficient to protect the child will not be put in place, that measures in place are not sufficient to protect the child, or that no measures will suffice to protect the child.

Whether sufficient protective measures exist to ensure the child's safe return, is an essential element of the determination, under the Convention, of whether or not the child faces a "grave risk of harm." In this case, however, where the district court found that sufficient ameliorative measures were in place, and the Court of Appeals found that the lower court did not abuse its discretion in so finding, Petitioners have twisted the question to whether a court "is required to consider ameliorative measures that would facilitate the return of the child despite the grave-risk determination." Framed in this way, the question not only ratifies the wrongful abduction, but undermines the Convention's primary objectives of ensuring the safe return of the child and leaving further decisions to be made in its country of habitual residence.

B. Hague Conference Special Commissions and Guides to Good Practice Require That Ameliorative Measures Be Considered Before a Grave Risk Can Be Established.

This Court has emphasized the importance of considering not only the words of the treaty, but the history, negotiations, and practical construction adopted by the parties. *See Water Splash v. Menon, Inc.,* 137 S.Ct. 1504 (2017) (interpreting the Hague Service Convention); *see also, e.g. Volkswagen Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988); *Air France v. Saks*, 470 U.S. 392 (1985).

Since 1989, seven Special Commissions have met every four or five years, and issued Reports with Conclusions and Recommendations regarding the implementation of the Child Abduction Convention.[6] These have included recognizing the role of the Central Authorities and direct judicial communications through judicial networks in arranging for protective measures to be put in place upon the child's return.[7]

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[6] The more recent Fifth (2006), Sixth (2011/12), and Seventh Commissions (2017) have also included the newer 1996 Hague Child Protection Convention which entered into force in 2002.

[7] Sixth Special Commission (Part I) Facilitating the safe return of the child and the accompanying parent, where relevant (1980 and 1996 Conventions):

> 39. The Special Commission recognizes the value of the assistance provided by the Central Authorities and other relevant authorities, under Articles 7(2) d), e) and h) and 13(3), in obtaining information from the requesting State, such as police, medical and social workers' reports and information on measures of protection and arrangements available in the State of return.

The Sixth Special Commission recommended that a Good Practice Guide on Article 13(1)(b) be prepared.[8] In 2020, the Hague Conference published the *Guide to Good Practice Under the Child Abduction Convention–Part VI–Article 13(1)(b)*, with the express purpose of promoting "the consistent application of Article 13(1)(b) of the Child Abduction Convention and good practice for judges and Central Authorities faced with the application of this provision." To this end, the Guide specifically describes the analysis the court should conduct in determining whether a "grave risk" of harm has been established under the Convention.

Once the court has considered the nature of the assertions, it "determines whether it is satisfied that the grave risk exception to the child's return has been established by examining and evaluating the evidence presented by the person opposing the child's return/information gathered, *and by taking into account the evidence/information pertaining to protective measures available in the State of habitual residence*." The Guide further underscores the point: "This means that even where the court determines there is sufficient evidence or information demonstrating element of potential harm or of an intolerable situation, it must nevertheless duly consider the circumstances as a whole, *including whether adequate measures of*

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40. The Special Commission also recognizes the value of direct judicial communications, in particular through judicial networks, in ascertaining whether protective measures are available for the child and the accompanying parent in the State to which the child is to be returned.

[8] Hague Conference on Private International Law, *Conclusions and Recommendations of the Sixth Special Commission* (Part II), para. 81.

protection are available or might need to be put in place to protect the child from the grave risk of such harm or intolerable situation, when evaluating whether the grave risk exception has been established."[9] (*emphasis added).* In other words, a court must consider whether adequate protective measures exist *as part of* its grave risk assessment.

The Conference has also thus made clear that, under the Convention and consistent with its purpose, a "grave risk" of harm to the child is not present if measures in place are adequate to protect the child upon its return.

C. United States Courts Should Follow International Practice, the Special Commissions and Guides to Good Practice by Considering Ameliorative Measures.

In the United States, the Convention, which has been adopted by 101 countries, is implemented through the International Child Abduction Remedies Act ("ICARA").[10] In enacting ICARA, Congress expressly recognized the international character of the Convention and the need for uniform interpretation of its provisions by the Contracting Parties.[11]

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9 Hague Conference *Guide to Good Practice 13(1)(b)*, para. 40-41.

10 22 U.S.C. §§ 9001–9011.

11 22 U.S.C. § 9001(b)(3)(B) (1988). In Section § 9001. Findings and declarations, Congress states:

> (b) Declarations
>
> The Congress makes the following declarations:
>
> * * *

The continuing oversight of the Convention, with an emphasis on judicial cooperation, is reflected in the Special Commission meetings, and the consensus of these meetings is reflected in the Conclusions and Recommendations of those Special Commissions. *See* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAV. L. REV. 1049, 1082-1084 (2005). For example, the Fourth Special Commission in 2001, in its Recommendations and Conclusions indicated that Contracting States should consider necessary provisional protective measures in the jurisdiction to which the child is being returned.[12] Similarly, the Conclusions and Recommendations of the Fifth Special Commission called attention to the desirability of safe-return orders and mirror orders when enforceable in the country to which the child is being returned, leaving no doubt that the use of ameliorative measures to effectuate the return of a child is consistent with the Convention.[13]

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(3) In enacting this chapter the Congress recognizes—

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention

12 Safe return orders 5.1 Contracting States should consider the provision of procedures for obtaining, in the jurisdiction to which the child is to be returned, any necessary provisional protective measures prior to the return of the child

13 "When considering measures to protect a child who is the subject of a return order (and where appropriate an accompanying parent), a court should have regard to the enforceability of those measures within the country to which the child is to be returned. In this context, attention is drawn to the value of safe-return

The Reports of the Special Commissions and the Guides to Good Practice reflect and express the Contracting Parties' evolving interpretation of how the Convention is to be implemented. Consistent with Congress's intent in enacting ICARA, courts in the United States should look particularly to the *Guide to Good Practice for Article 13(1)(b)* with regard to the "grave risk" assessment.

"In cases where the taking parent has established circumstances involving domestic violence that would amount to a grave risk to the child, courts *should consider* the availability, adequacy and effectiveness of measures protecting the child."[14] (*emphasis added*) *Guide to Good Practice*, ¶ 59. The Guide reflects the practice in various Convention States, and provides examples of the types of protective measures that are likely to ensure the child's safe return. The Guide further noted that where legal protections, police and social services were available to assist victims of domestic violence, courts have ordered return of the child.

Some courts "assess the availability and efficacy of protective measures at the same time as they examine the assertions of grave risk;" other courts consider ameliorative protective measures "only after the existence of a grave risk and an understanding of its nature has been established by the party objecting to return."[15] Whether courts assess the availability

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orders (including "mirror" orders) made in that country before the child's return, as well as to the provisions of the 1996 Convention." (Conclusions and Recommendations, ¶ 1.8.2)

[14] GGP para. 59

[15] GGP para. 45

and efficacy of protective measures in making a determination about "grave risk of harm" in the first instance or after finding a "grave risk of harm," the Guide makes clear that the court "must" consider the circumstances as a whole, including whether measures of protection are available or might need to be put in place to protect the child from the grave risk of harm.

The view of the Hague Conference and the common practice of States is that ameliorative measures should be considered as part of the analysis in determining the Art. 13(1)(b) defense.

II. THIS COURT SHOULD REQUIRE COURTS TO CONSIDER AMELIORATIVE MEASURES.

A. Ameliorative Measures Have Proved Effective in Ensuring the Safe Return of Children.

Other international treaties and regulations have determined that ameliorative measures are an effective mechanism for ensuring the safe return of children who have been wrongfully removed or retained. The 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children ("Hague Child Protection Convention"), includes provisions that enhance a court's ability to order return of the child and provide for its safety upon return. Although the Senate has not yet ratified it, the United States has signed the Convention.

The Seventh Special Commission[16] and the *Guide to Good Practice*[17] refer to the important relationship between the 1996 Convention and the 1980 Hague Child Abduction Convention. Several provisions strengthen the court's authority to order return of the child, and include "safe harbor" provisions that can be enforced in the State of the child's habitual residence. Interim measures, including those for the safe return of the child, will be recognized by the country to which the child is being returned, with the possibility of advance recognition such that a court asked to make a return order can be confident that the court in the State to which the child is returned will enforce the protective measures that have been issued.

The obligation to consider protective measures also appears in the Brussels IIbis Regulation, which applies to countries in the European Union.[18] Article

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[16] Benefits and use of the 1996 Convention in relation to the 1980 Convention Habitual residence, rights of custody, rules on applicable law, access / contact

> 26. The Special Commission notes the many benefits and use of the 1996 Convention in relation to the use of the 1980 Convention, including the primary role played by the authorities of the State of habitual residence of the child, rules on jurisdiction, applicable law, recognition and enforcement and co-operation with respect to the organization and enforcement of rights of custody, access/ contact, urgent measures of protection, possible post-return assistance and relocation.

[17] GGP para 48.

[18] Art. 11(4), Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matter of parental responsibility (EU Regulation Brussels IIbis).

11(4) refers explicitly to intra-EU abductions and provides that a Member State cannot refuse to return a child under the Hague Abduction Convention "if it is established that adequate arrangements have been made to secure the protection of the child after his or her return."

B. A Rule Mandating Consideration of Ameliorative Measures Would Provide Clear Guidance to Courts Hearing Hague Petitions.

This Court should require courts to consider the effect of ameliorative measures in determining whether a "grave risk" exception to the principle of return has been established. Previous appellate courts that have attempted to provide guidance on this issue have underscored that "mandatory *consideration*" of ameliorative measures does not require the court to *adopt* ameliorative measures in order to effect the return of the child. *See* Linda Silberman*, The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT. L. & Pol. 221 (2000) at 239-240. A court may always exercise its discretion to reject ameliorative measures after considering whether or not they will be effective.

In *Simcox v. Simcox*, 511 F.3d 594, 607-08 (6th Cir. 2007), the court identified three categories of

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See also effective August 2022, Art. 27 (3), EU Regulation No 2019/1111 of 25 June 2019 on jurisdiction, the recognition of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (Recast), OJ L 178/1 of 2 July 2019 Citation and then note the revised Recast effective August 2022. (both references are in *Good Practice Guide*, fn 125.

"grave risk" of harm cases. First, where "the abuse is relatively minor . . . it is unlikely that the risk of harm caused by return of the child will rise to the level of a "grave risk." or otherwise place the child in an "intolerable situation." *Id.* at 607. Second, "there are cases in which the risk of harm is clearly grave," and where "undertakings will likely be insufficient to ameliorate the risk of harm, given the difficulty of enforcement and the likelihood that a serially abusive petitioner will not be deterred by a foreign court's orders." *Id.* at 607-08. Third, there are cases "where the abuse is substantially more than minor, but is less obviously intolerable," and whether "the return of the child would subject it to a "grave risk" of harm . . . depends on careful consideration of several factors, including the nature and frequency of the abuse, the likelihood of its recurrence, and whether there are any enforceable undertakings that would sufficiently ameliorate the risk of harm to the child caused by its return." *Id.* at 608.

In each of these situations, however, the court is required to *consider* ameliorative measures even if the court ultimately decides–as it did in *Simcox*–that undertakings or protective measures will not be effective and refuses to order the child's return. The court retains the discretion to find that protective measures are not sufficient to eliminate a "grave risk of harm," and thus to refuse to order return of the child. Whether to order return or not, and on what conditions, is always in the discretion of the court of first instance. A rule *mandating* the court to consider protective measures when deciding upon return would offer clear guidance as to the steps the courts should

engage in when hearing an application for return under the Hague Convention.

The Former Judges Amici argue that courts should not be required to consider ameliorative measures because many judges, particularly federal court judges, have limited family law experience and handle very few Hague Convention cases. That, however, is precisely why guidance and direction on this issue is necessary. If, as Petitioner argues, courts are not required to consider the effectiveness of ameliorative measures as part of the "grave risk" assessment, it would be all too easy for a court to refuse to order the child's return simply on the basis of the abducting parent's allegations, which would violate the objectives of both the Convention and ICARA.

C. Mandatory Consideration of Whether Ameliorative Measures Are in Place and Effective Does Not Require the Court to Extend the Case Beyond the Scope of the Convention.

As numerous courts have indicated, the child should be returned where the courts in the country of return are in a position to assess the risk of harm to the child and can protect the child if necessary. One method of providing that protection is to include undertakings and/or mirror or safe harbor orders as ameliorative measures to ensure the child's safety while the allegations are assessed and custody adjudicated in the country of habitual residence.

Petitioners argue, however, that consideration of ameliorative measures requires an inquiry into matters underlying the merits issue of custody in the case, which-as all parties agree-is not the proper subject

for a court hearing a Hague application for return. Contrary to Petitioner's claim, however, considering possible ameliorative measures to protect the child does not "require a court to attempt to understand the complex, psychological issues associated with the underlying abuse and the ways such issues affect the adequacy of any potential measures." *Petitioner's Brief*, pp. 17-18. The critical inquiry for a court entertaining a Hague petition in light of an Article 13(1)(b) defense is not whether the allegations are true, but whether, if the allegations are true, the requested country can impose (perhaps in coordination with the requesting country) adequate measures to protect the child.

Furthermore, the "consideration" of ameliorative measures does not extend the return proceedings beyond the scope of the Convention. A court hearing a Hague application should determine only whether a "grave risk" of harm to the child can be averted through protective measures. Where this is the case, the child will not face a "grave risk" of harm if it is returned to that country for further proceedings.

III. MANDATORY CONSIDERATION OF AMELIORATIVE MEASURES IS CONSISTENT WITH THE CONVENTION'S MAIN PURPOSE.

Petitioner's argument that mandatory consideration of ameliorative measures is inconsistent with the Hague Convention's main purpose is flawed in two respects. First, as previously noted, mandatory "consideration" does not require a court to "adopt" ameliorative measures in light of the allegations of harm, but to "consider" whether they would be appropriate and effective in preventing harm to the child. Second, Petitioner's reliance on the State Depart-

ment's critique of "undertakings" misses the fact that "undertakings" and even safe harbor orders are quite different from "mirror-image orders."

Undertakings are promises made by the left-behind parent who seeks return and who agrees to do or not do certain things, but which have no guarantee of performance once the child is returned. The State Department's early concern about "undertakings" rested on the potential lack of enforcement and the possibility that broad undertakings covering issues such as custody and visitation constituted an interference with the proper role of the court in the country of habitual residence.

Safe harbor orders, which provide for conditions in connection with the return of the child (with or without undertakings) may be made either in the court deciding whether to return the child (the requested state) or by the court in the state where the child is to be returned (the requesting state). If the order is made by the court in the requested state, enforcement once the child is returned is not guaranteed. Moreover, a safe harbor order in the requesting state is only in effect upon the child's return. Often the courts in both states will make safe harbor orders in order to provide protective measures for the return of the child, and then have other measures in place in the requesting state once the child is actually returned. There may be differences in the details of those orders, but when possible, the courts in both countries will enter mirror-image orders.

Mirror-image orders have been explained by Judge James Garbolino as follows:

> "These orders are entered in both the courts of the states hearing the petition and the courts in the child's habitual residence. The orders are "mirror images" of one another, containing the same terms with differences only in syntax. They are enforceable in both jurisdictions."[19]

As a result, when ameliorative measures take the form of safe harbor or mirror-orders, rather than being inconsistent with the Convention, they accomplish its primary objectives to secure the safe return of the child to the country of habitual residence, and to leave the enforcement and supervision of the order and subsequent proceedings in the hands of the court at the habitual residence.

The Court of Appeals drew this distinction between "undertakings," "safe harbor orders," and "mirror-image orders" in its initial remand and subsequent affirmance of the district court's orders in this case. Finding that "unenforceable undertakings are generally disfavored," the court ordered the district court to consider the enforceability in the Italian courts of the key provisions in its original order. The district court did so, and the subsequent cooperation between the district court and the Italian Central Authority resulted in safe harbor orders in both the requested and requesting states that were affirmed by the Second Circuit as appropriate ameliorative measures to ensure the safe return of the child.

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[19] Judge James Garbolino in the *2015 Federal Judicial Center's Judges' Guide*, p 150

IV. CONSIDERATION OF AMELIORATIVE MEASURES PRESERVES THE PROPER ROLES FOR THE REQUESTED AND REQUESTING STATES AS ENVISIONED BY THE CONVENTION.

The Convention does not specify to whom the child should be returned. It provides only that the "judicial or administrative authority of the Contracting State where the child is . . . shall order the return of the child forthwith." The Convention did not specify that return should be to the country of habitual residence because of concern that in some situations the applicant may no longer be in the original State of habitual residence.[20] In many cases, the status quo is preserved by returning the child in the custody of the abducting parent, leaving further questions about custody and other measures to the court at the habitual residence.

At the same time, the requested court's obligation is to ensure the safe return of the child. The availability of a mirror or safe harbor order in the requesting state is the most effective way to ensure that protective measures are enforced upon return of the child. Indeed, ameliorative measures—properly used—help to maintain the appropriate roles for the requested and requesting states. The requested state's return order and consideration of appropriate ameliorative measures fulfill its dual obligation under the Convention to return the child and to ensure the child's safety upon return. The court in the child's country of habitual residence, not the court hearing the return petition, will resolve factual disagreements between the parties, including allegations of domestic violence

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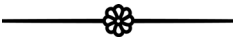
[20] Perez-Vera Report, para. 110

and its effects on the child, any further need for protection, and the ultimate custody determination.

Petitioner's misleading characterization of the role of ameliorative measures, makes it incumbent upon this Court to clarify that ameliorative measures are a proper consideration for a court when deciding a return application in the face of a 13(1)(b) "grave risk" defense. The United States agrees that consideration of ameliorative measures is proper even in a case of alleged domestic violence: "To the extent petition suggest (Br. 36-42) that the domestic-violence context warrants a presumption that ameliorative measures will be ineffective or inappropriate, that suggestion is incorrect." *Brief of the United States*, p. 31 fn 3.



CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Second Circuit, and require that courts hearing Hague petitions for the return of a child to its country of habitual residence consider the effect of ameliorative protective measures in determining whether the child faces a "grave risk" of harm if it is returned.

Respectfully submitted,

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