No. 20-1034

In the Supreme Court of the United States

NARKIS ALIZA GOLAN,

v.

ISACCO JACKY SAADA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF CHILD JUSTICE, INC., PREVENT CHILD ABUSE NY, AND PROFESSOR JENNIFER BAUM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Child Justice, Inc. is a national organization that advocates for the safety, dignity, and selfhood of abused, neglected, and at-risk children. The mission of Child Justice is to protect and serve the rights of children in cases where child sexual abuse, physical abuse, or domestic violence are present. It works with local, state, and national advocates, legal and mental health professionals, and child welfare experts to defend the interests of affected children. It provides public policy recommendations, legal services, community service referrals, court-watching services, research, and education. Child Justice also serves important public interests by securing *pro bono* representation for protective parents in financial distress and by seeking appropriate judicial solutions to the threats faced by abused, neglected, and at-risk children.

Prevent Child Abuse New York is the only private, nonprofit agency serving the entire state of New York whose single mission is to prevent child abuse in all its forms. It has been operating since 1980 with over 100 representatives, and works with families, legislators and the legal community in protecting children in New York from abuse—by directly assisting those affected and advocating for changes in policy to reduce future abuse.

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

Jennifer Baum, Esq. is a Professor of Clinical Legal Education and the Director of the St. Vincent de Paul Legal Program's Child Advocacy Clinic at St. John's University School of Law. She has written extensively on issues related to low income children and families, child welfare, and child abuse specifically. She is the founder and director of the Foster Family Support Initiative, and co-founder and co-director of the Immigrant Children's Justice Project, whose aim is to halt the deportation of New York State children to abusive parents abroad. She has testified about poverty law and child welfare issues on numerous occasions before the New York City Council and the New York State Assembly, and has presented before the American Bar Association, the New York State Bar Association, the Association of the Bar of the City of New York, the New York State Judicial Institute, the Association of American Law Schools, the National Association of Counsel for Children, and other national and local organizations.

SUMMARY OF ARGUMENT

The purpose of the Hague Convention has always been to protect the interests of children. Indeed, the grave-risk exception recognizes that the safety of children is of paramount concern, even when in direct conflict with the interest in returning the child to their habitual residence. In the four decades since the Convention was drafted, however, the profile of the "typical abductor" has changed, as many are now caregiver parents fleeing domestic violence. In parallel, our understanding of the impact of domestic violence on children has substantially evolved, and as a result U.S. courts have increasingly taken domestic violence into account in family-law proceedings. The decision below, however, failed to take any of this into account. Contrary to the rule in the second circuit mandating consideration of ameliorative measures, in Hague Convention cases where domestic violence is established, courts should be extremely wary of inquiring into ameliorative measures. Research has shown that such measures frequently do not work in practice, and thus fail to protect children from exposure to harm.

The text and original purpose of the Hague Convention, along with the extensive research on the effect of domestic violence on children, all caution against requiring courts to consider ameliorative measures in these cases. Accordingly, the Court should reverse the Second Circuit's decision below.

ARGUMENT

I. THE ORIGINAL PURPOSE OF THE HAGUE CONVENTION WAS, AND CONTINUES TO BE, TO PROTECT THE INTERESTS OF THE CHILD.

The Hague Convention's guiding principle is that "the interests of children are of paramount importance." [2] According to the Convention's explanatory report, although the Convention's immediate impetus was "the struggle against the great increase in international child abductions," it was widely recognized that the Convention was, above all, "inspired by the *desire to protect children* and should be *based upon an interpretation of their true interests*." [3] Subsequently, judges and commentators have affirmed, time and again, that the interests of the child lie at the crux of all Hague Convention cases.[4]

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[2] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

[3] Elisa Pérez-Vera, *Explanatory Report, in* 3 Hague Conf. on Priv. Int'l L., III Actes et Documents de la Quatorzième, at 431 (Apr. 1981) [hereinafter Pérez-Vera Report] (emphases added).

[4] *See, e.g.*, Brenda Hale, *Taking Flight—Domestic Violence and Child Abduction*, 70 Current Legal Probs. 3, 8 (2017) ("[T]he best interests of the child are . . . at the forefront of the whole exercise.") (citation omitted) ; Lynn Hecht Schafran, *Saada v. Golan: Ignoring the Red Flags of Domestic Violence Danger and What Is Required to Protect a Child from "Grave Risk,"* 25 Dom. Viol. Rep. 3, 15 (2019) ("[T]he interest of the child is paramount.") (citing Judge Shireen Fisher, *Abduction Then and Now: Assumptions, Biases and Realities* (2004)); Merle H. Weiner, *International Child Abduction and the*

It is important to recognize, however, that while domestic violence accounts for an increasing percentage of Hague cases, the Hague Convention was not drafted specifically with domestic violence in mind. The "typical abductor" who was front of mind for the Convention's drafters more than forty years ago was a non-primary caregiver, typically the father, who abducted the child and absconded to a jurisdiction with favorable custody laws.[5] The drafters concluded that in that scenario prompt return would typically serve the child's interests, including by deterring abducting parents from forum shopping.[6] The drafters gave far less consideration to a child's exposure to harm upon return where the so-called abductor is a caregiver parent fleeing to protect themselves and their child from domestic violence. In fact, in the drafting history of the Hague Convention, domestic violence is mentioned only once.[7] But over the past few decades, the profile of the "typical abductor" has transformed such that many (if not most) respondents in Hague proceedings today are indeed

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Escape from Domestic Violence, 69 Fordham L. Rev. 593, 677 (2000) ("[P]rotection of children is the *raison d'étre* of the Convention.") (emphasis added).

[5] Adair Dyer, *Report on International Child Abduction by One Parent ('Legal Kidnapping')*, *in* 3 Hague Conf. on Priv. Int'l L., III Actes et Documents de la Quatorzième, at 20–21 (Aug. 1978).

[6] *Id.*

[7] *See Working Documents Nos 1–3*, *in* 3 Hague Conf. on Priv. Int'l L., III Actes et Documents de la Quatorzième, at 256 (Oct. 1980).

caregiver parents fleeing domestic violence.[8] The prevailing assumption that return best effectuates the original purpose of the Convention—to protect the interests of the child—thus deserves careful reconsideration in these cases.[9]

Since the Convention was drafted, a wealth of social-science literature and research has documented the harmful effects of domestic violence on a child, even where the abuse is not directed at the child. *See infra* Section III. There is now overwhelming evidence that returning a child to an environment in which they risk retraumatization, harm to their primary caregiver, and even direct abuse does not serve to protect the child's interest and on the contrary exposes the child to grave risk of exposure to harm.

For this reason, many courts and commentators—although not the court below—have recognized that the Convention does not require U.S. courts to contrive means of returning the child in domestic-violence cases. *See Simcox v. Simcox*, 511 F.3d 594, 609 (6th Cir. 2007) ("[T]he Convention

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[8] *See* 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, 226 (2021) [hereinafter Weiner, *You Can and You Should*] (finding that, in 2000-01 and 2017-18, 78 percent of federal appellate cases brought under the Hague Convention involved allegations of domestic violence).

[9] In particular, the underlying assumption that the interests of the child are best served by maintaining a relationship with both parents, even if one is abusive, will in most cases conflict with the interests of the child, particularly as to safety, stability, dignity, and selfhood.

. . . was never intended to be used as a vehicle to return children to abusive situations."); Pérez-Vera Report ¶ 25 (interpreting the Convention's exceptions to return as "concrete illustrations" of the principle that "the interests of the child are . . . to be the guiding criterion").[10] That is because "the text of the Convention and the commentaries on it place a higher premium on children's safety than on their return." *Baran v. Beaty*, 526 F.3d 1340, 1348 (11th Cir. 2008); Hague Convention on the Civil Aspects of International Child Abduction, 1343 U.N.T.S. 89, Art. 13(b) (Oct. 25, 1980).

The Second Circuit's precedent mandating consideration of ameliorative measures in domestic-violence cases fails to recognize both the Convention's "higher premium" on the interests of the child, including as reflected in Article 13(b), and the overwhelming evidence that it is not in the child's interest to be returned to "abusive situations." Instead, it appears to be an effort to balance the interests of promptly returning a child to their habitual residence against protecting the child from a grave risk of exposure to harm. As explained below, however, where domestic violence is involved, attempting to strike such a balance is unmoored from the realities of domestic violence, and ultimately undermines the overarching original purpose of the Convention. Where a child is at grave risk of exposure to harm, almost no other interest is an appropriate counterbalance.

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[10] *See also* Weiner, *You Can and You Should*, *supra* note 8, at 290.

In sum, domestic-violence was not what the drafters had in mind when they initially urged the prompt return of children. The inclusion of the Article 13(b) grave-risk exception makes that plain. On the contrary, refusing to order the return of a child in domestic-violence cases is often more consistent with the original purpose of the Hague Convention, and is also why the mandatory consideration of ameliorative undertakings thwarts that purpose.

II. THE DECISION BELOW LAGS BEHIND HOW U.S. COURTS TREAT THE CHILD'S INTERESTS IN CHILD CUSTODY CASES INVOLVING DOMESTIC VIOLENCE.

The Second Circuit's precedent requiring consideration of ameliorative measures in domestic violence cases is not only in tension with the original purpose of the Convention, but also at odds with how U.S. courts treat domestic violence in child-custody proceedings outside of the Hague context. As with U.S. courts adjudicating Hague proceedings, family courts, too, have had to balance sometimes conflicting interests. After decades of debate, however, a consensus has emerged that in cases involving domestic violence where the safety of the child cannot be reconciled with the desire to keep biological families together, the child's safety prevails.[11]

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[11] For a list of state statutes on joint custody and domestic violence through 2013 *see* Am. Bar Ass'n Comm'n on Domestic & Sexual Violence, *Joint Custody Presumptions and Domestic Violence Exceptions* (Aug. 2014), https://www.americanbar.org/content/dam/aba/administrative

Beginning in the 1990s, legislators, courts adjudicating family-law proceedings, and social-science researchers recognized that extreme caution is required before placing a child in the custody of an abusive parent. Almost every state now requires by statute that courts consider the effect of domestic violence in determining the best interests of the child.[12] Additionally, nearly half of these states have adopted child-custody laws to include a rebuttable presumption that awarding custody to a domestic-violence perpetrator is not in the best interests of the child.[13] New York State's Family Protection and Domestic Violence Intervention Act of 1994 explicitly notes that

> [t]he corrosive effect of domestic violence is far reaching. The batterer's violence injures children both directly and indirectly. Abuse of a parent is detrimental to children whether or not they are physically abused themselves. Children who witness domestic violence are more likely to experience delayed development, feelings of fear, depression and helplessness and are

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/domestic_violence1/Charts/migrated_charts/2014_Joint_Custody_Chart.pdf.

[12] *Id.*

[13] Alabama, Alaska, Arizona, Arkansas, California, Delaware, D.C., Florida, Hawaii, Idaho, Iowa, Louisiana, Massachusetts, Minnesota, Mississippi, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Wisconsin, Wyoming. *See* Am. Bar Ass'n, *Joint Custody Presumptions*, *supra* note 11.

> more likely to become batterers themselves.

L 1994, Ch 222, § 1. Understanding this, New York state courts have since consistently found that "when a child's best interests are endangered, such objectives [of keeping biological families together] must yield to the State's paramount concern for the health and safety of the child." *See, e.g.*, *In re Marino S.*, 795 N.E.2d 21, 27 (N.Y. 2003).

Similarly, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), ratified by 49 states, requires courts to consider domestic violence in interstate custody cases.[14] In interpreting the UCCJEA, courts across the country have considered domestic violence to be one of the most important factors in determining jurisdiction for child-custody proceedings.[15] This is in part because the UCCJEA reflects an appreciation of the harm returning a child to an abusive environment can cause. It also reflects an understanding that domestic-violence cases should consider the position

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[14] Nat'l Conf. of Comm'rs on Unif. State Laws, *Uniform Child Custody Jurisdiction & Enforcement Act* (1997), http://www.lrcvaw.org/laws/uccjea.pdf.

[15] *See, e.g.*, *Hector G. v. Josefina P.*, 771 N.Y.S.2d. 316, 323 (Sup. Ct. 2003) (recognizing that "the legislative history of the UCCJEA establishes that domestic violence was very much on the minds of the drafters of the statute"); *In re Marriage of Stoneman v. Drollinger*, 314 Mont. 139, 148-149, ¶26, 64 P.3d 997, 1002 (2003) (urging "district courts to give priority to the safety of victims of domestic violence when considering jurisdictional issues under the UCCJEA"); *Huege v. Huege*, 1 CA-CV 12-0764, 2013 Ariz. App. Unpub. LEXIS 591, at *8 (Ariz. Ct. App. May 23, 2013) (same).

of the parents fleeing with their children from one jurisdiction to seek protection from another jurisdiction. *See, e.g.*, *Hector G. v. Josefina P.*, 771 N.Y.S.2d. 316, 323 (Sup. Ct. 2003) ("While earlier laws had often presumed that the party fleeing the jurisdiction with children was the wrongdoer, experience showed that it was often a victim of domestic violence who sought protection in another jurisdiction.").

This principle is also recognized at the federal level. In 1990, Congress resolved that "for purposes of determining child custody, credible evidence of physical abuse of a spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive [parent]."[16] In 2018, Congress additionally resolved that "courts should resolve safety risks and claims of family violence first, as fundamental consideration, before assessing other best interest factors."[17] Congress' reasoning was that child safety must be of paramount concern in any custody and visitation adjudications.[18]

This consensus reflects not only the importance of considering the interests of the child in domestic violence cases, but also the critical importance of not reflexively requiring joint custody in such cases. For example, the American Bar Association's *Joint Custody Presumptions and Domestic Violence Exceptions* maintains that providing an abusive parent with even joint custody

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[16] H.R. Con. Res. 172, 101st Cong., 2d Sess. (1990).

[17] H.R. Con. Res. 72, 115th Cong., 2d. Sess. (2018).

[18] *Id.*

is inappropriate when child abuse is likely to occur.[19] Similarly, a judicial guide published by U.S. family-court judges instructs that it is "detrimental to a child" to be placed in "joint legal custody, or joint physical custody with the abusive parent."[20]

Given this wide-reaching consensus that in most cases it is not in the interests of the child to return to an abusive environment, the Second Circuit's mandate that ameliorative measures be considered in Hague proceedings is not only atextual and contrary to the prevailing purpose of the Hague Convention, it also is out of step with the consensus of the Nation's courts and legislatures.

III. AMELIORATIVE MEASURES OFTEN DO NOT ADEQUATELY ACCOUNT FOR THE CHILD'S INTERESTS IN DOMESTIC-VIOLENCE CASES AND FREQUENTLY DO NOT WORK IN PRACTICE.

Ameliorative measures are not just a theoretical legal mechanic to be evaluated in the abstract. They have immediate and concrete effects on the children in these cases. While ameliorative measures are often *only* ineffective, in many cases they can be profoundly detrimental to the families affected by enabling the continuation of abuse against the returned child and abused parent.

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[19] *See* Am. Bar. Ass'n, *Joint Custody Presumptions, supra* note 11.

[20] *See* Nat'l Council of Juv. and Fam. Ct. Judges, Fam. Violence Dep't, *A Judicial Guide to Child Safety in Custody Cases* §1.2 (2008), https://www.ncjfcj.org/wp-content/uploads/2012/02/judicial-guide_0_0.pdf.

A. Ameliorative Measures Do Not Properly Account For Coercive Control.

One of the most harmful misconceptions in domestic-violence cases is the notion that children are largely "witnesses" rather than "victims."[21] However, children are often harmed even when the physical abuse is not directed at them. Research has demonstrated the grave risk to children growing up in an abusive environment, even when they simply hear the violence or feel its after-effects.[22] And harm to the child extends beyond the risk of physical abuse and the emotional traumas of witnessing such abuse.

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[21] *See, e.g.*, Jane E.M. Callaghan et al., *Beyond "Witnessing": Children's Experiences of Coercive Control in Domestic Violence and Abuse*, 33 J. Interpersonal Violence 1551, 1552 (2015).

[22] *See* Heather Dye, *The Impact and Long-Term Effects of Childhood Trauma*, 28 J. Hum. Behav. Soc. Env't. 381, 383 (2018) (noting that "[w]hen children experience relationships as rejecting or unsafe, these experiences can alter a child's perception of self, trust in others, and perception of the world"). The Nat'l Council of Juv. & Fam. Ct. Judges Guide instructs judges to take into consideration that "children are affected not only when they are present at the violent incident, but also when they hear it, or see the aftermath—a parent injured or in distress, furniture knocked over, things broken, blood on the wall. They are affected, too, when they are forced to live in an atmosphere of threat and fear created by violence." *See* Nat'l Council of Juv. And Fam. Ct. Judges, *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide*, at 8–9 (2006), https://www.afccnet.org/Portals/0/PublicDocuments/ProfessionalResources/BenchGuide.pdf.

Arguably just as severe to a child is the abuser's wielding of coercive control. While the concept of "coercive control" is becoming more prominent in the assessment of an adult's experience of domestic violence, the child's experience of coercive control is also beginning to be considered.[23] Coercive controlling behaviors such as emotional abuse, isolation, and monitoring are frequent in the child's experience of domestic violence. And yet, the primary determinative assessment of child abuse rests upon an anachronistic view that asks only whether the child has been exposed to "incidents" of physical violence.[24]

Physical violence is just one manifestation of coercive control. Other coercive-control techniques can be just as insidious and devastating, limiting the survivor's ability to act or speak freely to meet their needs without worry or fear, as perpetrators micro-regulate the survivor's everyday behavior.[25]

Directed at children, coercive control can manifest as constant monitoring of the child's behavior, isolating the child from interacting with their friends and family, or preventing the child from participating in education, sports, or other social activities. Post-separation, it can also manifest as emotional manipulation, including by

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[23] Emma Katz, *Beyond the Physical Incident Model: How Children Living with Domestic Violence are Harmed By and Resist Regimes of Coercive Control*, 25 Child Abuse Rev. 46 (2016).

[24] *Id.* at 47.

[25] *Id.* at 48.

making the child feel as though they were responsible for the separation; making the child feel the perpetrator could appear anywhere, anytime to harass or kidnap them or their primary caregiver (referred to as "omnipresence"); or engaging in dangerous conduct, such as threatening to or actually using force against the child, the primary caregiver, or anyone/thing the child cares about (e.g., their pet).[26]

Alternatively, the perpetrator may exert coercive control over the primary caregiver, which by extension negatively affects the child. For example, perpetrators often isolate victims by preventing them from working, meeting friends and family, or denying them access to transportation or means of communication with the outside world. [27] Particularly relevant in Hague cases, survivor

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[26] Emma Katz et al., *When Coercive Control Continues to Harm Children: Post-Separation Fathering, Stalking and Domestic Violence*, 29 Child Abuse Rev. 310 (2020).

[27] Adrienne Barnett, *Letters to the U.S. State Department Commenting on the Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention on the Civil Aspects of International Child Abduction*, Univ. of Cal., Davis, at 5 (2017), https://law.ucdavis.edu/faculty/bruch/files/Letters-re-Hague-Convention.pdf; *see also* Jacquelyn Graham (formerly Abbott), *Letters to the U.S. State Department Commenting on the Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention on the Civil Aspects of International Child Abduction*, Univ. of Cal., Davis, at 56 (2017), https://law.ucdavis.edu/faculty/bruch/files/Letters-re-Hague-Convention.pdf; The Australasian Inst. Of Jud. Admin., National Domestic and Family Violence Bench Book of Australia, § 4.2. (2021) ("[A] parent may use their joint parenting role or related judicial options as a means of exercising ongoing control over their former partner.")

parents living abroad in their partner's home country, away from family, friends, and community, are uniquely vulnerable to even greater degrees of coercive control.[28] This then trickles down to the child, who may be inhibited from attending school outings, after-school activities, family trips, or other activities involving socialization.[29]

Finally, even the filing of a Hague proceeding itself can be an act of coercive control—an attempt to reinforce fear in both the primary caregiver and child by reminding them that the perpetrator's reach transcends state boundaries.[30] It is not uncommon in domestic child-custody proceedings that survivors are pulled back into oppressive power dynamics, despite having physically left their abusers, and children are made vulnerable to becoming "pawns" in a dispute between the parents.[31] Hague

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[28] Barnett, *Letters to the U.S. State Department, supra* note 27*,* at 4.

[29] Katz, *supra* note 23, at 53.

[30] *See, e.g.*, Graham, *Letters to the U.S. State Department, supra* note 27, at 57 ("Increasingly, as in my case, the Hague Convention has become a tool used by the perpetrators of domestic violence to continue abusing their victims and asserting control over the lives of those who have fled in fear."); *see also* Anita Gera, *#SurvivorStories Series with Anita Gera and the Misuse of the Hague Convention to Harm Children*, En(gender)ed Podcast, Episode 30 (Nov. 15, 2018), https://engendered.us/episode-30-survivorstories-series-with-anita-gera-on-how-the-hague-convention-can-be-used-to-harm.

[31] *See, e.g.*, Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a. Why Abuse Victims Stay*, 28 Colo. Law. 19, 20 (1999) ("Since batterers know that nothing will devastate the victim more than seeing her children endangered, they frequently use the threat of obtaining custody to exact agreements to their

proceedings are not immune to similar abuse, and are only exacerbated when dragged on for months to review all available options for ameliorative measures.

The ameliorative measures analysis gives perpetrators yet another opportunity to escape accountability and widen the expanse of their control over their victims. Once a victim of domestic violence has established the existence of a grave risk of exposure to harm, engaging in an additional inquiry into ameliorative measures sends two messages. First, it sends a message to abusers—that no matter the abuse, there will always be a second chance to evaluate how the risk can be "mitigated" and child custody can be retained. Second, it sends a message to survivors—that their abusers can potentially harness the power of the legal system to perpetuate their control over survivors and their children with few consequences.

Because of this asymmetric power dynamic, protected and furthered by an ameliorative measures analysis, in the Amici's experience, survivor parents are often forced to make decisions that may have lifelong effects on the child. The current approach of the Second Circuit requires a survivor of domestic violence, especially one who is the primary caregiver, to make what can be an

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liking."); *see also* Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts*, 9 Seattle J. for Soc. Just. 1053, 1081 (2011) ("Being forced back into the courts to determine custody and visitation rights immediately places the survivor in a position where she continues to be under the control of the batterer . . . .").

impossible choice: to trust in a legal analysis that too often gives abusers the benefit of the doubt, or to return to the abuser to avoid losing contact with the child.

In that light, courts must examine ameliorative measures with utmost skepticism as to their efficacy and as to their ability to resist misuse by the very people those measures are designed to constrain. The idea that a caretaker-survivor parent will be required to clear yet another hurdle by proving the ineffectiveness of potential ameliorative measures often results in harm to the child, irrespective of whether the ameliorative measures actually work.

B. Children Are Often Harmed Upon Return.

Since the United States became a party to the Hague Convention, research examining the lives of children after being returned overwhelmingly points to the ineffectiveness of ameliorative measures to protect children from further harm.

An analysis of case studies in the United Kingdom found that undertakings were broken in 66.6% of cases studied, and of those broken, undertakings to refrain from further violence were never followed.[32] A similar study surveying cases in the United States found that in 58.3% of cases, women or children faced renewed violence following

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[32] Marilyn Freeman, *The Outcomes for Children Returned Following an Abduction,* Reunite Research Unit, Int'l Child Abduction Ctr., at 31 (Sept. 2003), https://takeroot.org/ee/pdf_files/library/freeman_2003.pdf.

return, despite undertakings.[33] Moreover, in multiple cases, children who were not subjected to physical violence previously became direct victims of physical abuse after being returned.[34]

The fact that undertakings are likely to be broken has been discussed at length. Courts around the world have recognized that, due to the severity of the previous abuse, "possible undertakings, conditions and protective facilities, even if they were offered or existed, would be insufficient to protect the returning child and / or accompanying parent."[35] A Hague-proceeding petitioner with a history of violent and patterned abuse, even if not directed initially at the child, is likely to repeat the abuse both toward the abused parent *and* toward the child following return.[36]

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[33] 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*, Nat'l Inst. Of Just., at 196 (Nov. 2010), https://www.ojp.gov/pdffiles1/nij/grants/232624.pdf.

[34] *Id.*

[35] Hague Conf. on Priv. Int'l L., *Domestic and Family Violence and the Article 13 "Grave Risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper*, at 25 (2011), https://assets.hcch.net/docs/ce5327cd-aa2c-4341-b94e-6be57062d1c6.pdf.

[36] *See* Mariachiara Feresin et al., *The Involvement of Children in Postseparation Intimate Partner Violence in Italy: A Strategy to Maintain Coercive Control?*, 34 J. Women & Social Work 481, 494 (2019) (confirming that "postseparation violence is a serious problem for women after couples separate"); H.R. Con. Res. 72, 115th Cong., 2d. Sess. (2018) (recognizing that "a child's risk of abuse increases after a perpetrator of domestic

Courts have also recognized that they cannot enforce undertakings in foreign jurisdictions, rendering such undertakings unreliable as a means of protecting respondents and their children from future harm. In domestic-violence cases, an abusive parent has already shown that the risk of punishment under law is not an adequate deterrent against perpetrating violence toward their family. The Australian National Domestic and Family Violence Bench Book, a guide to judges dealing with domestic violence cases that was endorsed by the Hague Conference's *Guide to Good Practice on Article 13(b)*,[37] specifically discusses this risk of future harm, noting that "it is common for perpetrators to continue or escalate the violence after separation in an attempt to gain or reassert control over the victim, or to punish the victim for leaving the relationship."[38] In fact, the period after being reunited with their victims is often the most likely

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violence separates from a domestic partner, even when the perpetrator has not previously abused the child"); *cf.* Raina Kelley, *Why Ordinary People Murder Their Families*, Newsweek (Feb. 18, 2009, 7:00 PM EST), https://www.newsweek.com/why-ordinary-people-murder-their-families-82425 (noting that a parent commits "revenge annihilation" by killing their family unit upon a "catalyst that is seen as catastrophic," such as a child-custody battle).

[37] Hague Conf. on Priv. Int'l L., *1980 Child Abduction Convention, Guide to Good Practice*, Part VI, Article 13(1)(b) (2020), https://www.hcch.net/en/ publications-and-studies/details4/?pid=6740, ¶ 106.

[38] The Australasian Inst. Of Jud. Admin., National Domestic and Family Violence Bench Book of Australia, *supra* note 27, § 4.2.

to see a violent abuser recommit acts of violence.[39] The problem is that ameliorative measures often focus on the institutions of the home jurisdiction, rather than the characteristics of the violent parent. Even where the home jurisdiction has an effective criminal-legal system in place, those institutions may only be able to respond *after* further violence or abuse has taken place. To then return a child to the country in which the abuse took place "on the ground that they will be protected by the police of [that] country, would be to act on an unrealistic premise." *Van De Sande v. Van De Sande*, 431 F.3d 567, 571 (7th Cir. 2005).

The harm that children can face upon being ordered to return is not trivial, and in at least one reported case, was fatal. In the U.S. report discussed above, returned children were physically harmed by the abusive parent, in one case leading to the repeated hospitalization of the returned daughter. [40] Another abused child asked his protective parent "'What if dad hits me 'til I'm dead?'"[41] And in yet another case, a parent who was ordered to return to the United Kingdom with her

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[39] *See* Peter G. Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 Juv. & Fam. Ct. J., 57, 59 (2003) (research indicating that, "during separation, when a perpetrator's perceived grasp on his intimate partner is weakening, he may be most dangerous and extreme in his attempts to regain control" and that "[a]ttempts to leave a violent partner, with children, is one of the most significant factors associated with severe domestic violence and death").

[40] Edleson et al., *supra* note 33, at 179.

[41] *Id.* at 180.

children (from Australia) was dragged behind a car and stabbed to death by her spouse in front of her two sons.[42]

The threat of future violence is tragically real. Requiring judges to consider ameliorative measures in cases involving domestic violence places them in an impossible position. It requires them to look into every possible avenue of potential protection, without any real assurance that they are not returning a child to a place where the child will be harmed—often irreparably.

Not only is it wrong to require judges to make this determination, it is also unnecessary: there is no basis in the text or purpose of the Hague Convention for the mandatory examination of ameliorative measures. As the facts of this case show, any attempt to "balance" the two stated goals of "ensuring the prompt return of the child" and "protecting the child from grave risk" will by definition compromise the latter interest, contrary to the universally recognized principle that the interests of the child are "paramount." If courts are required to undertake extensive research and measures in order to find a way to return two of its *own citizens* to a country in which they were abused, then the judicial system is operating on an assumption that the return of the child overrides the child's safety.

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[42] Sandra Laville, *Woman's Murder Could Have Been Prevented, Says Jury*, Guardian (Feb. 26, 2014), https://www.theguardian.com/society/2014/feb/26/cassandra-hasanovic-murder-domestic-violence.

The court below also failed to recognize that even if the country of habitual residence could effectively protect the caretaker parent and the child from physical violence and other forms of abuse, it could not eliminate other harm the child would face upon return. Ameliorative measures can almost never protect a child from the trauma of witnessing their protective parent being forced to live in constant fear of future violence upon return. This is something that neither money, a restraining order, nor relocation can ameliorate.

On the facts of this case, Ms. Golan has no social support network in Italy, limited access to its resources, and a significantly diminished ability to provide for her son. No amount of money and court-ordered supervised visitation will ameliorate the isolation and retraumatization that both the protective parent and child would likely face upon being returned. The irrationality of ordering the child to be returned in this case is heightened by the fact that the child was only two years old when the initial petition was filed. It is at odds with the purpose of the Convention to remove a small child from a safe and supportive environment free of violence, and order him returned to a country in which his abused mother would be socially isolated and at risk of further violence.

Additionally, continued contact with an abusive parent can result in retraumatization of the child that does not go away merely because that contact takes place only during supervised visitation (as is often ordered as a protective measure). For example, the American Psychological Association noted that, "[e]ven during supervised visitation, in

which physical violence is constrained by the presence of an observer, threats as well as verbal and emotional abuse may continue" with the result that "the children often feel responsible for the [abuse] against their mother, because the father was visiting them." Am. Psych. Ass'n, *Violence and the Family, Report of the American Psychological Association Presidential Task Force on Violence and the Family* 40 (1996). This recognizes that violence, trauma, and harm to an abused parent is not isolated to them alone. The child lives with the reality that their parent is subjected to that abuse, exposing the child to further trauma.

The district court in *Blondin v. Dubois* recognized this unfortunate reality when, on remand, it determined that the children in that case "would suffer severe psychological harm from any return to France, no matter how carefully managed by the French courts." 78 F. Supp. 2d 283, 298 (S.D.N.Y. 2000), *aff'd*, 238 F.3d 153 (2d Cir. 2001) (emphasis omitted). The court emphasized that France very well could protect the children from further physical abuse, but "[w]hat France could not do, if the children were returned, [wa]s protect them from the trauma of being separated from their home and family and returned to a place where they were seriously abused." *Id.*

When evaluating whether ameliorative measures should be taken into consideration, the court must appreciate the reality of the situation to which the child is being returned. As described above, Amici's experience and overwhelming evidence shows that ameliorative measures

prescribed often are ineffective and expose the child to further physical or psychological harm.

CONCLUSION

For these reasons and those set forth in Petitioner's brief, *Amici* respectfully submit that the decision below should be reversed.

Respectfully submitted,

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