No. 20-1034

In The
Supreme Court of the United States

NARKIS ALIZA GOLAN,

Petitioner,

v.

ISAACO JACKY SAADA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* FREDERICK K. COX INTERNATIONAL LAW CENTER IN SUPPORT OF PETITIONER

MICHAEL P. SCHARF
STEPHEN J. PETRAS, JR.
ANDREW S. POLLIS
AVIDAN Y. COVER
Frederick K. Cox International Law Center, Case Western Reserve University School of Law
10900 Euclid Ave.
Cleveland, Ohio 44106
(216) 368-2000

DAVID A. CARNEY
Counsel of Record
MELISSA BILANCINI
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, Ohio 44114
(216) 621-0200
dcarney@bakerlaw.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Frederick K. Cox International Law Center at Case Western Reserve University School of Law is one of the world's premier institutions dedicated to scholarly publications and projects that foster the rule of international law. There are thirty-four full time and adjunct faculty experts in international law associated with the Cox Center. They hold leadership positions in prestigious international law-related professional organizations, including the Council on Foreign Relations, the Public International Law and Policy Group, the Canada-U.S. Law Institute, the International Law Association, and the American Society of International Law. They have testified before the Senate Foreign Relations Committee and been cited in the opinions of this Court, the International Court of Justice and International Criminal Tribunals. They have won three national book-of-the-year awards. And the Chief Prosecutor of the United Nations Special Court for Sierra Leone nominated the work of the Cox Center for the Nobel Peace Prize in 2005 for the invaluable assistance the Center provided to the Office of the Chief Prosecutor.

The Cox Center's overarching mission remains the advancement of international law. This amicus brief is submitted in furtherance of that mission.

---

[1]Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity other than the Frederick Cox International Law Center and its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

INTRODUCTION

The question presented by the petition requires the Court to balance several interests that lie at the heart of the Child Abduction Convention—not only the goal for prompt return to the country of habitual residence, but also the paramount goals for the protection of the child, for expeditious Convention proceedings, and for a clear line of demarcation between Convention petitions and the determination of child-custody disputes.

In balancing these interests, the Cox Center agrees with the petitioner and the United States: "As a matter of practice, elaborate conditions undermine the purpose of prompt return and cause hardship for parents as well as Central Authorities, who must act as intermediaries with left-behind parents to negotiate the terms of return, many of which are beyond the control of either Central Authorities or parents." Kathleen Ruckman, *Undertakings as Convention Practice: The United States Perspective*, The Judges' Newsletter (Hague Conf. on Private Int'l Law, London, England) Vol. II, at 46 (2006); *see also* Pet. Br. 14-15, 28-31 (arguing same).

As these positions are applied to this case, the Second Circuit's rule—mandating the judicial consideration of protective undertakings after a finding of grave risk under the Article 13(b) exception—misapplies the Child Abduction Convention.

Above all else, the Convention "aims to serve the best interests of the individual child." *In re E (Children) (FC)*, [2011] UKSC 27, ¶ 14. "It does so by making certain rebuttable assumptions about what will best achieve this." *Id.* (citing Explanatory Report of Professor Perez-Vera, at para 25 (in turn providing: "it has to be admitted that the removal of a child can sometimes be justified by

objective reasons which have to do either with its person, or with the environment with which it is most closely connected").) As relevant here, the return presumption is made inapplicable where "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." Conv., Art. 13(b).

In applying this exception, our sister signatories have not allowed left-behind parents to unilaterally create alternate realities through promises placed on a piece of paper. Our sister signatories have instead recognized that the best evidence of what will happen in the immediate future—the Convention sets forth the goal that return petitions be decided within six weeks, not six years—is what has happened in the immediate past. Thus also, our sister signatories have held that "the requirements made in this country must not be so elaborate that their implementation might become bogged down in protracted hearings and investigations," *In re M (Abduction: Undertakings)*, [1995] 1 FLR 1021, 1024 (Butler-Sloss, LJ), and deny return petitions in cases like this one, involving serious allegations of prolonged and severe domestic abuse, *e.g., LRR v. COL*, CA743/2018, [2020] NZCA 209, ¶¶ 135-36; *Achakzad v. Zemaryalai*, 2010 Ont. Ct. of Just. 318 [Can. LII], ¶¶ 97-98.

These holdings apply with particular force in the United States, where, unlike many of our sister signatories, our trial courts have no built-in mechanism for enforcement of judicial orders abroad. Thus, as this case shows, embroiling our state and federal judges in a judicially mandated protective undertakings analysis thwarts two Convention goals: the prompt determination of return petitions (Conv., Art. 11) and separating petition proceedings from child-custody disputes (*id.*, Art. 16).

It is for these reasons that the Cox Center agrees with the position of the United States: the consideration of protective undertakings is both (1) not required by the Convention, and (2) should be limited in time and scope to ensuring the safe return of the child to the country of habitual residence in the first instance. (Br. for the U.S. as *Amicus Curiae* (Oct. 2021), at pgs. 8, 10.) Undertakings that go any further than this limited scope, and judicial requirements mandating consideration of undertakings that go any further than this limited scope, necessarily distort Convention proceedings in a way that the framers of the Convention could never have intended.

This case shows this distortion better than any other: the Second Circuit's judicially imposed protective-undertakings mandate has placed the life of a child in legal limbo for nearly four years and enmeshed a United States district court judge sitting in Brooklyn into child custody proceedings occurring in Milan, contrary to the very fiber of the Convention's basic principles.

Under these circumstances, comity is best-served by applying the Convention as it was framed, rather than amending the Convention through judicial fiat. As our sister signatories have likewise held: "it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate." *In re D (a child)*, [2006] UKHL 51, ¶ 55 (Baroness Hale of Richmond); *LRR v. COL*, CA743/2018, [2020] NZCA 209, ¶¶ 100, 119, 146 (holding same).

ARGUMENT

1. The Court Interprets Treaties Consistent with the Shared Expectations of the Parties.

"A treaty is in the nature of a contract between nations." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984). The interpretation of a treaty "begins with its text," *Abbott v. Abbott*, 560 U.S. 1, 10 (2010) (quoting *Medellin v. Texas*, 552 U.S. 491, 506 (2008))—the Court gives "the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France v. Saks*, 470 U.S. 392, 399 (1985); *see also Lozano v. Montayo Alvarez*, 572 U.S. 1, 12 (2014) (same); Vienna Convention on the Law of Treaties, Article 31 (General rule of interpretation) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

Basic norms of contract interpretation provide that "[a] court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions when read as a whole." *Stockman v. Heartland Industrial Partners, L.P.*, 2009 WL 2096213, at *6 (Del. Ch. Ct. Jul. 14, 2009) (Strine, J.) (quoting *Council of the Dorset Condo. Apts. v. Gordon*, 801 A.2d 1, 7 (2002)); *AEP Energy Services Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 729 (2d Cir. 2010) ("the primary concern when interpreting a contract is to ascertain and give effect to the intent of the parties as that intent is expressed in the contract"; "[n]o single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument") (quotation omitted).

Specific with respect to treaty interpretation, "'[t]he opinions of our sister signatories are entitled to considerable weight.'" *Abbott*, 560 U.S. at 16 (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999)) (internal quotations and ellipsis omitted); *see also Lozano*, 572 U.S. at 12; *Air France*, 470 U.S. at 399 (1985); *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 175-76 (1999) (all same).

This principle applies with "special force" to the Child Abduction Convention, where "Congress has directed that 'uniform international interpretation of the Convention' is part of the Convention's framework." *Abbott*, 560 U.S. at 16 (quoting 22 U.S.C. § 9001(b)(3)(B)); *cf. Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, ¶ 36 (Sup. Ct. Can. 2018); *L.K. v. Director-General, Department of Community Services*, [2009] HCA 9, 237 CLR 582, 596 ¶ 36; *Punter v. Secretary of Justice*, CA 221/05 [2007] 1 NZLR 40, 84 ¶ 171; *PAS v. AFS*, [2004] IESC 95 (Ir.) (recognizing same).

2. The Principle of Uniformity of Interpretation Has More Limited Application for the Article 13(b) Defense.

This principle of uniform international interpretation of the Child Abduction Convention comes with a caveat. If there are reasons that sister signatories may interpret the particular provision differently from one another, then it does no harm to international comity interests to depart from these interpretations. As the Australia High Court has held: "It follows that, *unless it is shown that the term is used in the statute law of other contracting states in a sense different from the way in which it is used in the Abduction Convention*, care is to be exercised to avoid

giving the term a meaning in Australia that differs from the way it is construed in the courts of other contracting states." *L.K. v. Director-General, Department of Community Services*, [2009] HCA 9, 237 CLR 582, 596 ¶ 36 (emphasis added).

In this case, there are three material differences for the Court to consider in analyzing the question presented by the petition. *First*, courts in the European Union—unlike United States courts—are required by Brussels IIa regulations (not the Convention) to analyze protective measures in grave-risk cases. *See* Regulation (EC) No 2201/2003 of 27 November 2003, Art. 11(4) (providing that "[a] court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return").

Pursuant to European Union regulation, protection orders in child-abduction cases from sister European courts are directly enforceable in the courts of other member states. *See* European Regulation 606/2013 on the Mutual Recognition of Protection Measures in Civil Matters.

Second, many of our sister signatories—but not the United States—are parties to the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect to Parental Responsibility and Measures for the Protection of Children, including Australia, Belgium, Denmark, France, Germany, Greece, Norway, Switzerland, and the United Kingdom of Great Britain. *See* Status Table, 1996 Child Protection Conv., https://www.hcch.net/en/instruments/conventions/status-table/?cid=70 (last visited Jan. 24, 2022).

Unlike Brussels II, the 1996 Child Protection Convention does not mandate consideration of protective measures in Child Abduction Convention proceedings. But as with Brussels II, it does provide a mechanism for making any protective measures automatically enforceable in the country of habitual residence. Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, *reprinted in*, 35 I.L.M. 1391, art. 28 (1996) ("Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child.").

United States courts, by contrast, have no built-in mechanism to ensure that their orders are enforceable in foreign domestic courts. *E.g., Danaipour v. McLarey*, 286 F.3d 1, 25 (1st Cir. 2002) (noting "[t]he district court had no authority to order a forensic evaluation done in Sweden, or to order the Swedish courts to adjudicate the implications of the evaluation for the custody dispute").

The absence of an enforcement mechanism strongly counsels against a United States court's imposition of wide-ranging protective measures abroad.

Third, Congress has mandated that a parent opposing return under the Convention exceptions must prove them by clear and convincing evidence. 22 U.S.C. § 9003(2)(A) (Burdens of proof). This is a higher standard of proof than applied by our sister signatories. *See* Rhona Schuz, The Hague Child Abduction Convention: A Critical Analysis

Interpretation and Application of the Grave Risk Defence, at pg. 273 ("it should be noted that the US implementing legislation imposes a higher standard of proof for proving the Article 13(1)(b) and Article 20 defences. These defences have to be proven by clear and convincing evidence; instead of the usual preponderance of evidence."); Brenda Hale, Taking Flight-Domestic Violence and Child Abduction, at pg. 12 (noting that "[t]he USA also have stricter rules of evidence and a higher standard of proof than most other countries, requiring 'clear and convincing evidence' in Article 13(1)(b) cases.").

This heightened evidentiary burden already furthers the Convention's general goal for prompt return, *see* Dep't of State, Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,495 (Mar. 26, 1986), App'x A, Lett. Trans. at pg. 1, and thus also counsels against imposing additional hurdles for applying the exception according to its text in the United States.

3. The Leading Opinions from Our Sister Signatories Remain Relevant for the Court's Textual Analysis of the Article 13(b) Defense.

With those differences in mind, we believe the leading opinions from our sister signatories interpreting the Article 13(b) defense provide several guiding principles that remain helpful to the Court's consideration of the question presented by the petition.

First, our sister signatories have held that "[t]he words of article 13 are quite plain and need no further elaboration or 'gloss.'" *In re E (Children) (FC)*, [2011] UKSC 27, ¶ 31 (quoting *DP v. Commonwealth Central Authority* [2001] HCA 39, (2001) 206 CLR 401, paras 9, 44)).

As the Australia High Court explained: "On its face [the text of Article 13(b)] presents no difficult question of construction and is not ambiguous." *DP v. Commonwealth Central Authority*, [2001] HCA 39 (Aust. High Ct.), ¶ 41. Rather, "[w]hat must be established is clearly identified: that there is a grave risk that the return of the child would expose the child to certain types of harm or otherwise place the child in 'an intolerable situation.'" *Id.*; *see also LRR v. COL*, CA743/2018, [2020] NZCA 209, ¶ 81 (holding that Article 13 exceptions to the obligation to return "do not need any extra interpretation or gloss").

Second, the language of the Article 13(b) exception sets a high bar. "[T]he risk has to be more than an ordinary risk, or something greater than normally would be expected on taking a child from one parent to another." *Thomson v. Thomson*, 1994 CarswellMan 91 (Can. Sup. Ct.), ¶ 82; *see also Habimana v. Mukundwa*, 2019 ONSC 1781 (Ontario Sup. Ct. of Just.), ¶ 38 ("The jurisprudence relating to the grave risk of harm defence, pursuant to Article 13(b), provides for a rigorous and exacting test. The case law supports the conclusion that the risk must be 'grave,' 'weighty,' and 'severe,' on a balance of probabilities (see para. 28 of *Finizzio v. Scoppio-Finizzio*, 1999 CarwellOnt 3018 (C.A.) as guided by *Thomson v. Thomson*, [1994] 3 S. C. R. 551, CanLII 26)."); *see also In re E (Children) (FC)*, [2011] UKSC 27, ¶ 33 ("[T]he risk to the child must be 'grave.' It is not enough, as it is in other contexts such as asylum, that the risk be 'real.' It must have reached such a level of seriousness as to be characterized as 'grave.'"); *In the Matter of K (A Minor)*, [2020] NIFam 9, ¶ 16 (High Ct. of Just., N. Ire.); *Arthur & Secretary, Dep't of Family Comm. Services v. Anor*, Family Court of Australia [2017] 111, ¶ 54 (same).

These holdings are consistent with the position of the Department of State. *See* Dep't of State, Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986) ("The person opposing the child's return must show that the risk to the child is grave, not merely serious.").

Third, "article 13b is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country." *In re E (Children) (FC)*, [2011] UKSC 27, ¶ 35; *In the Matter of S (a Child)*, [2012] UKSC 10, ¶ 34 ("The critical question is what will happen if, with the mother, the child is returned.").

This forward-looking nature of the provision, however, does not provide a judicial license to conduct a wide-ranging general inquiry into what can be done to ensure the long-term well-being of the child under circumstances that might or might exist upon return. Rather, "the requirements made in this country must not be so elaborate that their implementation might become bogged down in protracted hearings and investigations." *In re M (Abduction: Undertakings)*, [1995] 1 FLR 1021; *see also Arthur & Secretary, Department of Family Community Services v. Anor*, Family Court of Australia, [2017] FamCAFC 111, ¶ 76 (following *In re M* and likewise holding that "[c]onditions or undertakings should operate only until the courts of the country of habitual residence can become seized of the proceedings brought in that jurisdiction").

Fourth, and finally, "the Convention recognizes that not all parents have the right to demand the automatic return of children who have been taken away without their consent." *In re D (a child)*, [2006] UKHL 51, ¶ 24.

Thus also: "It cannot be emphasized too strongly that the exceptions set out in Article 13 are as integral to the scheme of the Convention as the Article 12 provision for

prompt orders for return." *LRR v. COL*, CA743/2018, [2020] NZCA 209, ¶ 79; *DP v. Commwlth. Cent. Auth.*, [2001] HCA 39 (Aust. High Ct.), ¶ 36 (recognizing the Convention exceptions as "important qualifications to the general rule for returning a child to the place of its habitual residence").

And, specific with respect to Article 13(b), our sister signatories have thus held that entering a return order notwithstanding a finding of grave risk or an intolerable situation to the child would be "inconceivable." *LRR v. COL*, CA743/2018, [2020] NZCA 209, ¶¶ 100, 119, 146. As Baroness Hale likewise wrote: "it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate." *In re D (a child)*, [2006] UKHL 51, ¶ 55.

4. The Opinions of Our Sister Signatories Show that the Second Circuit's Judicial Imposition of a Protective Undertakings Requirement Is Wrong.

The opinions of our sister signatories thus make plain this pure fact: the Second Circuit's judicial imposition of a protective-undertakings mandate after a finding of grave risk or intolerable situation to the child misapplies the Abduction Convention. Article 13(b)'s text is plain and unambiguous and needs no judicial gloss. This text sets forth a demanding, forward-looking standard, and when that standard is met it would be inconceivable to order the return of the child. And, if the left-behind parent offers no proposed undertakings and chooses to argue against the exception on other grounds, there is simply no legitimate textual basis for the Court to consider them.

At a very basic level, then, the Second Circuit's judicial imposition of this mandatory requirement violates a fundamental principle of treaty interpretation. As this Court long ago held: "[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions." *The Amiable Isabella*, 19 U.S. 1, 22 (1821) (Story, J.).

Rather: "We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind." *Id.*; *see also Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134-35 (1989) (holding in the context of treaty interpretation, "where the text is clear, as it is here, we have no power to insert an amendment," because to do so "would be to make, and not to construe a treaty").

5. The Second Circuit's Judicial Mandate for Broad Consideration of Protective Undertakings Violates Core Convention Principles and Offends Comity.

A. The Second Circuit's error is not only procedural, however. Entangling our district courts in the process of attempting to ensure undertakings are enforceable in the child's country of habitual residence sends our judges down a treacherous path that runs directly contrary to two fundamental Convention goals: (1) the prompt and summary disposition of return petitions, so that a child's life is not held in legal limbo; *see* Conv., Article 11 (requiring "[t]he judicial or administrative authorities of Contracting States shall act expeditiously in proceedings

for the return of children," and contemplating that Hague petitions would be decided by the relevant authorities within six weeks); and (2) a clear line of demarcation between Convention proceedings and subsequent child-custody disputes, wherever those disputes might take place, *see* Conv., Art. 16 (providing that "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") (emphasis added); *see also, e.g.,* Dep't of State, Text and Legal Analysis, 51 Fed. Reg. at 10,509 (discussing Article 16 of the Convention, which "bars a court in the country to which the child has been taken or in which the child has been retained from considering the merits of custody claims").

No case better demonstrates this treacherous path than this one. Applying the Second Circuit's mandate, the district court initially worked with the parties after a nine-day bench trial to negotiate protective measures that might be put in place in Italy even before the Court's initial return order. (Pet. App. 42a, 81a-84a.) The Second Circuit rejected these measures because there were not sufficient guarantees that the respondent would follow them. (*Id.*, 27a-28a, 35a.)

The Second Circuit's requirements for the district court on remand were staggering and violate the very premise of prompt disposition:

1. "On remand, the district court must determine whether there exist alternative ameliorative measures that are either enforceable by the District Court or, if not directly enforceable, are supported by other sufficient guarantees of performance." (*Id.*, 36a.)

2. "In doing so, the District Court may consider, among other things, whether Italian courts will enforce key

conditions such as Mr. Saada's promises to stay away from Ms. Golan and to visit B.A.S. only with Ms. Golan's consent." (*Id.*, 36a-37a.)

3. "On remand, the District Court may consider whether it is practicable at this stage of the proceedings to require one or both of the parties to [apply to Italian courts for relief]. The District Court may then take into account any corresponding decision by the Italian courts in determining whether there are sufficient guarantees of performance of protective measures that will mitigate the grave risk of harm B.A.S. faces if repatriated. This is, of course, just one of several avenues the District Court may elect to pursue." (*Id.*, 38a.)

The district court then worked with Italian authorities *for nine months* in an attempt to figure out whether those authorities would enforce the undertakings. (Pet. App. 12a.) Ultimately, the district court become enmeshed in child-custody proceedings in Italy. (*Id.*, 17a-18a.) In order to meet the district court's protective-undertakings requirements, the Italian court entered "a protective order against the petitioner and an order directing Italian social services to oversee his parenting classes and psychoeducational therapy." (*Id.*, 17a; *see also id.*, 20a (same).) The district court made a substantial property allocation as between the petitioner and respondent, ordering Mr. Saada to pay the petitioner $150,000 to ensure "the respondent's financial independence from the petitioner and his family" upon their return from Italy, at least while the Italian courts figured out the remainder of the child custody dispute. (*Id.*, 22a.)

To be sure, "[t]he Convention requires a court in a requested State to walk a delicate line between ensuring that the application is determined promptly, and ensuring that proper attention is paid to the important and often

strongly contested issues that can arise in the context of Convention applications." *LRR v. COL*, CA743/2018, [2020] NZCA 209, ¶ 101.

The process mandated by the Second Circuit here is abhorrent to both the letter and spirit of the Convention. "Hague Convention cases are a special type of proceedings in which this country adheres to an international Convention which we are duty-bound to observe and to implement. The procedure is summary, and intended expeditiously to deal with the mischief of wrongfully removing children from the jurisdiction of their habitual residence." *In re M (Abduction: Undertakings)*, [1995] 1 FLR 1021, 1024 (Butler-Sloss, LJ). And "[t]he temptation to conduct a full inquiry into the welfare and best interests of the child must be resisted. A lengthy and wide-ranging inquiry of that kind would defeat one of the Convention's central objectives: ensuring the prompt return of children who have been wrongfully removed or retained, where none of the exceptions applies." *LRR v. COL*, CA743/2018, [2020] NZCA 209, ¶ 101; *Arthur & Secretary, Dep't of Fam. Comm. Servs. v. Anor*, Family Court of Australia, [2017] FamCAFC 111, ¶ 76 (same); *cf. Thomson v. Thomson*, 1994 CarswellMan 91 (Can. Sup. Ct.), ¶ 86 (undertakings permissible "provided that such undertakings are made within the spirit of the Convention," where "any short-term harm to the child is ameliorated").

B. The Second Circuit's judicially imposed protective-undertakings mandate also undermines, rather than fosters, fundamental comity interests. To begin, it does not further comity interests to have United States courts openly criticizing their foreign domestic peers. *E.g., Davies v. Davies*, 2017 WL 361556, at *21 (S.D.N.Y. Jan. 25, 2017), *aff'd* 717 F. App'x 43, 49 (2d Cir. 2017) ("the

Court finds the legal system in St. Martin to be inadequate to protect Ms. Davies and K.D. from Mr. Davies's abuse"). To the contrary: "Respect for the sovereignty of foreign nations and legitimate foreign policy concerns counsel against having American courts sit in judgment of their foreign counterparts." *Wright & Miller*, 14 D. Fed. Prac. & Proc. Juris. § 3828.3.

And, for those unwilling to openly criticize their foreign domestic peers, "institutional pressures will predictably cause judges to overestimate the safety that will exist upon return." Letter from Merle H. Weiner, Esq., Philip H. Knight Professor of Law, University of Oregon to Michael Coffee, U.S. Dep't of State (Sept. 2, 2017), at pg. 6. As Professor Weiner explains: "Not only do institutional dynamics give the entities in the child's habitual residence reason to minimize the uncertainties and problems with protective measures, but institutional dynamics also give judges adjudicating petitions reason to accept without question the information provided." (*Id.*)

We have frequently seen evidence of this over-deference phenomenon in the forum non conveniens context. Here, notwithstanding "general accusations of corruption, delay, or other problems with the alternative forum's judicial system," federal courts "appear reluctant to look closely at the quality of justice or competence of judicial personnel in the alternative forum." Arthur R. Miller, 14D Fed. Prac. & Proc. Juris. § 3828.3 (4th Ed., Oct. 2020 Update). And, "by categorically rejecting generalized accusations of corruption, delay, and other inadequacies in foreign judicial systems, or imposing too high a level of proof on these points, federal courts ignore the realities of the nature of the justice systems of many nations." *Id.*; *see also* Virginia A. Fitt, Note, *The Tragedy*

of Comity: Questioning the American Treatment of Inadequate Foreign Courts, 50 Va. J. Int'l L. 1021, 1044 (2010) (concluding that "[t]he reality of systemic corruption inherent in some foreign courts," "as well as challenges to the logic underpinning the current practice of American comity," "justifies adherence to a less dogmatic form of judicial deference").

Where forum non conveniens may result in improper dismissal of a civil action, here the over-deference will result in transfer of a child to a situation where his or her life is at risk. Notably, several of our treaty partners have a demonstrated record of noncompliance with their treaty obligations under the Child Abduction Convention. *See, e.g.,* Report on Compliance, April 2020, United States Dep't of State, at 12-27 (detailing signatories demonstrating a pattern of noncompliance with the treaty, including Argentina, Brazil and Ecuador); *id.* at 12 (noting that "the Argentine judicial authorities failed to regularly implement and comply with the provisions of the Convention," and "[a]s a result of this failure, 25 percent of requests for the return of abducted children remained unresolved for more than 12 months"; "[o]n average, *these cases were unresolved for more than nine years and 10 months*") (emphasis added).

6. The Court Should Reverse the Judgment of the Second Circuit and Keep B.A.S. Here at Home.

For all of these reasons, the Cox Center agrees with the petitioner and the United States: the consideration of protective undertakings in Convention proceedings is by no means mandatory, and to the extent considered at all they should be limited in scope and designed solely to ensure the safe return of the child to the country of

habitual residence until the courts of that country can protect the child. (Br. for the U.S. as *Amicus Curiae* (Oct. 2021), at pgs. 8, 10; Pet. Br. 14-15, 28-31.)

This is particularly so in the United States, where the enforcement of any potential undertakings cannot be guaranteed, and the party opposing return already must demonstrate grave risk of an intolerable situation under a heightened burden of proof (clear and convincing evidence). In domestic-violence cases in particular, an abusive parent should not be allowed to change the facts by manufacturing an alternate universe of facts that might or might not exist upon return based on promises of proposed undertakings that United States courts cannot automatically enforce in any event.

Adopting this interpretation of the Convention applies this fundamental maxim of contract interpretation: "A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions when read as a whole." *Stockman v. Heartland Industrial Partners, L.P.*, 2009 WL 2096213, at *6 (Del. Ch. Ct. Jul. 14, 2009) (Strine, J.) (quoting *Council of the Dorset Condo. Apts. v. Gordon*, 801 A.2d 1, 7 (2002)); *AEP Energy Services Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 729 (2d Cir. 2010) ("the primary concern when interpreting a contract is to ascertain and give effect to the intent of the parties as that intent is expressed in the contract"; "[n]o single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument.") (quotation omitted).

As applied here, this principle means the Court should reverse the judgment of the Second Circuit and keep B.A.S. in the United States, which is now the only home he knows. In cases of severe and domestic abuse, like this

one, our sister signatories have not hesitated in refusing to enter a return order. *LRR v. COL*, CA743/2018, [2020] NZCA 209, ¶¶ 81, 87 (denying return petition based on extensive domestic violence toward the child's mother; "The mother fears for her safety in Tasmania, where she will be living in proximity to the father and will probably be forced to interact with him to some extent in connection with arrangements concerning H. This fear is well grounded in fact."); *Achakzad v. Zemaryalai*, 2010 Ont. Ct. of Just. 318 [Can. LII], ¶ 95 (same; "Canadian and U.S. courts, as well as the courts of other Hague signatories, have recognized, that in some Article 13(*b*) cases, a return order simply cannot be made."); *compare Quinn v. Millsap*, 491 U.S. 95, 106-07 (1989) (refusing to remand where "there is no good reason to delay the resolution of this issue any further").

CONCLUSION

"No-one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm." *In re D (a child)*, [2006] UKHL 51, ¶ 52.

In this case, the district court expressly found that the petitioner established the grave-risk exception by clear and convincing evidence (Pet. App. 80a), and there were never any limited undertakings that could have been put in place to negate this finding (*id.*, 34a-35a).

The judgment of the Second Circuit should be reversed, and the Court should order that B.A.S. remain in the United States.

Respectfully submitted,

Dated: January 26, 2022

MICHAEL P. SCHARF
STEPHEN J. PETRAS, JR.
ANDREW S. POLLIS
ANDREW A. ZASHIN
AVIDAN Y. COVER
Frederick K. Cox International Law Center, Case Western Reserve University School of Law
10900 Euclid Ave.
Cleveland, Ohio 44106
(216) 368-2000

DAVID A. CARNEY
Counsel of Record
MELISSA BILANCINI
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, Ohio 44114
(216) 621-0200
dcarney@bakerlaw.com

Counsel for Amicus Curiae