19-820-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ISACCO JACKY SAADA,
Petitioner-Appellee,

v.

NARKIS ALIZA GOLAN,
Respondent-Appellant.

On Appeal from the United States District Court
For the Eastern District of New York (Civ. No. 18-5292)
(The Honorable Ann M. Donnelly, J.)

BRIEF FOR AMICI CURIAE SANCTUARY FOR FAMILIES, PATHWAYS TO SAFETY, DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT, HER JUSTICE, DAY ONE NEW YORK, NATIONAL NETWORK TO END DOMESTIC VIOLENCE, LAWYERS COMMITTEE AGAINST DOMESTIC VIOLENCE, SAFE CENTER LI, LEGAL MOMENTUM, PROFESSOR DEBORAH EPSTEIN, BATTERED MOTHER'S CUSTODY CONFERENCE, LANSNER & KUBITSCHEK, PROFESSOR LEIGH GOODMARK, PROFESSOR MERLE WEINER, NEW YORK LEGAL ASSISTANCE GROUP, SAFE HORIZON, URBAN RESOURCE INSTITUTE, AND DR. JACQUELYN CAMPBELL IN SUPPORT OF RESPONDENT-APPELLANT AND PARTIAL REVERSAL

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FED. R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT

None of the corporate *Amici* have a parent corporation, and no publicly held corporation owns 10% or more of the stock of any of the *Amici*.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*[1]

Amici are non-profit and academic organizations, law firms, and directors of legal clinics that advocate for and support victims of domestic abuse and their children. *Amici* have considerable expertise in the patterns of coercive control and escalation of violence that are present in this case. Each *Amicus* is described more fully in the declaration attached to the accompanying motion and is concerned with the District Court's decision because it appears to ignore well-established social science findings about the impact of domestic abuse and coercive control on victims and their children and the efficacy of undertakings in that context.

[1] No counsel for a party authored this brief in whole or in part, and no party's counsel, party, or person other than *amici curiae* contributed money intended to fund preparing or submitting the brief.

PRELIMINARY STATEMENT

"He told me if she comes back she would either be leaving in a pine box or that he would drive her into a mental ward. . . . [T]he only option was to send the baby back or if she came back, it wouldn't be too good for her."

- Eldar Golan, Appellant's brother, *Tr. 386:9–20.*

From the inception of their relationship, Respondent-Appellant Narkis Golan has been beaten, thrown, kicked, punched, strangled, raped, chastised, threatened, demeaned, isolated, sued, and emotionally razed by Petitioner-Appellee Jacky Saada. Mr. Saada shows little restraint around their two-year-old child, B.A.S., frequently putting him in harm's way and exposing him to severe developmental harm. He engaged in this endless abuse, violence, and coercion with utter disregard for the laws of Italy and the United States and admits to as much in court. Over their five-year relationship, Mr. Saada has *repeatedly* promised to change his behavior to induce Ms. Golan to return to Italy. His behavior has not changed, and it will not change. His actions evidence a solitary purpose: assertion of power and control over Ms. Golan.

Sadly, Ms. Golan's experience is not atypical. It conforms to the real experiences of the myriad women abused by their spouses. Torn between a sense of love, duty, hope, and family pressure on the one hand and deep fear and vulnerability on the other, these women frequently capitulate to their abusers' will to try to avoid further abuse. Their actions are born out of a desire to *survive*.

Physical violence is only one component of domestic abuse, but given its brutal, visible nature, it is frequently credited by courts. But victims of domestic violence suffer from other, more insidious forms of abuse, including emotional, psychological, and economic abuse. Abusers expertly combine these components with the terror of physical and sexual violence to demean their victims, establish power, and exert control. Under the weight of this multi-modal assault, known as coercive control, a victim will invariably succumb to her abuser's dominance. Children who witness such abuse and are in the care of a parent struggling to cope with coercive control suffer well-documented developmental trauma.

Escaping this web of control is no small feat. If a victim finds the courage, resources, and opportunity to escape, she faces a greater danger. In *Amici*'s collective experience, confirmed by literature and experts, abuse frequently escalates after separation and the risk of lethality or severe physical injury increases significantly. Under these conditions, it is senseless for a U.S. court to banish a victim and her child to a foreign country with nothing but empty promises from her abuser, and expect her to protect herself and her child.

ARGUMENT

Mr. Saada's sweeping violent and coercive abuse of Ms. Golan has already inflicted untold harm on both Ms. Golan and their child, B.A.S. A proper application of the Hague Convention on the Civil Aspects of International Child

Abduction, *opened for signature* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Convention or Hague Convention], to Ms. Golan's case demands that B.A.S. not be returned to Italy to endure more trauma. First, a victim who has endured sustained and pervasive abuse, as Ms. Golan has here, does not manifest an intent to establish her child's habitual residence through actions that reflect the will of her abuser. Second, when returning the child to his purported residence will inflict a grave risk of harm upon him—a difficult standard to meet, no set of undertakings can mitigate that risk. The imposition of ineffective and unenforceable undertakings not only renders the grave risk exception in the Convention meaningless, but also violates principles of comity.

I. The actions of a domestic abuse victim frequently reflect the will of her perpetrator who exercises coercive control over her, and do not reflect an intent to establish a habitual residence for her child.

Perpetrators of domestic abuse do so in a number of ways, including physical, sexual, psychological, emotional, and economic abuse. These modes of abuse, combined, enable an abuser to gradually exert coercive control over his victim and eventually "establish[] a regime of dominance" over her. Q&A with Evan Stark, Ph.D. MSW, New York State Office for the Prevention of Domestic Violence (2013), *available at* https://www.opdv.ny.gov/professionals/abusers/coercivecontrol.html ("Coercive control is a strategic course of oppressive behavior designed to . . . establish[] a regime of dominance [over a victim's]

personal life."). In fact, non-physical modes of abuse expand a perpetrator's *sphere of control* over his victim and continue to affect the victim well beyond the end of their relationship. *E.g.*, Laurel B. Watson & Julie R. Ancis, *Power and Control in the Legal Sys.: From Marriage/Relationship to Divorce and Custody*, 19 VIOLENCE AGAINST WOMEN 166, 167 (2013) ("The tactics of power and control . . . often continue to manifest during the dissolution of the relationship and pervade legal proceedings."). After enduring this type of on-going abuse, victims become extremely vulnerable and often internalize their abusers' expectations and comply with their wishes to avoid further abuse and to protect themselves and their children. *Id.* As a result of the insidious nature of this dynamic, courts often misattribute volition and choice to a victim's actions.

A. Perpetrators of domestic violence exercise coercive control over their victims through physical, sexual, psychological, emotional, verbal, and economic abuse.

Even though sixty to eighty percent of abused women suffer more than physical and emotional abuse, Q&A with Evan Stark, courts often fixate upon the physical violence, and overlook the profound effects of nonviolent abuse and sexual assault (a separate and uniquely devastating form of physical abuse) and underestimate the breadth of an abuser's sphere of control over his victim. Defeating this prejudice requires understanding the multi-faceted nature of abuse—sexual, emotional, psychological, verbal, economic, *and* physical.

Beyond the physical violence, perpetrators ***sexually abuse*** their victims to demean and control them. Pamela Powell & Marilyn Smith, UNCE, *Domestic Violence: An Overview* (2011), https://www.unce.unr.edu/publications/files/cy/2011/fs1176.pdf. Sexual abuse includes rape, coercion to have sex, assault to sexual organs, threats of sexual assault, and verbal attacks of a woman's sexual history, intent, or fidelity and is inflamed by cultural norms. World Health Org., *Understanding and Addressing Violence Against Women: Intimate Partner Violence*, at 4–5 (2012), https://apps.who.int/iris/handle/10665/77432 (listing "[s]exual intercourse is a man's right in marriage" and "[s]exual activity . . . is a marker of masculinity" as beliefs that support sexual violence).

Psychological, emotional, and verbal abuse also reinforce a perpetrator's control:

> Offenders who manipulate a victim's self-worth are more likely to be able to control a victim. Constant criticism, name-calling, and minimizing a victim's abilities, are all methods for emotionally controlling a victim. When a victim feels worthless, they are less likely to believe that they deserve better treatment and, therefore, are more apt to remain [with an abuser].

Powell, *Domestic Violence: An Overview*, at 2. A perpetrator extends this control by manipulating his victim's vulnerability and desire for safety and security, and convincing her that he will "change." World Health Org., *Understanding and Addressing Violence Against Women*, at 3 (citing "the hope that the partner will

change" as a reason that victims stay with abusive partners and recognition that an abuser will *not* change as a common motivation to permanently leave an abusive partner).

Economic abuse is another common and effective tactic abusers use. By ensuring a "lack of alternative means of economic support," an abuser restrains his victim from escaping his sphere of control. *Id.* at 3; *see also* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1679–87, 1734 (2004) ("The most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the economic resources to survive without him."). Over seventy-eight percent of perpetrators inflict such economic abuse upon their victims, Diane Johnston & Divya Subrahmanyam, *Denied! How Economic Abuse Perpetuates Homelessness for Domestic Violence Survivors*, CAMBA.ORG, at 1 (Sept. 2018), https://www.camba.org/Documents/denied-how-economic-abuse-perpetuates-homelessness-for-domestic-violence-survivors.pdf, chiefly by controlling victims' spending or access to resources such as money, transportation, or employment. Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Court*, 9 SEATTLE J. SOC. JUST. 1053, 1059 (2011). In *Amici's* experience, this form of coercive control is particularly potent when there are children involved. The fear of being unable to

provide for their children keeps victims chained to abusers who guarantee their children's economic well-being.

Immigration abuse is exceptionally predatory—an abuser further isolates an immigrant victim, already separated from her community and lacking language skills, by withholding the documentation required to secure a job and independently support herself. *Patrilocality*, where a perpetrator insists his victim lives with him and in proximity to *his* community, envelops the victim in a *community of perpetrators* on whom she must rely. The victim then often endures further abuse from a perpetrator's in-laws, particularly female in-laws. Anita Raj & Jay Silverman, *Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence,* 8 VIOLENCE AGAINST WOMEN 367, 371 (2002). Patrilocality exacerbates other forms of abuse because the abuser's community acts as a barrier preventing the victim from developing an independent, supportive community, learning the language, or seeking education or work.

This multimodal campaign of abuse is as powerful as any shove or choke and confines a victim within her abuser's sphere of control. Preeminent expert, Dr. Evan Stark, narrates life in the sphere:

> [Coercive control] . . . gives victims the feeling that perpetrators are omnipresent and omnipotent, rendering separation even less effective as an antidote . . . . [T]hese dimensions of [coercive control] allow

> perpetrators to affect a level of subjugation that is more devastating than physical assault . . . .

Commentary on Johnson's "Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence," 12 VIOLENCE AGAINST WOMEN 1019, 1022 (2006).

There can be no doubt that Ms. Golan suffered each of these kinds of abuses at Mr. Saada's hands—the District Court meticulously catalogs them in her findings of fact, even if it fails to appreciate their significance. In addition to the physical abuse she endured, including while she was pregnant, (SA009) (Mr. Saada clutched a pregnant Ms. Golan's hair, and slammed her face into the dashboard, breaking her sunglasses), Ms. Golan also suffered sexual abuse,[2] in at least one instance while she was pregnant. (SA009.) Mr. Saada supplemented his physical abuse with *daily* emotional and psychological abuse. (SA012-013) (Mr. Saada's texts to her careen from "I wish u fucking die" to "I don't want to abuse u."); (*see also* Tr. 965:21-966:17) (Mr. Saada admitting to "screaming and going

[2] Given the degrading and devastating effect that sexual violence has on its victims, and the resulting increase in vulnerability, it is disappointing that the District Court gave the sexual violence here such short shrift, even reducing one incident to a footnote in the opinion. (SA032 n.37); *see also* Lynn Hecht Schafran, *Risk Assessment and Intimate Partner Sexual Abuse: The Hidden Dimension of Domestic Violence*, 93 JUDICATURE 161, 161 (2010) ("[R]esearch documents the importance of a largely ignored sign of risk and potential lethality in [domestic violence] cases: intimate partner sexual abuse.").

crazy" at least "700 times in 1,000 days"). As if that were not enough, his immigration and economic abuse ensured that she was totally and helplessly dependent on him. (SA003-004 n.4, 018-019) (Saada did not register their marriage in Italy, depriving Ms. Golan of legal work authorization, and has threatened to "make sure Ms. Golan ha[s] no money if she return[s] . . . ."). Finally, he isolated her from her family— in a foreign country, without language ability, in the same building as his family.[3] (SA011-012.) Through this deliberate, strategic course of conduct, Mr. Saada ensured that Ms. Golan was totally within his sphere of control.

B. An abuser's coercive control over his victim interferes with her ability to act voluntarily and independently of him.

Combination abuse causes palpable trauma that obstructs a victim's capacity to make voluntary "choices" in the relationship. To the contrary, victims "adopt strategies to maximize their safety and that of their children," and what may appear to be a woman's voluntary action or inaction is often actually "the result of a calculated assessment about how to protect herself and her children." World Health Org., *Understanding and Addressing Violence Against Women*, at 3. Given

[3] The Saada family participated in Ms. Golan's abuse. Mr. Saada's mother, Caroline Darwich, routinely screamed and swore at Ms. Golan and sometimes instructed her son to hit Ms. Golan. (SA010 n.17.) Ms. Darwich repeatedly referred to Ms. Golan as a "psychopath." (Tr. 85:7–10, 115:12–25.) When Ms. Golan missed a family dinner because of a painful pregnancy, Ms. Darwich told Mr. Saada to "put some sense into this madwoman you married." (SA010 n.17.)

the profound impact of coercive control on victims, courts must view a victim's actions through the complex lens of the power and control dynamics of domestic abuse when evaluating a victim's intent or "choice."

When viewed through this lens, it is clear that Ms. Golan's actions to stay in Italy *do not* reflect her intent to do so. Ms. Golan's actions were often a product of the fear, vulnerability, and confusion sowed by Mr. Saada's multimodal campaign of abuse. *See* Przekop, *One More Battleground*, at 1058. In court, Mr. Saada acknowledged that he asserted authority over Ms. Golan *because* she was vulnerable. (SA007) ("I knew when I met Narkis that she came from a broken home . . . . [M]aybe sometime . . . I took advantage—not advantage, but not—I felt comfortable doing certain things because she didn't know to, maybe to protect herself."). He repeatedly thwarted her efforts to exercise any autonomy. (SA009) (after she fled from him, he tracked her down at her grandmother's house); (SA017-018) (when he found a letter from her lawyer, he confronted her in a car, sped up dangerously, grabbed her crotch, and yelled, "Who owns you?"). Moreover, he exploited her vulnerability to lure her back to Italy based on empty promises to "change" and stop abusing her. *See* Brief of Respondent-Appellant Narkis Aliza Golan at 28–29.

Yet, after narrating a vivid catalogue of Mr. Saada's abuse, the District Court *then* presumed, based on her actions, that Ms. Golan made "choices" (*e.g.*, to

stay in Italy) that happened to conform to Mr. Saada's rigid expectations—even though "[t]he record shows that she expressed a desire to return to the United States from the beginning of her marriage . . . ." (SA028.) Worse, the District Court engaged in "victim blaming" when it invoked mutuality—it shifted blame for Mr. Saada's abuse of Ms. Golan *onto* Ms. Golan. (SA007) ("Although Mr. Saada was far and away the more violent, there were times when Ms. Golan fought with and yelled at him."). These errors are all too common:

> [C]ourts may . . . marginalize or neutralize [claims of abuse] by blaming both the abuser and the victim for the 'mess'[—]what is referred to as 'mutuality' finds both parties at fault for not acting like 'mature adults'. . . . [A]bused women carry with them flaws of their own, but there is something different about physical violence—there is something very different about a batterer's behavior that cannot be blamed on both parties.

Przekop, *One More Battleground*, at 1076. Mutuality and volition are injurious myths—Mr. Saada engaged in a "strategic course of oppressive behavior" to control Ms. Golan, and she struggled to survive and to protect her child.

Contrary to the District Court's conclusion, Ms. Golan did not manifest an intent to establish B.A.S.'s habitual residence in Italy by temporarily residing with Mr. Saada there—a time period marked entirely by Mr. Saada's ongoing abuse and control. The District Court was required to consider not only whether Ms. Golan's actions, but also whether her declarations exhibited an "element of voluntariness and purposeful design." *Application of Ponath*, 829 F. Supp. 363, 367 (D. Utah

1993). But it ignored Ms. Golan's explicit declarations of intent, and it failed to view Ms. Golan's actions through the lens of domestic abuse and survival. If it had, the District Court would have understood that Mr. Saada's campaign of abuse and coercion were the foundation for actions that it incorrectly interpreted to be voluntary and purposeful decisions by Ms. Golan to settle B.A.S. in Italy. Any conclusion to the contrary is spurious.

II. Where an abuser has inflicted sustained and pervasive abuse upon his victim, unenforceable undertakings are inadequate to mitigate a grave risk of harm to their child if repatriated to the abuser's home country.

The Convention was drafted and ratified in the United States at a time when domestic abuse and its devastating effects on children's psychological and cognitive development were not widely known. *See* Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 601–10 (2000); 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 14 (2010). The primary concern of Convention drafters was not the primary caregiver who flees with her children to escape an abusive spouse, but rather the non-custodial parent who abducts the child to avoid losing a custody battle. *See, e.g.*, Weiner, 69 FORDHAM L. REV. at 608–10. Consequently, courts have struggled to adjudicate domestic abuse cases within the structure of the Hague Convention because of a

perceived mandate to balance the interests of the requesting state in the prompt return of the child with the interests of the child.

That said, even though the Hague Convention does not factor in domestic abuse situations, it is explicit that "the interests of children are of paramount importance" when making a decision about their return. *See* Hague Convention, Preamble. Through this foundational principle, Convention drafters recognized that guarding the welfare of a child may require that he not be repatriated to a country in which he would endure "a grave risk that his . . . return would expose [him] to physical or psychological harm or otherwise place [him] in an intolerable situation." Hague Convention, Article 13(b). Critically, they also realized that where grave risk of harm is found, protection of the child *must* take precedence. *See* Hague Convention Explanatory Report at 433 ("[T]he interest of the child in not being removed from its habitual residence without sufficient guarantees of stability in its new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger."). Thus in cases where the respondent has met the high threshold[4] of establishing that the protective parameters of the grave risk exception apply to her child, the Convention mandates

[4] *See Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013) ("This 'grave risk' exception is to be interpreted narrowly, lest it swallow the rule."); *Simcox v. Simcox*, 511 F.3d 594, 609 (6th Cir. 2007) (requiring claimants to prove a grave risk of harm to the child by clear and convincing evidence).

that the requested state's interest in protecting the child must prevail. *See* Carol S. Bruch, *Symposium on International Law, The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Cases*, 38 FAM. L.Q. 529, 530, 530 (2004) (The grave risk defense "addresses a concrete factual situation in which an individual child's best interests are, indeed, *meant* to control the outcome of the Hague proceeding."). Under this paradigm, courts should only consider returning a child if they can *guarantee* that the child will be protected from the grave risk of harm.

Some courts have attempted to fashion this guarantee in domestic abuse cases through a litany of undertakings that purportedly "'allow *both*' the child's return and his protection from harm . . . ." (SA033.) But this is folly. Undertakings are an ineffective remedy to guarantee a child's protection from grave risk of harm because they rely on the abuser to mitigate the harm that *he* created, and they are often ignored. When ignored in a foreign jurisdiction, they are unenforceable. Given their ineffectiveness and unenforceability, the imposition of undertakings in domestic abuse cases renders the grave risk exception meaningless. Moreover, courts that create an expansive list of undertakings that must be fulfilled in a foreign country in the futile attempt to reduce the grave risk of harm to a child frustrate "the exercise of comity . . . [that] is at the heart of the Convention." *See, e.g.*, *Blondin v. Dubois*, 189 F.3d 240, 248–49 (2d Cir. 1999).

A. Undertakings gut the critically important "grave risk" exception.

Because the grave risk exception is interpreted narrowly, a successful application will likely be based on extraordinary facts, like repeated exposure to heinous domestic abuse. *No* undertaking can mitigate the grave risk of harm that is created by such situations. Hague Conference on Private International Law, *Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abuse*, Hague Convention on Private International Law, at 34 n.148 (June 2017), https://assets.hcch.net/docs/0a0532b7-d580-4e53-8c25-7edab2a94284.pdf ("[V]oluntary undertakings are not effective in cases of domestic violence."); Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, U.S. Dep't of State, to Michael Nicholls, Lord Chancellor's Dep't, Child Abduction Unit, U.K. (Aug. 10, 1995), *at* http://www.hiltonhouse.com/articles/Undertaking_Rpt.txt ("If the requested state court is presented with unequivocal evidence that return would cause the child a "grave risk" of physical or psychological harm, however, then it would seem less appropriate for the court to enter extensive undertakings than to deny the return request."). To believe otherwise is to willfully disregard the complex dynamic of domestic abuse and the research demonstrating its harmful effect on children.

Here, after a nine-day trial, the District Court concluded that Ms. Golan had *met* her burden to demonstrate that there would be a grave risk of harm to B.A.S. if he were to return to Italy. (SA030-033.) It found that Mr. Saada's campaign of abuse against Ms. Golan seriously endangered B.A.S. (SA030-033.) Moreover, the District Court had no confidence that the abuse would end. (SA032) ("Mr. Saada has not demonstrated a capacity to change his behavior . . . and . . . could not . . . take responsibility for his behavior."). By imposing ineffectual undertakings to send B.A.S. back to Italy despite finding that the abuse was likely to continue and would place B.A.S. at a grave risk of harm if it did, the District Court effectively eviscerated the "grave risk" exception.

1. Undertakings are ineffective to mitigate the risk of grave harm to a child.

Because post-return undertakings are unenforceable, *see infra* Part II.A.2., the implementation of the undertakings rests primarily on the good faith of the abuser, creating a perverse scenario whereby the abuser must promise to protect his victims. *See* Weiner, 69 FORDHAM L. REV. at 681 ("Undertakings technically do not depend upon the habitual residence's response to domestic violence, but rather depend upon the petitioner's agreement and good faith."). But in *Amici's* experience, which social research confirms, abusers remain highly likely to abuse again, and certainly cannot be trusted to implement undertakings that purport to mitigate their own abuse. *See* Laurel B. Watson & Julie R. Ancis, *Power and*

Control in the Legal System: From Marriage/Relationship to Divorce and Custody, 19 VIOLENCE AGAINST WOMEN 167, 167 (2013).

Separation undermines the power and control that the abuser enjoyed over his spouse and their children during cohabitation and induces an abuser to re-establish that power and control, thus increasing the likelihood and severity of future domestic violence. Daniel G. Saunders & Karen Oehme, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends Risk Factors, and Safety Concerns*, CHILD CUSTODY AND VISITATION DECISIONS IN DOMESTIC VIOLENCE CASES 4 (2007); Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2138–39 (1993). Contemporary social science research clearly concludes that "physical abuse, stalking, and harassment continue at significant rates post-separation and may even become more severe." Peter G. Jaffe et al., *Parenting Arrangements After Domestic Violence*, J. CTR. FAM, CHILDREN & CTS. 81, 82 (2005) (internal citations omitted). Further research shows that separation "from an abusive partner after living together was associated with a higher risk" that the victim will be murdered. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1090 (2003).

This growing body of research is not based on mere theory; it reflects the daily realities of post-separation life for domestic abuse victims. Courts that order repatriation for the children—and by extension the victim mother who is frequently the primary caretaker for her children—may well be placing them in grave danger. Roxanne Hoegger, *What If She Leaves–Domestic Violence Cases under the Hague Convention and the Insufficiency of the undertakings Remedy*, 18 BERKELEY WOMEN'S L.J. 181, 196–97 (2003) ("If courts force victims to return to countries of habitual residence, where they are immigrants, judges may unwittingly enable [abusers] to control their victims more effectively. . . . [Abusers] can easily isolate and take advantage of victims' marginalized status."). For example, in 2008, an Australian court that ordered two young boys, and consequently their 24-year-old primary caretaker mother, returned to the United Kingdom where they had been born and where their abusive father lived, did just that. Shortly after her return, the woman was forced to flee to a refuge with her children. She never made it there. En route, she was brutally murdered by her estranged husband, on a public street, in front of her children and her mother. *See* THE GUARDIAN, *Woman's Murder Could Have Been Prevented, Says Jury* (Feb. 26, 2014), https://www.theguardian.com/society/2014/feb/26/cassandra-hasanovic-murder-domestic-violence.

Social scientists confirm that separation can sometimes harm child and adult victims differently, but with no less devastating effects on either. "Abusers may be more likely to use children as proxies for control post-separation, as other forms of abuse become less available." Brittany E. Hayes, *Indirect Abuse Involving Children During the Separation Process*, 32 J. OF INTERPERSONAL VIOLENCE 2974, 2987 (2017) (finding a higher likelihood that an abuser will threaten to harm children post separation). The American Psychological Association notes 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 violence against their mother, because the father was visiting them." American Psychological Association, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 40 (1996).[5]

[5] In fact, children are not only likely to be exposed to violence between the abuser and the mother post-separation, but threats of violence may be directed at the child. *See* Zeoli et al., *Post-Separation Abuse of Women and Their Children: Boundary-Setting and Family Court Utilization among Victimized Mothers*, 28 J. FAMILY VIOLENCE 547, 547 (2013) (citing "threats against [] children" as a manner in which abuse escalates post-separation). Since separation creates the feeling that an abuser has lost control, the abuser may resort to abusing children to gain that power and control over the victim.

Given an abuser's propensity to abuse again, it is hardly surprising that abusers often ignore or violate undertakings, rendering them little more than empty promises. A 2003 survey of cases imposing undertakings on abusers found that those addressing violence were broken *in every case*. Reunite, Int'l Child Abduction Centre, *The Outcomes for Children Returned Following an Abduction*, at 31–32 (Sept. 2013), *available at* http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Outcomes%20Report.pdf (In some cases, "it was clear from what was stated by the undertaking parent that the failure to [honor] was deliberate and premeditated."). Under these circumstances, an undertaking such as that requiring an abuser to "stay away" from his victim cannot practically be expected to ameliorate the grave risk of harm to a child upon repatriation. In *Davies v. Davies*, No. 16-CV-6542, 2017 WL 361556, at *20-21 (S.D.N.Y. Jan. 25, 2017), *aff'd*, 717 F. App'x 43 (2d Cir. 2017), the court declined to repatriate the child subject to a "stay away" undertaking by the abuser in part because the island country was so small that it would be impossible "to hide or avoid one's abuser there." *Id.* at *20. But the impracticality of a "stay away" order should not depend on the *size* of the foreign jurisdiction. In fact, abusers frequently use custody proceedings to locate, confront, harass and intimidate their victims. *See, e.g.*, Weiner, 69 FORDHAM L. REV. at 679–80 ("Some batterers are so determined to harm their victims that [even] laws and court orders mean little, if anything.").

Here, the likelihood that the undertakings the District Court imposed will be ineffective to protect B.A.S. from a grave risk of harm is nearly certain. The District Court found that Mr. Saada's abuse was "chilling," "violent," reckless, and pervasive; that he was unable and unlikely to change; and that he was impenitent and unreliable. Yet it did not appreciate the myriad factors present in this case that indicate that the abuse is not only likely to continue, but to escalate, if Ms. Golan returns to Italy, post-separation. Renowned expert Dr. Jacquelyn C. Campbell's oft-used Danger Assessment[6] predicts a high likelihood that Ms. Golan may face a real and substantial threat to her life if she returns. (SA008-022) (Mr. Saada's physical violence intensified over time; he has strangled her, raped her, beaten her while she was pregnant, and threatened to kill her; he has controlled her daily activities; and he is violently and constantly jealous of her). Moreover, the District Court failed to consider whether Mr. Saada is likely to comply with these undertakings—and given his reprehensible behavior, cavalier attitude toward his abuse of his wife, and previous broken promises, he is decidedly not. *See* Hoegger, 18 BERKELEY WOMEN'S L.J. at 191 ("[I]n determining the feasibility of undertakings, courts can take into account the probability of compliance."). Under

[6] *See* Jacquelyn Campbell et al., *Assessing Risk Factors for Intimate Partner Homicides*, 250 NAT'L INSTITUTE OF JUST. J. 14 (2003) (hereinafter Campbell, *Assessing Risk*); Jacquelyn Campbell, *Danger Assessment*, https://www.dangerassessment.org/uploads/pdf/DAEnglish2010.pdf.

these facts, it is impossible for any court to craft undertakings that will meaningfully and effectively *guarantee* mitigation of the grave risk of harm to the child.

2. Undertakings are unenforceable outside the United States.

Undertakings—bare promises to do or not do something—can only be enforced by a U.S. judge if the parties, or the child, remain in the United States. "Once the child had been returned to the habitual residence, there could be no guarantee that the undertaking would be performed . . . . At best, [their enforcement] would be subject to the vagaries of comity as perceived by a foreign court." James D. Garbolino, Federal Judicial Center, *The Use of Undertakings in Cases Arising Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction,* at 2 (2016). Thus, as a practical matter, it is virtually impossible for U.S. courts to assess whether undertakings will be effective in a particular case because courts are gambling, well against the odds, that undertakings will even be enforced once the parties are outside the United States.

Their unenforceability makes it tantalizingly easy for an abuser to agree to undertakings that he never intends to fulfill and that will do little to protect the child. *See Simcox v. Simcox*, 511 F.3d 594, 607 (6th Cir. 2007) (quoting *Van De Sande v. Van De Sande*, 431 F.3d 567, 572 (7th Cir. 2005)) ("Undertakings are

most effective when the goal is to preserve the status quo of the parties prior to the wrongful removal. This, of course, is not the goal in cases where there is evidence that the status quo was abusive."). A study of Hague Convention cases in 2010 found that "two-thirds of the undertakings issued, including those focused on a child's safety upon return, were not implemented in the other country." Karen Brown Williams, *Fleeing Domestic Violence: A Proposal to Change the Inadequacies of the Hague Convention on the Civil Aspects of International Child Abduction in Domestic Violence Cases*, 4 J. MARSHALL L.J. 39, 67 (2011) (citing Edleson, *Multiple Perspectives*, at 254). In fact, left-behind fathers are frequently advised by their attorneys to agree to specific undertakings because "the laws in the[ir] home State were different and 'the undertakings mean nothing.'" Reunite Int'l at 33.

Under these facts, *Amici*'s collective experience and social science research strongly suggest that Mr. Saada is likely to break his promises and continue or even escalate his abuse against Ms. Golan. *When* Mr. Saada violates these undertakings, as he undoubtedly will, Ms. Golan will be left with no recourse because the majority of the undertakings imposed by the District Court are unenforceable in Italy. Weiner, 69 FORDHAM L. REV. at 678 ("There is currently no remedy for the violation of an undertaking. . . . When an undertaking is violated, the violator is typically outside the jurisdiction that imposed the

condition, and the child has already been returned."). She will have little or no ability to protect herself or B.A.S. Consequently, their child faces a grave risk of harm. *See also* Brief for Dean Jeffrey L. Edelson, Ph.D, *et al.*, as *Amici Curiae* Supporting Respondent-Appellant, *Saada v. Golan*, No. 19-820 (2d Cir.) (explaining that domestic abuse "can destroy a child's sense of security and trust and can create deep feelings of helplessness, guilt, and shame when children cannot make the violence stop or protect the non-offending parent," and results in lasting detrimental neurological effects on childhood development (citations omitted)). *No* amount of empty promises can satisfactorily mitigate this risk.

B. Extensive undertakings offend international comity.

This Circuit has emphasized the importance of international comity in Hague Convention cases. *See, e.g.*, *Blondin v. Dubois*, 189 F.3d at 248–49 ("[T]he exercise of comity . . . is at the heart of the Convention"). But the Convention places "paramount importance" on the child's interests. Convention, preamble.[7] The core guiding principle in the Convention is to keep the child safe *at all costs*, even if that means declining to repatriate the child.

[7] *See also* Hague Convention Explanatory Report at 433 ("[T]he interest of the child in not being removed from its habitual residence . . . gives way before the primary interest of any person in not being exposed to physical or psychological danger"); Rhona Schuz, *The Doctrine of Comity in the Age of Globalization: Between Int'l Child Abduction and Cross-Border Insolvency*, 40 BROOK. J. INT'L L. 31 (2014) ("[I]n the context of the [Hague Convention], comity cannot be seen as a binding rule, but is rather a guiding principle.").

In complex cases involving a grave risk of harm to the child, court sometimes craft extensive undertakings that create an illusory set of ineffective and/or unenforceable "protections" that purport to enable the court to respect notions of comity and return the child. Perversely, however, such extensive undertakings actually *offend* principles of comity.

First, the ineffective and unenforceable nature of undertakings means that they are imposed at the expense of the child's safety and well-being rather than to ensure it. When a child is at grave risk of harm in the requesting country, the Convention's guiding principle and the comity it aims for require keeping the child safe in the requested country. Second, extensive undertakings, especially when designed to be enforceable abroad, can encroach on foreign civil and criminal justice systems. For example, a U.S. court may interfere with the adjudication of family law matters abroad by purporting to impose requirements upon the parties as to interim custody, visitation and financial support that would traditionally be the province of the foreign court. Efforts to ensure enforceability—without which the undertakings are rendered empty promises—certainly "smack of coercion of the foreign court." *Danaipour v. McLarey*, 286 F.3d 1, 23 (1st Cir. 2002) (quoting State Dep't Comment on Undertakings (The Department of State "does not support conditioning the issuance of a return order on the acquisition of [an] order from a court in the requesting state.")); *see Maurizio R. v. L.C.*, 201 Cal. App. 4th 616,

644 (Ct. App. 2011) ("The trial court overstepped its bounds by making an order for [the child's] return contingent on Father's provision of an assurance from the Italian government that it will not arrest or prosecute Mother.").

Here, the District Court imposed *ten* undertakings in a misguided attempt to secure B.A.S.'s safety when he is repatriated. As an initial matter, the very imposition of these undertakings misconstrues the grave risk of harm B.A.S. will face, undermines the Convention's guiding principle, and, as a result, ignores the comity the Convention tries to achieve. Moreover, several of these undertakings impinge on Italy's sovereignty. (SA033-034.) The District Court gave Ms. Golan custody of the child in Italy for the duration of the Italian custody proceedings and allows Mr. Saada to visit the child in Italy only at Ms. Golan's discretion. (SA032-033, 035.) This clearly crosses the comity line and interferes with the foreign court's ability to control custodial determinations. *See Danaipour*, 286 F.3d at 25 ("The development of extensive undertakings . . . could embroil the court in the merits of the underlying custody issues and would tend to dilute the force of the Article 13(b) exception." (quoting U.S. Department of State guidance). Like in *Maurizio R.*, the District Court told Mr. Saada to "pursue dismissal of criminal charges against Ms. Golan relating to her abduction of B.A.S.," without regard to Italy's right to make its own prosecutorial decisions. (SA035.) The District Court even imposed financial support and immigration requirements on Mr. Saada—both

within the purview of the Italian justice system. *Id.* Such undertakings that ignore a foreign country's sovereignty fly in the face of international comity—the opposite of their intended purpose.

CONCLUSION

For the reasons stated above, the judgment of the United States District Court for the Eastern District of New York should be partially reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rules 29 and 32.1 because this brief contains 6,496 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Times New Roman font.

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