No. 21A-____

In the Supreme Court of the United States

MICHAEL L. TAYLOR; PETER MAXWELL TAYLOR, APPLICANTS

v.

JEROME P. MCDERMOTT, SHERIFF, NORFOLK COUNTY, MASSACHUSETTS; JOHN GIBBONS, UNITED STATES MARSHAL, DISTRICT OF MASSACHUSETTS

EMERGENCY APPLICATION FOR A STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND PENDING FURTHER PROCEEDINGS IN THIS COURT

TILLMAN J. FINLEY
Counsel of Record
MARINO FINLEY LLP
800 Connecticut Avenue, N.W.
Suite 300
Washington, DC 20006
(202) 223-8888 (t)
tfinley@marinofinley.com

PARTIES TO THE PROCEEDING

The applicants (petitioners-appellants below) are the United States citizens Michael L. Taylor and Peter Maxwell Taylor.

The respondents (respondents-appellees below) are Jerome P. McDermott, in his official capacity as Sheriff, Norfolk County, Massachusetts, and John Gibbons, in his official capacity as United States Marshal, District of Massachusetts.

RELATED PROCEEDINGS

United States Court of Appeals (1st Cir.):

Taylor, et al. v. McDermott et al., No. 21-1083 (docketed Jan. 29, 2021)

United States District Court (D. Mass.):

Taylor, et al. v. McDermott et al., No. 4:20-cv-11272-IT

In the Matter of the Extradition of Michael L. Taylor, No. 20-mj-1069-DLC

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To the Honorable Stephen Breyer, Associate Justice of the Supreme Court of the United States and Circuit Justice for the First Circuit:

Pursuant to this Court's Rule 23, the All Writs Act, 28 U.S.C. § 1651, and 28 U.S.C. § 2101(f), petitioners respectfully apply for a stay of the January 28, 2021 order issued by the United States District Court for the District of Massachusetts denying petitioners' petition for a writ of habeas corpus, pending the consideration and disposition of petitioners' appeal from that order to the United States Court of Appeals for the First Circuit and, if necessary, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. Petitioners, both United States citizens, challenge the lawfulness of their extradition to Japan. A stay is necessary, and needed on an emergency basis, because the government is

likely to surrender petitioners to Japan **as early as February 12, 2021**, which would moot petitioners' appeal of the rulings by the district court thus deprive petitioners of any appellate review of the district court's rulings.

Petitioners are father and son, both United States citizens and residents of Massachusetts. The Government of Japan has requested that the United States extradite petitioners to Japan to face detention, lengthy interrogation, and prosecution for alleged violations of Article 103 of the Japanese Criminal Code, which criminalizes "Harboring of Criminals." In short, Japan alleges petitioners assisted former Nissan CEO, Carlos Ghosn Bichara, to leave Japan in December 2019, in violation of the bail conditions to which he was subject pending his trial on charges relating to Nissan's financial filings and disclosures.

The petitioners' extradition, however, is unlawful because (1) if extradited to Japan, they are likely to be subjected to treatment qualifying as prohibited torture under the United Nations Convention Against Torture ("CAT"), and (2) there is not probable cause to believe that the petitioners committed the offense for which extradition is sought, *i.e.*, "Harboring of Criminals," as required by both the U.S.-Japan Extradition Treaty itself and other U.S. law.

While it recognized the petitioners' substantive right not to be extradited to torture and the courts' jurisdiction, through habeas review, to determine whether extradition would violate the CAT's prohibition, the district court inexplicably found that the petitioners failed to establish a prima facie case that they are more likely than not to be tortured if extradited even while acknowledging the conditions they

are likely to face in Japan may be "deplorable." The district court so held despite petitioners' submission of sworn statements by two individuals (including Mr. Ghosn, who was prosecuted by the same prosecutors seeking petitioners' extradition) detailing their mistreatment and torture while in Japanese custody; statements by the family and representatives of a third individual regarding his torture by Japan (also under the supervision of the same prosecutors); a recent Opinion issued by a United Nations body finding Mr. Ghosn's detention and treatment in Japan to have violated international law, that he should be compensated, and that Japan's interrogation and detention practices may "expose detainees to torture, ill treatment and coercion" and referring the matter for further action by the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment; a 2015 Amnesty International report specifically finding the Japanese justice system "continued to facilitate torture and other ill-treatment"; statements by three United States Senators (including a speech on the floor of the Senate by one) describing Japan's mistreatment, including torture, of another American currently held in Japan; a letter signed by more than a thousand Japanese legal professionals declaring that Japan's practices violate international human rights standings "including … the prevention of torture"; an email from a former Japanese senator confirming treatment of Mr. Ghosn qualifying as torture; and numerous other statements, articles, and supporting evidence. Short of a formal, explicit admission by Japan that it intended to torture petitioners, it is hard to imagine any stronger evidence of the petitioners' likely fate if extradited.

Further, Japan's extradition request is premised upon a strained interpretation and unprecedented application of a Japanese criminal statute that the petitioners simply did not violate. To be extraditable, Japan must establish probable cause to believe that petitioners have committed the offense for which extradition is sought. But to support probable cause, the facts alleged (even if assumed to be true) must make out the alleged offense. In this case they do not. Having no bail jumping statute under which to proceed, Japan has sought to force the facts of these cases into some other crime. The theory Japan has advanced is that petitioners violated Article 103 which, roughly translated, prohibits one from harboring or enabling the escape of a criminal. But the specific Japanese term employed by Article 103, and the historical practice under the statute, make clear that Article 103 applies to working against law enforcement authorities' *active pursuit* of a criminal (whether identified by name or known only generally) to arrest him. There was no warrant for Ghosn's arrest at the time of petitioners' alleged actions, and Japanese authorities were not seeking to apprehend him. While the allegations may be sufficient to establish probable cause for a misdemeanor immigration offense in Japan, and they might establish probable cause for aiding and abetting and/or conspiracy to commit bail jumping if the events had taken place in the United States, neither of these things can support an extradition request.

Moreover, even if Article 103 applied to the facts alleged, those factual allegations fall short of establishing probable cause to believe that Peter Taylor himself committed the offense. There is no allegation, much less any evidence, that

Peter Taylor harbored (*i.e.*, hid or concealed) Mr. Ghosn at any point. Nor is there any evidence that Peter Taylor himself did anything to enable Mr. Ghosn's "escape"—he is not alleged to have brought Mr. Ghosn the box in which he concealed himself, he is not alleged to have assisted Mr. Ghosn into the box, he is not alleged to have transported that box to the airport and/or past immigration screening, and he is not alleged to have accompanied Mr. Ghosn or the box onto the airplane. Peter Taylor is not even alleged to have been present for any of the foregoing events; indeed, he is alleged to have at all times been more than 600 km away from the scene of the crime and, in fact, to have departed Japan altogether roughly four hours before the offense allegedly occurred.

Despite the foregoing, United States Magistrate Judge Donald Cabell found petitioners extraditable under the Treaty and held that there was probable cause to believe that Peter Taylor "assisted in the planning, financing, and execution of Ghosn's escape"; the former Deputy Secretary of State authorized petitioners' surrender to Japan; and the district court denied the petitioners' habeas petition and denied their request to amend that petition to seek review of Judge Cabell's ruling on the sufficiency of the factual allegations as to Peter Taylor.

Both the district court and the circuit court have denied motions requesting a stay of petitioners' surrender and extradition pending appeal. Petitioners now seek a stay from this Court so that they may exercise their right to appellate review. Failing to stay extradition until petitioners have had the opportunity to exercise their appellate rights will result in their imminent extradition to Japan where they will be

held in conditions that would never be permitted by any U.S. court, subjected to lengthy interrogation without the presence of counsel, subjected to mental and physical torture, and face prosecution and imprisonment for a supposed offense that may not even exist under Japanese law.

STATEMENT

1. On May 6, 2020, the United States requested, and U.S. Magistrate Judge Donald Cabell (hereinafter "the extradition court") issued, provisional warrants for petitioners' arrest premised on the assertion that, "[o]n December 29, 2019, [petitioners] and other individuals helped [former Nissan CEO Carlos] Ghosn flee from Japan" in violation of the conditions of Ghosn's release and, according to the Government, Article 103 of the Japanese Penal Code. Petitioners were arrested on May 20, 2020 and they have been held in federal custody at the Norfolk County Correctional Center ever since.

2. On June 29, 2020, Japan filed formal requests for extradition. Following briefing and a hearing, on September 4, 2020, the extradition court issued an Extradition Certification and Order of Commitment with respect to each petitioner providing that they "remain in the custody of the U.S. Marshal for this District, to be held pending final disposition of this matter by the Secretary of State, and pending each respondent's potential surrender to the Government of Japan." (Att. A.) On September 14, 2020, the extradition court issued Certifications and Committals for Extradition as to both petitioners. (Atts. B & C.)

3. On September 8, 2020, counsel for petitioners provided the United States Department of State with a submission opposing Japan's extradition requests. However, after 5:00 pm on Wednesday, October 28, 2020, an Assistant Legal Advisor at the State Department sent a one-page, two-paragraph letter to counsel stating that the former Deputy Secretary of State had authorized petitioners' surrender to Japan.

4. The next day, October 29, 2020, petitioners filed a petition for a writ of habeas corpus challenging both the former Deputy Secretary of State's decision and the extradition court's September 2020 rulings and a motion for a stay. The district court granted a stay pending review of the Petition.

The district court held a hearing on November 5, 2020 and took the matter under advisement, invited supplemental submissions, and maintained the stay pending its consideration of the matter. Both the government and petitioners thereafter filed supplemental materials.

Following a December 17, 2020 disclosure by Japan regarding its investigation, a series of motions followed seeking reconsideration of the factual sufficiency of the allegations (even if Article 103 applied) as to one of the petitioners, Peter Taylor. The extradition judge, however, ultimately denied reconsideration (Att. D) and, on January 28, 2021, the district court denied the petition (Att. F) and a motion to amend it to seek review of the extradition judge's reconsideration decision (Att. E).

5. On January 28, 2021, petitioners filed a notice of appeal of the district court's decisions to the First Circuit. Counsel for petitioners conferred with the government, which refused to consent to a stay pending appeal but did represent that

it would not surrender petitioners to Japan before February 5, 2021. On January 29, 2021, petitioners thus filed a motion with the district court requesting a stay pending appeal. The government opposed the motion, but amended its representation to commit to not surrendering petitioners to Japan prior to February 12, 2021. On February 1, 2021, the district court denied the stay motion. (Att. G.)

6. On February 5, 2021, petitioners filed a motion with the First Circuit seeking an emergency stay pending appeal. On February 11, 2021, the First Circuit denied petitioners' motion. (Att. H.)

REASONS FOR GRANTING THE APPLICATION

Under the Court's Rule 23 and the All Writs Act, 28 U.S.C. § 1651, a single Justice or the Court may stay a district court order pending appeal to a court of appeals. In deciding whether to issue such a stay, the Court or a Circuit Justice considers whether four Justices are likely to vote to grant certiorari if the court of appeals ultimately rules against the applicant; whether five Justices would then likely conclude that the case was erroneously decided below; and whether, on balancing the equities, the injury asserted by the applicant outweighs the harm to the other parties or the public. *See San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers).

In determining whether to grant a stay pending appeal, the Court considers: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in

the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009).

Where (as here) there is a clear threat of surrender prior to the outcome of appellate review of an extradition, numerous courts have granted stays in habeas cases pending appeal. *See, e.g.*, *United States v. Lui Kin-Hong*, 110 F.3d 103, 121 (1st Cir. 1997); *Romeo v. Roache*, 820 F.2d 540, 541 (1st Cir. 1987); *see also Ntakirutimana v. Reno*, 184 F.3d 419, 423 n.7 (5th Cir. 1999); *Smith v. Hood*, 121 F.3d 1322, 1327 (9th Cir. 1997); *Then v. Melendez*, 92 F.3d 851, 853 n.1 (9th Cir. 1996); *Spatola v. United States*, 925 F.2d 615, 617 (2d Cir. 1991); *Pukulski v. Hickey*, 731 F.2d 382, 383 (6th Cir. 1984); *In re Assarsson*, 670 F.2d 722, 724 n.2 (7th Cir. 1982); *Tavarez v. U.S. Attorney General*, 668 F.2d 805, 811 (5th Cir. 1982); *Artunes v. Vance*, 640 F.2d 3 (4th Cir. 1981); *Liuksila v. Turner*, No. 16-cv-00229 (APM), 2018 WL 6621339, at *1 (D.D.C. Dec. 18, 2018); *Martinez v. United States*, No. 3: 14-CV-00174, 2014 WL 4446924, at *2-6 (M.D. Tenn. Sept. 9, 2014); *Nezirovic v. Holt*, No. 7:13CV428, 2014 WL 3058571, at *2 (W.D. Va. July 7, 2014); *Zhenli Ye Gon v. Holt*, No. 7:11-cv-00575, 2014 WL 202112 at *1-2 (W.D. Va. Jan. 17, 2014); *Noriega v. Pastrana*, No. 07-CV-22816-PCH, 2008 WL 331394, at *1 (S.D. Fla. Jan. 31, 2008).

A. Petitioners Are Likely to Succeed on the Merits

"To obtain a stay, pending appeal, a movant must establish a strong likelihood of success on the merits or, failing that, nonetheless demonstrate a substantial case on the merits provided that the harm factors militate in its favor." *Momenta Pharm., Inc. v. Amphastar Pharm., Inc.*, 834 F. Supp. 2d 29, 30 (D. Mass. 2011) (quoting *Eon–*

Net, L.P. v. Flagstar Bancorp, Inc., 222 Fed. Appx. 970, 971–72 (Fed. Cir. 2007)). The first two factors—likelihood of success and irreparable harm—are "the most critical," *Nken*, 556 U.S. at 434, but they operate on a sliding scale such that a strong showing on one may offset a lesser showing on the other. *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996) ("the predicted harm and the likelihood of success on the merits must be juxtaposed and weighed in tandem"); *see also EEOC v. Astra USA,* 94 F.3d 738, 743–44 (1st Cir. 1996); *Maram v. Universidad Interamericana De Puerto Rico, Inc.*, 722 F.2d 953, 958 (1st Cir. 1983).[1]

In any event, showing a strong likelihood of success does not require an applicant to show that success is more likely than not. Though varying formulations have been employed, "[r]egardless of how one expresses the requirement, the idea is that in order to justify a stay, a petitioner must show, at a minimum, that [he] has a substantial case for relief on the merits." *Leiva–Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011).

[1] The government argued below that the first factor was an inflexible prerequisite, claiming that this Court's opinion in *Munaf v. Geren*, 553 U.S. 674, 690 (2008), precludes reliance on any suggestion of a sliding scale. But this Court has itself recognized that the factors "contemplate individualized judgments in each case, [and] the formula cannot be reduced to a set of rigid rules." *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987). And case law before and after *Munaf* reflects that "[t]hese [four] factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *SEIU Local 1 v. Husted*, 698 F.3d 3431, 343 (6th Cir. 2012); *see also Boston Taxi Owners Ass'n, Inc. v. City of Boston*, 180 F. Supp. 3d 108, 127 (D. Mass. 2016) ("Courts balance these factors on a 'sliding scale,' *sometimes awarding relief based on a lower likelihood of success on the merits when the potential for irreparable harm is high*."); *Momenta Pharm., Inc. v. Amphastar Pharm., Inc.*, 834 F. Supp. 2d 29, 30 (D. Mass. 2011) ("No one factor is determinative and all may be considered on a sliding scale."); *In re Aerovox, Inc.*, 281 B.R. 419, 433 (Bankr. D. Mass. 2002) ("the greater the harm the less emphasis need be placed on the likelihood of success on the merits"). "Simply stated, more of one excuses less of the other." *Astra USA,* 94 F.3d at 743–44.

1. Petitioners' Extradition Would Violate the Convention Against Torture

Petitioners' extradition to Japan is unlawful because it violates the CAT, a treaty signed and ratified by the United States and implemented by Congress as part of the Foreign Affairs Reform and Restructuring Act of 1998 ("FARR Act"), 8 U.S.C. § 1231 note. Under the CAT, the United States may not extradite "any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." *Id.* In a declaration submitted to the district court, the former Deputy Secretary of State summarily claimed to have determined the petitioners were not more likely than not to be tortured if surrendered to Japan, but neither he nor the government have provided any explanation regarding the basis for that determination or what was considered in making it.[2]

The district court correctly held it had habeas jurisdiction to review the former Deputy Secretary's claimed determination under the CAT,[3] but it erroneously denied petitioners relief on the stated basis the evidence presented "failed to establish that no reasonable factfinder could find anything other than that they are more likely than not to be subjected to torture in Japan." Att. F at 28. The district court's ruling, while

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[2] We note that the former Deputy Secretary's declaration pre-dated the November 20, 2020 issuance of Opinion No. 59/2020 discussed below.

[3] The government argued below that the FARR Act, the REAL ID Act and/or the common law rule of non-inquiry all precluded any review of the Deputy Secretary's CAT determination, but the district court correctly rejected each of these arguments. Att. F at 15-26. Citing to opinions from *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (en banc), the district court adopted a "rule of limited inquiry" under which a petitioner may overcome a contrary determination by the Secretary by demonstrating through "strong, credible, and specific evidence" that he is "more likely than not" to be tortured upon extradition. Att. F at 26. Under the approach adopted by the district court, the petitioner must first establish a prima facie case that "no reasonable factfinder could find otherwise." If the petitioner does so, then the burden shifts to the Government to "submit evidence, should [ ]he so choose and *in camera* where appropriate, demonstrating the basis for [his] determination that torture is not more likely than not." *Id.*

recognizing that the treatment petitioners receive may be "deplorable," summarily discounts petitioners' evidence as falling short of the "severe physical or mental pain or suffering" contemplated by the definition of torture, but this ruling fails to account for or address the full body of evidence in the record, which includes, *inter alia*, the following:

- Descriptions of the specific treatment of three individuals—Mr. Ghosn, Greg Kelly, and Scott McIntyre—each of whom were subjected to treatments meeting the definition of torture, including prolonged periods of solitary confinement (five weeks without a bed or, initially, a pillow for Mr. Kelly); forced to sleep shoulder-to-shoulder with other prisoners (Mr. McIntyre); denied a bed and forced to sleep on the floor (Mr. Kelly and Mr. Ghosn); deprived of heat in the dead of winter (Mr. Kelly) or provided "a low heated room" (Mr. Ghosn); denied medical care (Mr. Kelly) or access to medications (Mr. Ghosn); denied access to any clock, calendar or other time-keeping device (Mr. Ghosn and Mr. McIntyre); subjected to lights-on conditions at all times (Mr. Ghosn and Mr. McIntyre); required to remain seated, Japanese-style, at a low table on the floor with no chairs (Mr. McIntyre); addressed only by prisoner number, and not one's name (Mr. McIntyre); interrogated constantly, day and night without breaks (Mr. Ghosn); held for up to seven hours prior to interrogation in a tiny, cold and dark cell, shoulder-to-shoulder with up to 12 other detainees while not being permitted to stand, move or talk (Mr. McIntyre); permitted to shower just twice a week (Mr. Ghosn and Mr. McIntyre); prevented from sleeping for more than an hour or two at a time (Mr. McIntyre); and given only 30 minutes (Mr. Ghosn) or 15-20 minutes (Mr. McIntrye) time outside and only on non-holiday weekdays.
- Opinion No. 59/2020 issued on November 20, 2020, by the Working Group on Arbitrary Detention, a body of independent human rights experts that investigates cases of arbitrary arrest and detention under mandate of the United Nations' Human Rights Council, validating Mr. Ghosn's claims, finding his detention and treatment by Japan violated numerous provisions of international law, concluding Mr. Ghosn should receive "compensation and other reparations" and, significantly, observing the practices to which Mr. Ghosn was subjected (including solitary confinement, inability to leave his cell, deprivation of exercise, constant light to disturb sleep, absence of heating, and continuous interrogation sessions lasting on average five hours) and Japan's general "interrogation and detention practices under the *daiyo kangoku* system … ***may severely limit the right to a fair trial and expose detainees to torture, ill-treatment and coercion***" and referring the case to the Special

Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for further action.

- A March 2020 article by three U.S. Senators describing Mr. Kelly's treatment.
- A floor speech by U.S. Senator Roger Wicker detailing Mr. Kelly's treatment.
- A statement by a former Japanese senator, Tadashi Inuzuka, confirming Mr. Ghosn's treatment.
- A letter signed by 1,010 Japanese legal professionals reporting, *inter alia*, "[i]t is not uncommon for suspects to be yelled at from close range," "[m]ost suspects" are "placed under constant police surveillance, including during mealtimes or in toilets," identifying as "a systemic problem" the fact that "suspects who do not confess are detained for a long period of time," confirming that Japan "uses sufferings caused by prolonged detention and interrogation to force confession" and "violates international human rights standards including … the prevention of torture."
- A 2015 Amnesty International report finding the Japanese justice system "continued to facilitate torture and other ill-treatment to extract confessions during interrogation" and "[d]espite recommendations from international bodies, no steps were taken to abolish or reform the system in line with international standards."

The above represents only some of the evidence submitted, but it clearly describes conduct and practices by Japan rising to the level of torture. *See, e.g.*, *Guzman-Nunez v. Barr*, 822 F. App'x 563, 566 (9th Cir. 2020) (intentional denial of medical care as a form of punishment would be torture under CAT); *Kang v. Attorney Gen. of U.S.*, 611 F.3d 157, 16567 (3d Cir. 2010) (sleep deprivation, bright lights, extended periods of remaining in uncomfortable position, along with other severe mistreatment as part of interrogation is torture). At the very least this was sufficient to establish a prima facie case.

2. There Is Not Probable Cause to Believe Petitioners Committed the Offense for Which Extradition Is Sought Because Article 103 Does Not Apply to the Alleged Conduct

The statute Japan claims petitioners violated—Article 103—is inapplicable, even if all the alleged facts are true. Japan's request is premised upon an

unprecedented expansion of Article 103 that is articulated, if at all, by implication and inference in the applications for warrants for petitioners' arrest. The theory appears to be that because Ghosn violated his bail conditions in departing Japan, petitioners committed the act of "enabling the escape" of a person who had committed a crime.

Japan's theory is both contrary to the plain language of Article 103 and the entirety of the history of prosecutions and accumulated case law thereunder. As Dr. William B. Cleary, a noted law professor at Hiroshima Shudo University in Hiroshima, Japan, explained, while the English translation of Article 103 "uses two verbs—'harbors or enables the escape of another'—to describe the operative conduct, the original Japanese text in fact employs a single verb—**蔵匿**, or '*inpi*.'" Att. K ¶ 5. As Dr. Cleary explains, **蔵匿**, or "*inpi*" comprises "a single concept that describes working against law enforcement authorities' *active* pursuit of a criminal to arrest him." *Id.* (emphasis added). But no one was actively pursuing Mr. Ghosn on December 29, 2019—there was no warrant for his arrest and the authorities were not searching for him.

As we and Dr. Cleary pointed out below, while Japanese courts have found Article 103 violations based upon assisting fugitives to evade apprehension by the police, criminals to fee the scene of a crime, and those who have escaped from confinement (*i.e.*, a jail, prison or detention facility), Japanese courts have never sanctioned (and prosecutors have never attempted) a charge under Article 103 premised solely upon an allegation that one assisted or enabled a person to violate

bail conditions. Indeed, the very use of the word "harboring" includes the assumption that someone is searching for the person being harbored.

The extradition court and the district court, however, both deferred completely to Japan's conclusory assertions that Article 103 applied to the alleged conduct by the petitioners. U.S. law entitles petitioners to a determination, by a U.S. court, that there is probable cause to believe they committed the offenses for which extradition is sought. At the very least, that requires a considered analysis of whether the alleged crime is actually a crime in the foreign jurisdiction. In denying the petition, the district court held that "[c]itizens are protected from the threat that a foreign government will simply 'argue that something is prosecutable under its laws' not by the court's opining on foreign law but by the dual criminality provisions in extradition treaties," reasoning that the fact that what the petitioners are alleged to have done in Japan would have been a crime under U.S. law if committed in the U.S. is sufficient assurance that the alleged conduct was criminal in Japan. Att. F. But there is no authority for this analysis, which essentially turns the dual criminality concept into a single-pronged requirement. The courts cannot merely assume something is criminal in a foreign nation just because it is criminal in the U.S. any more than they can assume something is illegal in the U.S. simply because it is prohibited abroad.

Indeed, neither the Court nor the Government dispute that the crime petitioners would have committed if they had done what they are alleged to have done in the U.S.—aiding and abetting bail jumping in violation of 18 U.S.C. §§ 2, 371, 3146, and/or 3148—actually is widely acknowledged *to not be a crime in Japan*. Indeed,

Japan is forced to resort to its expansive interpretation of Article 103 precisely because of a widely-recognized gap in its own laws: Japan has no analogue to the federal bail jumping statute, nor an analogue to the federal conspiracy statute that would apply to Article 103. Ultimately, it is up to the Japanese legislature—and not a creative and embarrassed Japanese prosecutor, and certainly not the U.S. Government or courts—to repair obvious gaps under Japanese law. Japan should not be allowed to extradite and prosecute American citizens based on convenient, self-serving, and politically-motivated interpretations of its statutes that it has never applied to its own citizens.

The government has argued petitioners are unlikely to succeed in their appeal because the district court "properly rejected the Taylors' claim that enabling the escape of criminal defendants is lawful in Japan." This argument confuses the issue. It *is* illegal in Japan, under Article 97 of the Japanese Penal Code, for a person to escape *from detention or confinement* and, under Article 100, it is illegal for another person to assist them in doing so. But Mr. Ghosn was not detained or confined and petitioners are not alleged to have enabled his escape from detention or confinement. Indeed, the United States and Japan admit, and numerous articles and

commentaries acknowledge, that Mr. Ghosn's "escape" from Japan in violation of his bail conditions *was not a felony offense*.[4]

Instead, Japan alleges that petitioners *harbored* Mr. Ghosn in violation of Article 103. Article 103, however, prohibits harboring a criminal, *i.e.*, hiding or concealing him. The plain language of the statute (even in English) thus assumes that authorities are looking for or seeking the person being harbored. As detailed by our expert on Japanese law, Dr. Cleary, the original Japanese language is even more plain because it employs the verb **蔵匿**, or "*inpi*," which comprises "a single concept that describes working against law enforcement authorities' *active* pursuit of a criminal to arrest him."[5] Att. K ¶ 5.

The government and the district court persisted in viewing this plain language reading of Article 103 as conflicting Japanese caselaw and commentary, but it does not. The closest case identified by Japan was a May 10, 2000 judgment of the Osaka District Court where the defendant was "indicted for and convicted of enabling the escape of another person who had committed a crime, in violation of Article 103 of the Penal Code, after enabling a person … [to] abscond by providing the person with a credit card so that the person could stay at a hotel under a pseudonym (the defendant's name)." The person harbored in this case had been released on bail but,

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[4] The facts alleged relating to Mr. Ghosn's departure do arguably make out a misdemeanor immigration offense, but that is not, and could not be, the subject of Japan's extradition request.

[5] Though translated (alternatively) into English as "harboring or enabling the escape" of a person who has committed a crime, **蔵匿**, or "*inpi*," is a distinct and different concept from the word **逃走**, or "*toso*," which is also translated into English as "escape." This word, "*toso*," is the subject of different crimes, specifically Articles 97 ("Escape"), 98 ("Aggravated Escape") and 100 ("Assistance in Escape"). "*Toso*" has a very specific meaning in that it refers to escape from a place of physical confinement, such as a jail, prison or detention center. Att. K ¶ 6.

as Dr. Cleary pointed out, "[a]t the time of the defendant's crime, the individual he was convicted of assisting had his bail *revoked* and therefore was subject to arrest." Att. J ¶ 4(c). Accordingly, this case actually illustrates the plain meaning of the statute—one cannot be harbored unless the authorities are actively searching for or seeking to apprehend the person harbored.

The government also has argued that petitioners "were unable to identify a single Japanese case finding Article 103 was inapplicable under any fact pattern, let alone a fact pattern similar to this case." But this turns the analysis of the statute and case law on its head. It is true that we have not cited to a Japanese case specifically holding that Article 103 does not apply to assisting a person to violate the conditions of their release on bail, but that is because the plain meaning of the statute does not contemplate its application to such facts and Japanese prosecutors *have never before attempted* to apply Article 103 to such facts in more than 70 years of practice under the statute.

The absence of such a prior attempt is especially compelling in light of the many recent highly-publicized failures of offenders to appear for trial or to serve their sentence when released on bail. Though Mr. Ghosn's departure from Japan in violation of his bail conditions is the most famous incident, this very thing has happened a number of times in recent years prompting Japan to consider criminalizing such escapes. But even in the face of this string of embarrassing episodes, Japan has never before charged anyone who assisted these persons with a violation of Article 103.

3. Even if Article 103 Applied, the Factual Allegations Are Insufficient as to Peter Taylor

While the petition was pending, Japan made a material disclosure regarding the evidence offered against Peter Taylor. Specifically, Japan and the Government's prior submissions all placed emphasis upon the assertion that, on December 28, 2019, Peter Taylor provided Mr. Ghosn with an extra key to his room at the Grand Hyatt Tokyo. According to the allegations, this enabled Mr. Ghosn, on the following day (the date of his departure), to "operate the hotel elevator and go to the ninth floor by himself, an action that required a key to a room on the ninth floor." Japan's extradition request reasoned Mr. Ghosn must have had a key, and Peter Taylor must have provided it to him.

However, in a December 21, 2020 letter, the Tokyo District Public Prosecutors Office advised it had interviewed another employee of the hotel who stated that a room key *was not needed* to operate the elevator and enter the ninth floor on December 29, 2019. Japan thus reported "further investigation has revealed that a room key *was not necessary* to access the Grand Hyatt's 9th floor where Peter Taylor was staying."

Peter Taylor promptly asked the district court to remand the matter to the extradition court for reconsideration of the probable cause issue and filed a motion seeking reconsideration. In doing so, we pointed out that the provision of a key to Mr. Ghosn was the only act in which Peter Taylor himself was alleged to have engaged which enabled Mr. Ghosn to do anything he would not otherwise have been able to do on the date of his departure from Japan. Without it, the allegations were

merely that he had traveled to Japan and/or met with Mr. Ghosn on several occasions over a period of months; that he checked into a hotel room in Tokyo on December 28, 2019; that he received two suitcases from Mr. Ghosn's driver; that he greeted his father and George Zayek in the lobby of his Tokyo hotel on December 29; and that he left his hotel room at the same time as his father and Messrs. Ghosn and Zayek.

Japan acknowledges Peter Taylor went his separate way thereafter and did not accompany the group any further. Indeed, Peter Taylor departed Tokyo for China around 7:00 p.m., but it was not until roughly four hours later, and more than 600 km away, that Mr. Ghosn passed through the security checkpoint at Kansai International Airport outside of Osaka without being screened and departed on a private jet for Turkey. There is no allegation Peter Taylor participated in, or was even present for or knew of, any of these later events.

The absence of evidence Peter Taylor himself committed an act that enabled Mr. Ghosn's alleged escape, or even any step toward it, is fatal to any probable cause determination. The government responded by arguing Japan's subsequent investigative efforts mooted the motion, faulting Mr. Taylor for not contesting the factual allegations previously, and arguing that even without the key allegation, there was "overwhelming evidence" Peter Taylor played an "instrumental role" in "planning," "facilitating," "financing" and assisting in the execution of Mr. Ghosn's escape. We sought leave to file a reply brief responding to Japan's new evidence and the Government's contentions, including a declaration from Peter Taylor denying he had given Mr. Ghosn a key, noting evidence in the record that he was only ever given

a single key (and thus would not have had one to give Mr. Ghosn), and explaining involvement in planning, facilitating, financing or assisting the alleged offense could not suffice because Japan's limited law of criminal conspiracy is inapplicable to Article 103.[6]

However, on January 15, 2021, before Peter Taylor could submit a reply brief and before the district court had ruled on the motion to stay and remand the issue to the extradition court (which ruling the government itself had stated the extradition court should await), the extradition court denied reconsideration reasoning "the remainder of the evidence in the court's view, none of which moreover was disputed, still provides probable cause to believe that [Peter Taylor] assisted in the planning, financing and execution of Ghosn's escape as alleged." Att. D.

Even if correct, this finding did not suffice to establish the probable cause required with respect to Peter Taylor due to the inapplicability of conspiracy liability. Accordingly, petitioners sought to amend the petition to seek review of the extradition judge's further probable cause ruling. The district court, however, refused to consider the merits, holding the motion to amend was untimely. However, the ruling of which petitioners sought review was not issued until January 15, 2021. Petitioners filed their motion nine days later. By refusing to permit petitioners to amend, the district

[6] In 2017, Japan made it illegal for the first time to "make[ ] preparations for the purpose of committing" certain offenses or to "together with one or more persons, … plan[ ] to commit an act that constitutes" certain offenses. However, these prohibitions on preparation and planning apply only to certain specifically-identified crimes, ***of which Article 103 is not one***. *See* Art. 6(1) & Art. 6-2(1), Act on Punishment of Organized Crimes and Control of Proceeds of Crime.

court deprived them of any review of the extradition court's inapposite and erroneous probable cause ruling.

The problem with the district court's reliance on the suggestion that the insufficiency of the evidence as to Peter Taylor had been available since the time of his arrest is that this was not what the extradition court had held in refusing reconsideration. In the extradition context, the district court's role is to provide review of the extradition judge's rulings through the mechanism of habeas corpus. *See, e.g.*, *Koskotas v. Roche*, 931 F.2d 169, 171 (1st Cir. 1991). The extradition court, however, had not rejected Peter Taylor's arguments because they were untimely, but instead because "even assuming … that Peter Taylor did not provide Ghosn with an elevator key card, the remainder of the evidence in the court's view, none of which moreover was disputed, still provides probable cause to believe that [Peter Taylor] assisted in the planning, financing and execution of Ghosn's escape as alleged." 1/15/21 Electronic Order. As we have detailed, this ruling was inapposite because Japan is not charging, and cannot charge, Peter Taylor with conspiracy to violate Article 103 and the evidence presented does not establish Peter Taylor's participation in the actual commission of the alleged offense itself. In fact, Japan acknowledges Peter Taylor left Japan a good four hours before the offense occurred.

It was this ruling by the extradition court for which we sought district court habeas review, and we requested it *just nine days* after the order was entered. Accordingly, the district court plainly erred in denying petitioners' January 24, 2021 motion to amend seeking review of the extradition court's January 15, 2021 order as

untimely. The effect of that ruling was to deprive Peter Taylor of any review of the merits of the extradition court's ruling on his probable cause arguments.

B. Petitioners Will Suffer Irreparable Harm if a Stay Is Not Granted

The government has not promised to wait beyond February 12, 2021 to surrender the petitioners, thus if a stay is not granted, petitioners face surrender, prosecution and associated loss of liberty while at the same time losing ability to appeal the determination their extradition is authorized by the Treaty and otherwise lawful. Such consequences constitute irreparable harm. *Liuksila*, 2018 WL 6621339 at *1; *Nezirovic,* 2014 WL 3058571 at *2; *Zhenli Ye Gon*, 2014 WL 202112 at *1.

Further, if extradited, petitioners are likely to be tortured and treated in a way that violates fundamental notions of due process, the right to a speedy trial, the right not to be subjected to lengthy and coercive interrogation in the absence of counsel, protection against cruel and unusual punishment, the presumption of innocence, the right against self-incrimination, and other rights we cherish and the U.S. and the rest of the civilized world have recognized through various international treaties and human rights conventions. Courts have recognized the poor conditions under which a petitioner will be held can themselves constitute irreparable harm warranting a stay. *Martinez*, 2014 WL 4446924 at *4.

C. The Government and Public Interest Weigh in Favor of a Stay.

The third and fourth factors—harm to the opposing party and the public interest—merge when the government is the opposing party. *Nken*, 556 U.S. at 435. "There is a public interest in ensuring that a person is not wrongfully surrendered to

face prosecution abroad." *Liuksila*, 2018 WL 6621339 at *2 (citing *Nken*, 556 U.S. at 436). Further, while the United States may have an interest in promptly fulfilling its legal obligations to its treaty partners, the United States *has no legal obligation to extradite petitioners* under Article V of the Treaty. Here, the previous administration *chose* to extradite petitioners, U.S. citizens, and is not under any compulsion or legal obligation to do so.[7] Where it is a U.S. citizen whose extradition is sought, "staying the extradition to allow him to seek appellate review of his claims that the extradition is unlawful clearly is in the public interest." *Martinez*, 2014 WL 4446924 at *6.

However, even if the United States were obligated to extradite petitioners, the devastating and irreparable harm of losing their appellate rights far outweighs any such obligation. Indeed, Article 3 of the Treaty expressly contemplates that extradition take place in accordance with the law of the requested party. As explained by one court:

> The court agrees that the United States' honoring of its treaty obligations is extremely important. But it does not agree that allowing an extraditee to obtain review of his legal claims interferes with the United States' ability to comply with its treaty obligations. This country prides itself on the legal process it affords those accused of crimes, even though that legal process takes time to complete.

Martinez, 2014 WL 4446924 at *5.

[7] The privilege to refuse extradition of one's own citizens is one Japan has not hesitated to exercise in refusing U.S. requests for extradition of Japanese nationals charged with far more serious crimes involving far more serious harm (including loss of life). Moreover, in the underlying prosecution of Messrs. Ghosn and Kelly, Japan *affirmatively worked around the Treaty* by not requesting extradition in a straight-forward fashion, but instead enlisting rival Nissan officials in a ruse to lure Mr. Kelly from his home in Tennessee to Japan under false pretenses so that it could arrest and prosecute him.

CONCLUSION

The issues raised by petitioners merit full and careful consideration, and the stakes are enormous for them. The very least the U.S. courts owe the petitioners is a full chance to litigate these issues, including exercising their appellate rights, before they are consigned to the fate that awaits them at the hands of the Japanese government. But if a stay is not entered, there will be no review at all, and both the circuit court and this Court will lose jurisdiction. Therefore, we respectfully request that this Court enter an Order staying the extradition and surrender of petitioners pending the consideration and disposition of their appeal to the circuit court and, if necessary, a writ of certiorari and any further proceedings before this Court.

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Respectfully submitted,

Tillman J. Finley
MARINO FINLEY LLP
800 Connecticut Ave., NW, Suite 300
Washington, DC 20006
Tel. 202.223.8888
tfinley@marinofinley.com

Daniel Marino
MARINO FINLEY LLP
800 Connecticut Ave., NW, Suite 300
Washington, DC 20006
Tel. 202.223.8888
dmarino@marinofinley.com

Abbe D. Lowell
WINSTON & STRAWN LLP
1901 L Street, N.W.
Washington, DC 20036
Tel. (202) 282-5875
adlowell@winston.com

Paul V. Kelly
JACKSON LEWIS, P.C.
75 Park Plaza
Boston, MA 02110
Tel (617) 367-0025

paul.kelly@jacksonlewis.com

James P. Ulwick
KRAMON & GRAHAM PA
One South Street, Suite 2600
Baltimore, MD 21202
Tel. (410) 752-6030
JUlwick@kg-law.com