NO. _____

In the Supreme Court of the United States

JEREMY HULSH
Applicant,

V.

VIERA HULSH,
Respondent.

EMERGENCY APPLICATION FOR STAY PENDING APPEAL TO THE SEVENTH CIRCUIT

TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT

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TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT:

In assessing this emergency application to stay, the Justice or the Court serves as the final guardian of our nation's private rights protected by our Constitution. These private rights are fundamental to the foundation of our democracy and the rule of law. *See generally* The Federalist No. 78 (A. Hamilton) (Wills ed. 1982). Article 20 of the Hague Convention[1] is the treaty's guardian and gatekeeper's unique weapon to protect these fundamental rights, and provides the sole mechanism in treaty cases to do so. A stay is therefore required so that the appeals court can address on an expedited basis its own guardian and gatekeeper mandates under both the Constitution and the treaty.

The district court entered its Memorandum Opinion and Order on Tuesday, July 21, 2020 for the return of the parties' eight and six-year-old sons to Slovakia. The children are currently in Chicago, Illinois. Under the terms of the district court's return order, as soon as this coming Monday, July 27, 2020 at 8:00 A.M. (if not before then), the children are to be surrendered and will depart the United States for Slovakia. Re-return to the United States is most likely a non-starter—for all the reasons that the Father is advancing in his article 20 defense.

Slovakia fails to comport with United States principles of fundamental freedoms and human rights. Return to Slovakia is therefore inconsistent with article 20 of the treaty. Slovakia fails to protect the human rights and fundamental freedoms standards guaranteed by the Constitution of United States of America in the following areas: (A) due process and notice and

[1] The Convention on the Civil Aspects of International Child Abduction, done at the Hague on October 25, 1980 (the "Convention" or the "Hague Convention" or the "treaty"), T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10,493 (1986); *see also* International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9001 *et seq.* (2015).

opportunity to be heard; (B) the finality of judgments and equality of arms; (C) an impartial and independent judiciary; (D) the fundamental right to a fair trial; (E) the availability of constitutional remedies for violations of fundamental rights; and (F) the enforcement of child custody and access orders.

The district court recognized as it must that returning children to a country that violates United States constitutional due process standards or the fundamental right to parent as long recognized by this Court, would result in an article 20 non-return. Uncontroverted expert evidence as to Slovakia's lack of an independent judiciary free from interference by its executive branch, its lack of an impartial judiciary, and its material and substantial due process failings, particularly as to notice and opportunity to be heard in child custody matters was put before the district court. Yet the district court determined that these failings do not merit a non-return. This result is unconstitutional and a misapplication of the article 20 defense.

DECISION UNDER REVIEW

Jeremy Hulsh, the Applicant, seeks a stay or injunction pending appeal of the district court's July 21, 2020 Memorandum Opinion and Order for the return of the children to Slovakia. *Hulsh v. Hulsh*, No.1:19-cv-07298 (N.D. Ill. Jul. 21, 2020), ECF No. 177. The Memorandum Opinion and Order is attached as Appendix A. In accordance with this Court's Rule 23.3, the Father moved in the district court and the court of appeals for a temporary stay of the Memorandum Opinion and Order. Both courts denied any stay. The orders of the district court and the court of appeals are attached hereto as Appendices B and C respectively.

BACKGROUND

The purpose of the Hague Convention is two-fold. On the one hand, the treaty drafters wanted to protect children from the harmful effects of international child abduction. Yet on the

other hand, the Convention drafters recognized that there are abductions that are entirely justified – and that children sometimes need to be protected *by and through* a justified abduction, rather than needing protection *from* an abduction. The Hulsh children abduction was a justified removal because at the very heart of the Convention is the welfare of the children involved. That is why the Convention contains six enumerated defenses that are always available to protect children like the Hulsh children who have been removed from a requesting country.

The unique article 20 human rights and fundamental freedoms defense to return is central to this case. The uncontroverted human rights expert evidence in this case establishes the systematic and case-specific failures of Slovakia to protect the Hulsh children; and that Slovakia fails to protect the human rights and fundamental freedoms standards required by the United States of America.

Earlier this year, the Court articulated that the "Convention's return requirement is a provisional remedy that fixes the forum for custody proceedings." *Monasky v. Taglieri*, 140 S.Ct. 719, 723 (2020) (citations omitted). "Upon the child's return, the custody adjudication will proceed in that forum." *Id*. To that end, the Convention therefore ordinarily requires the prompt return of a wrongfully removed child to the child's habitual residence. *Id*. (emphasis added). The *Hulsh* scenario is not an ordinary case.

The Slovakian justice system does not provide the right to a fair trial, and does not uphold a parent's rights to the upbringing of his or her children. Such a system is rejected by the fundamental freedoms protected by our United States Constitution. Indeed, without the article 20 protections, the treaty itself would be one-sided and unconstitutional.

Return of the Hulsh children to Slovakia is further barred by Article 13*b* of the Convention on two grounds. First, return to a country where the children most likely will never see their father

again is intolerable. Second, return to a country that does not take seriously the risk of physical and psychological harm to children, as a result of the sexual grooming and inappropriate behavior of the Mother's boyfriend is the definition of grave risk that no undertakings can ameliorate.

The summary factual background is as follows. The Mother and Father first met in Israel in 2008. They were married in Israel in 2010. Their first son, H.P.H., was born in Israel in 2011 and their second son, T.S.H., was born in Israel in 2014. Both parties are Israeli citizens. The Father is also a United States citizen and the Mother is also a Slovak citizen.

In 2016, the Mother obtained a United States Permanent Resident Card and the family planned to emigrate together to the United States to live in early 2017. The Mother claims that before that point, the family lived in Slovakia. The Father's position is that the family lived in Israel. On January 8, 2017 the Mother took both children to Slovakia from Israel.

When it became clear to the Father that the Mother was not going to move to the United States with the children as the parties had agreed and planned, and that she had instead removed the children to Slovakia, the Father travelled to Slovakia to try to get the children back. But on January 17, 2017, the Mother had filed an *ex parte* secret custody case against the Father in the Slovakian court seeking custody of the children. The Mother was represented by counsel, Dr. Anna Niku, in the Slovakian custody case. The Mother's custody petition was never served on the Father. Just five days after the Mother's petition was filed secretly, the Slovakian Court entered an *ex parte* order awarding the Mother temporary custody of the children, without any notice or opportunity to be heard provided to the Father. (Resp. Ex. 101).[2] The Mother and Dr. Niku both

[2] Citations to "Resp. Exs." refer to the Father's exhibits admitted into evidence at the evidentiary hearing. Citations to "Pet. Exs." refer to the Mother's exhibits admitted into evidence at the evidentiary hearing. Citations to "Tr." Refer to the evidentiary hearing transcript.

testified at the evidentiary hearing before this Court, and both stated somewhat brazenly that Slovakian law does not require notice and an opportunity to be heard before the entry of temporary custody orders. (Tr. 109-110; 215-224). The temporary custody order remained in effect for nearly three years. (Tr. 224-229).

The Father only learned that a custody case had been filed when he received an email from the court *after* the secret custody order had been entered. (Resp. Ex. 102). The email to the Father did not attach a copy of the custody order. It merely stated that a case was pending and demanded that the Father advise within five days when and where he would be located in Slovakia to be served. *Id*. The Father had to obtain on his own a copy of the January 22, 2017 order that had been obtained in secret.

The Father then obtained piecemeal formal translations of the WhatsApp messages he had discovered the previous month. (Tr. 384:11-385:15). Consistent with the secret January 22, 2017 Order, the Father discovered that the Mother was engaged in a scheme, since at least September 2016, to get possession of the children in Slovakia and to keep them from the Father.

The WhatsApp messages contain communications between the Mother and her friend, Lucia Krasnahorska, in which the Mother tells Ms. Krasnahorska about the family's plan to emigrate together to the United States (Tr. 479-484; Resp. Ex. 119). But then the communications switch to the Mother telling Ms. Krasnahorska that she will make the Father's life hell in their divorce case and she would use her "trump cards" (*i.e.*, her political operative contacts) who are highly influential politicians in Slovakia. (Tr. 484:11-486:3). One such contact is a former prime minister of the country. *Id.*

The Father also then read the translated messages between the Mother and her boyfriend, Mr. Svarinsky. Of grave concern to the Father was and is the following message, relating to Mr. Svarinsky masturbating in front of his own young son:

Svarinsky:	I jerked off.
Mother:	I caught you.
Svarinsky:	But I stopped.
Mother:	Well, go on.
Svarinsky:	He [Svarinsky's son] is here next to me, I cannot, he put his legs on me and that's it. I'm going to the bathroom.

(Resp. Ex. 115, page 5589; Tr. 527:18-528:1; Tr. 579:10-580). It is clear from the content and the time stamp of this WhatsApp message that Mr. Svarinsky masturbated with his own son (an 8 or 9 year old child at the time) beside him in the bed. *Id*. Notably, the parties' son, H.H., is the same age now that Mr. Svarinsky's son was at the time of the masturbation communication.

For the next nearly three years in Slovakia, the children were deprived of proper and meaningful contact with the Father. Over time, the Slovakian court entered order after order maintaining its January 22, 2017 *ex parte*, secret custody order in favor of the Mother, further restricting any contact for the Father with the children. Over the same period of time, the Mother continually withheld the children first from the limited contact, and then from the minimal supervised contact the children were provided with the Father.

The Father did not have immigration status in Slovakia at the relevant times that allowed him to live and work in Slovakia. He was able to enter Slovakia only as a non-immigrant visitor, and was only permitted to be in the country for a limited number of days. So in addition to the access to the children being withheld by the Mother, there were also occasions when the children

were not able to see the Father because his immigration status did not permit him to be present in Slovakia.

The Father filed numerous requests, with both the Slovakian courts and law enforcement, to enforce his access with the children. (Tr. 244-248; Resp. Ex. 163). The Slovakian justice system did nothing. The only half-hearted effort to address the Mother's withholding of the children was one order requiring the Mother to pay a €200 Euro fine. *Id*. Indeed, as of the time of the evidentiary hearing before this Court in February 2020, the Mother's Slovakian family law attorney, Anna Niku, testified that the Father's enforcement requests remained pending in the court in Slovakia, and had never been resolved. (Tr. 261:3-15).

Over the course of 2017, 2018, and 2019, the courts in Slovakia entered numerous orders restricting the Father's contact with the children, none of which ever changed the initial temporary custody order that the Mother obtained without notice to the Father. Numerous judges presided over numerous decisions, sometimes in three judge panels and sometimes as a single judge. (Resp. Ex. 163). In particular, a judge named Patricia Železníková was involved. Judge Železníková in some instances was a member of a three-judge panel in the case in Slovakia, and in at least one instance was the presiding judge of the three-judge panel. *Id*. This appointment is particularly significant because the Mother's attorney in Slovakia, Dr. Anna Niku (also the Mother's expert in the Slovakian family law in this case), had previously represented Judge Železníková in the judge's own personal matter. This prior representation was never disclosed to the Father or his counsel in Slovakia. (Tr. 206-208; Resp. Ex. 163). The Father only learned of Dr. Niku's representation of Judge Železníková by happenstance, after the Father had already come to the United States with the children. Significantly, it is undisputed that under Slovakian law, there is no requirement that either Dr. Niku or Judge Železníková disclose their relationship. (Tr. 208:1-5; Resp. Ex. 163).

In October 2019, after nearly three years of getting nowhere with the Slovakian court system in progressing the merits of the custody case, or in enforcing the Slovakian court's own orders, the Father removed the children to the United States. Before being served with the Mother's Petition for Return, the Father filed his Answer, asserting the Convention's article 13*b* and article 20 exceptions. The Court thereafter appointed Dr. Sol Rappaport as the Rule 706 "neutral" court-appointed psychological expert. The Court also appointed Guardians *ad Litem* for the children. Over the pendency of this case, the children have spent approximately 50:50 parenting time in Illinois with both parents.

On July 21, 2020, the district court ordered the return of the parties' eight and six-year-old Hulsh boys to Slovakia. Rarely has the United States been presented with a return case to the country of Slovakia. And the federal courts have yet to be presented with a legitimate Article 20 treaty exceptions case until now.

The district court ordered that the children be returned to Slovakia within 21 days of the return order. Under the current parenting time arrangement, the Mother is scheduled to pick up the children from the Father on the morning of July 27, 2020 at 8:00 A.M. At that point, under the district court's return order, she will be permitted to take the children to Slovakia.

ARGUMENT

Under Supreme Court Rule 23 and the All Writs Act, 28 U.S.C. § 1951, a single Justice or the Court has the authority to enter a stay pending proceedings in a court of appeals. *See, e.g.*, *Trump v. International Refugee Assistance Project*, 138 S.Ct. 542 (2017); *West Virginia v. EPA*, 136 S.Ct. 1000 (2016); Stephen M. Shapiro et al., *Supreme Court Practice* § 17.6, at 881-884 (10th ed. 2013).

In considering an application for a stay, the Court or Circuit Justice considers: (i) the likelihood of whether four Justices would vote to grant a writ of certiorari if the court of appeals ultimately rules against the applicant; (ii) whether five Justices would then conclude that the case was erroneously decided below; and (iii) whether, on balancing the equities, the injury asserted by the applicant outweighs the harm to the other parties or to 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); *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (traditional stay factors); *Chafin v. Chafin*, 568 U.S. 165, 179 (2013) (traditional stay factors apply to Hague Convention child abduction matters). In Hague Convention matters, " . . . the well-being of a child is at stake; application of the traditional stay factors ensures that each case will receive the individualized treatment necessary for appropriate consideration of the child's best interests." *Chafin*, 568 U.S. at 179 (emphasis added).

I. THIS COURT IS LIKELY TO GRANT REVIEW IF THE COURT OF APPEALS AFFIRMS THE RETURN ORDER & THERE IS AT LEAST A FAIR PROSPECT THAT THIS COURT WILL REVERSE IF THE COURT OF APPEALS AFFIRMS THE RETURN ORDER.

The Father here addresses the first two factors together. He does so because (i) there is substantial overlap in relation to the first two factors here; (ii) there considerable urgency in this application to ensure it is presented before the Justice or the Court; and (iii) once the Mother leaves the United States with the children for Slovakia for all practical purposes this unique application is moot, even though the merits of the Father's appeal is not technically moot.

A. Return of the Children to Slovakia is not permitted by the fundamental principles of the United States relating to the protection of human rights and fundamental freedoms.

The United States Constitution sets forth two of our most basic human rights and fundamental freedoms: the right to due process and to the right to parent one's own child. This Court has long held that "[t]he interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests" protected by the United States Constitution. *Troxel v. Granville,* 530 U.S. 57, 64 (2000). Such a fundamental liberty interest, the fundamental right to parent, is entitled to the highest level of due process protection. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

Central to the Convention's functioning is the recognition that there will be cases where protection of these human rights and fundamental freedoms by the requested state does not permit the return of a child to the requesting state. Convention, art. 20. To that end, this Court recognizes that article 20 of the Convention is an entirely valid treaty defense in its application and interpretation of the Convention. *Chafin v. Chafin*, 568 U.S. 165, 169 (2013). Article 20 provides that:

> The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

Convention, art. 20.

In the official Explanatory Report[3] to the Convention, the official reporter, Dr. Elisa Perez-Vera, explains the purpose of article 20. Elisa Perez-Vera, Explanatory Report ¶ 29, in 3 *Hague*

[3] *Choctaw Nation v. United States*, 63 S.Ct. 423, 677 (1943) ("In interpreting a treaty it is proper to refer to the records of its drafting and negotiation"); *see also Simcox v. Simcox*, 511 F.3d 594, 604, n. 3 (6th Cir. 2007) (explaining the Perez-Vera Report is "recognized by the Hague Conference on Private International Law as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it").

Convention on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 1069 (1982) (the "Perez-Vera Report"). Dr. Perez-Vera explains that article 20 arose as a compromise between the drafters, some of whom favored a "public policy" clause to the Convention, thereby permitting the requested State to refuse a child's return through applying a restrictive legal formula based on the public policy in the requested State. Perez-Vera Report at ¶ 31. Instead, the text of article 20 as it was adopted requires that the principles of human rights protect children and prohibit when appropriate the return requested. *Id*. at ¶ 33.

Dr. Perez-Vera explains in her Report that the Convention as a whole is based on the proposition that the best way to combat child removals on an international level "is to refuse to grant them recognition." *Id*. at ¶ 34. But she further explains:

> The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child's habitual residence – are in principle best placed to decide upon question of custody and access.

Id.

The exceptions to return include the article 20 exception and must be viewed through this essential human rights and fundamental freedoms prism. Here, the chasm of problematic fundamental differences in the rule of law between the United States and Slovakia cannot be ignored.

Unlike the United States, Slovakia ignores the right to parent through due process and an opportunity to be heard, and permits secret custody orders. Equally disturbing from the view from our shores, Slovakia permits the interference by its executive branch of government with its own judiciary. Return of the children to Slovakia for an adjudication of custody rights cannot therefore

be permitted under United States fundamental principles of human rights and fundamental freedoms.

The "Convention's return requirement is a provisional remedy that fixes the forum for custody proceedings." *Monasky*, 140 S.Ct. at 723 "Upon the child's return, the custody adjudication will proceed in that forum." *Id*. But here there is a direct link between the Convention's provisional remedy – fixing the forum for custody proceedings – and the human rights and fundamental freedoms violations in Slovakia. Return to Slovakia cannot be permitted under United States human rights and fundamental freedoms principles. The very rights and principles that are systemically violated in Slovakia go to the heart of what a return is meant to achieve.

B. Political and Executive Interference With the Judiciary.

Slovakia permits political interference with the judiciary and disruption of final orders. In Slovakia, the Public Prosecutor can interfere with court proceedings and have final judgments set aside. (Resp. Ex. 163). Litigants do not have the ability to engage with the Public Prosecutor in this process, and do not have the any ability themselves to have final judgments set aside. *Id*. There is therefore a complete lack of separation of powers, equality of arms, and finality of judgments in Slovakia. Indeed, the European Court of Human Rights has recognized that this interference is a major due process problem specific to Slovakia. *See, e.g., COMPCAR, s.r.o. v. Slovakia* (no. 25132/13, 9 June 2015); *OVA v. Slovakia* (no. 72493/10, 9 June 2015); *Lispuchová and Lispuch v. Slovakia* (no. 21998/14, 15 October 2019); *PSMA spol. s.r.o. v. Slovakia* (no. 42533/11, 9 June 2015).

Most recently in *Bosits v. Slovakia* (no. 750941/17, 19 May 2020), the European Court of Human Rights excoriated Slovakia for its political meddling in court proceedings. The European

Court of Human Rights found that political bodies in Slovakia still have wide discretion to interfere with judicial proceedings, including interference in cases that have already been resolved and closed by final judgment. *Id*.

At issue in *Bosits* was a piece of land taken from private citizens after the Second World War in what was then Czechoslovakia. Reparations commissions were established in Slovakia in the late 1990s, which ultimately resulted in the private citizen in *Bosits* obtaining back the property that had been taken from him. The case was appealed to the Prešov Regional Court in Slovakia and was resolved in favor of the private citizen against the government. It became a final judgment. There was nothing further that could be done in the case. But a year later, the Prosecutor General decided he could enter his own unilateral extraordinary order, and reverse the Prešov Regional Court's decision, taking back the private citizen's land for the government, despite the existence of a final order.

The private citizen brought a claim against Slovakia in the European Court of Human Rights. The European Court of Human Rights held that this interference with the judiciary by Slovakia is a gross violation of the rule of law, legal certainty, and equality of arms. And the European Court of Human Rights awarded money damages to the private citizen to be paid by Slovakia.

Political interference with the judiciary and lack of finality of judgments are anathema to the principles of the protection of human rights and fundamental freedoms in the United States. In the Memorandum Opinion and Order, the district court characterized our constitutionally protected separation of powers as merely "design features" of the United States government, and not as "in and of themselves fundamental freedoms." Mem. Op. at 21. That characterization minimizes the

importance of separation of powers, and fails to recognize the separation as a crucial part of our due process protections.

Separation of powers and an independent judiciary free from political interference and the interference of other branches of government is a fundamental building block of the rule of law to protect human rights and fundamental freedoms. U.S. CONST. arts. I-III; The Federalist No. 78 (Hamilton, A.) ("For I agree that 'there is no liberty if the power of judging be not separate from the legislative and executive powers' . . . liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments." (quoting Montesquieu, *Spirit of Laws*, Vol. I, page 186)).

"Maintaining the independence of the branches of government is essential to the preservation of liberty." *United States v. Scott*, 688 F. Supp. 1483, 1487-89 (D.N.M 1988) (citing *Myers v. United States*, 272 U.S. 52, 116 (1926)). The separation of powers is not merely a "design feature" of the structure of our government. It is the vital guard in the protection of individual liberties:

> . . . the founders considered the separation of powers a vital guard against governmental encroachment on the people's liberties, including all those later enumerated in the Bill of Rights. What would happen, for example, if the political majorities who run the legislative and executive branches could decide cases and controversies over past facts? They might be tempted to bend existing laws, to reinterpret and apply them retroactively in novel ways and without advance notice. Effectively leaving parties who cannot alter their past conduct to the mercy of majoritarian politics and risking the possibility that unpopular groups might be singled out for this sort of mistreatment—and raising along the way, too, grave due process (fair notice) and equal protection problems.

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149-50 (10th Cir. 2016) (Gorsuch, Circuit Judge, concurring).

A judiciary free from political control and control of the other branches " . . . is essential to adjudication of rights by judges who are free from potential domination by the other branches. It is for these reasons that the independence of the judiciary ought to be jealously guarded, and encroachments upon its powers by the other branches be rigorously scrutinized." *U.S. v. Scott*, 688 F. Supp. 1483, 1488 (D.N.M. 1988) (citing The Federalist No. 78, at 394 (A. Hamilton) (Wills ed. 1982). Applying article 20 of the Convention to refuse to return children to a requesting nation that has no effective separation of powers as it relates to the judiciary is therefore not "passing judgment on the political system of Slovakia" as the district court erroneously determined. Rather, refusing to return the children to a nation that lacks an independent judiciary advances and protects the Father's fundamental rights and freedoms recognized in the United States.

C. No Right to Notice and Opportunity to be Heard in Child Custody Proceedings.

Slovakia fails to uphold human rights and fundamental freedoms guaranteed by the United States Constitution through its lack of notice and opportunity to be heard in child custody cases. Notice and opportunity to be heard – the very cornerstone of United States due process protections of fundamental rights and freedoms – is not required under Slovakian law before a custody order is considered, heard, or entered. To hold that such a due process violation is insufficient in order to achieve an article 20 defense is inconsistent with this Court's long standing jurisprudence on the fundamental right to parent.

The Mother's own Slovakian family law attorney conceded in her cross-examination that notice and opportunity to be heard is not required under Slovakian law before the entry of a temporary custody order – even when that order may be in effect for three years. (Tr. 211:4-25; 212:1-8; 215:4-23) *see also* (Resp. Ex. 101). The Mother herself also conceded that notice and

opportunity to be heard are not required in Slovakian law for the entry of temporary custody orders, even when such an order can be in effect for three years. (Tr. 109:17-22; 113:6-25; 114:1-8).

This fundamental protection is made crystal-clear through the adoption of the Uniform Child Custody Jurisdiction and Enforcement Act (the "UCCJEA") in 49 of the 50 states (and its predecessor statute in the 50th state—the Commonwealth of Massachusetts), which requires that parents have notice and opportunity to be heard before custody orders are entered. The State of Illinois has adopted the UCCJEA, and requires that all parties to child custody proceedings, whether located inside or outside the state, be provided notice and opportunity to be heard *before* a child custody determination is made by the court. § 750 ILCS 36/205 and 36/108. The required notice must be given in a manner reasonably calculated to give actual notice. *Id*. This requirement is of course to protect parents' fundamental liberty interests in the upbringing of their children – a fundamental right long recognized in the United States. *Troxel*, 530 U.S. at 64.

The United States places great importance on notice and opportunity to be heard requirements such that the UCCJEA (and its predecessor the UCCJA), as collectively adopted in all 50 states. The United States expressly prohibits courts from recognizing and enforcing out-of-state child custody orders where one of the parties did not have notice and opportunity to be heard before the order was entered. *See, e.g.,* § 750 ILCS 36/305(d)(3). This requirement is so critical to the protection of fundamental human rights and freedoms that it applies to both states of the United States and to foreign countries. *Id*.; *see also* § 750 ILCS 105. For example, a state court in Illinois is prohibited from registering and enforcing any child custody determination – whether entered by its next-door sister state or by a court in Ireland – if the out-of-state proceeding did not provide notice and opportunity for both parents to be heard in a manner that comports with the UCCJEA's standards. This strictest level of due process applies regardless of whether it is a permanent,

temporary, or an initial child custody determination. § 750 ILCS 36/102(3). The notice and opportunity to be heard requirement is crucial to the protection of a parent's liberty interest in the upbringing of his or her child. The failure to provide these critical due process protections is not a form over substance issue or a harmless error issue in this or any case.

The Mother obtained the January 22, 2017 *ex parte*, secret temporary custody order from the Slovak court: i) without serving her petition on the Father; ii) without the Father being notified of the case; and iii) without the Father being notified that the court would be making any determination related to the parties' children. Indeed, as the Mother's own family law attorney opined, the Father was not notified or provided an opportunity to be heard because there is no requirement whatsoever that he be notified under Slovakian law. For the nearly three years that followed, the no-notice, secret, *ex parte* order awarding the Mother custody of the children remained in effect, placing the Father at an insurmountable disadvantage from the outset, and resulting in the Mother having exclusive control of the children. The article 20 defense is therefore likely to succeed.

D. Systemic and Individualized Problematic Approach to Judicial Impartiality.

An impartial judiciary is essential to the fundamental due process rights enshrined in the United States Constitution. Slovakia's legal approach to the impartiality of judges—as evidenced in the specific facts of this case—is not in accordance with the fundamental principles of an impartial judiciary and has violated the Father's fundamental right to a fair trial.

The European Court of Human Rights has repeatedly criticized Slovakia's acceptance of lack of impartiality of judges. *See, e.g., Harabin v. Slovakia* (no. 58688/11, 20 November 2012); *Indra v. Slovakia* (no. no. 46845/99, 1 February 2005); *Nešťák v. Slovakia* (no. 65559/01, 27

February 2007); *see also* (Resp. Ex. 163). The systemic lack of impartiality was played out in the Father's case.

The collusion between the Mother's Slovakian attorney, JUDr. Anna Niku, and Judge Železníková, who presided over or participated in at least four appeal proceedings in the parties' case in Slovakia, undermines the appearance of impartiality of the Slovakian judiciary, which violates the Father's right to a fair trial in Slovakia. (Resp. Ex. 163).

In Dr. Niku's report, which was admitted as Petitioner's Exhibit 2, and in her trial testimony, Dr. Niku concedes her relationship with Judge Železníková. Dr. Niku states that she represented the judge in "her family matter in 2009." (Pet. Ex. 2, p. 7). Dr. Niku's testimony—incredibly—is that this relationship does not undermine the judge's impartiality. (Tr. 215-224). After the trial before the district court ahd concluded, however, it was discovered by happenstance that Dr. Niku in reality represented Judge Železníková until at least 2015.

Dr. Niku testified that in the Hulsh family proceedings in Slovakia, "JUDr. Gelacikova was the presiding judge here – NOT Mgr. Železníková as stated by Mr. Fiala-Butora." (Pet. Ex. 2, p. 7). Whether Judge Železníková was the presiding judge or a panel member is irrelevant. As Dr. Niku conceded, all judges "have an equal say and an independent voice in each decision." *Id*. But Judge Železníková did in fact serve as the presiding judge in at least one proceeding between the parties. (Tr. 333:1-334:5); *see also* (Resp. Ex. 163). And she was member of the panel in at least three other decisions in the Hulsh matter in Slovakia. (Tr. 331:22-333:1).

Dr. Niku's position in her report and in her testimony, which was adopted by the district court here, was that her relationship with Judge Železníková did not undermine Judge Železníková's impartiality and that she was under no obligation to disclose it to anyone, all in accordance with Slovakian law. (Pet. Ex. 2, p. 7). Here, the district court's position is precisely the

problem. The Supreme Court of the Slovak Republic is the supreme judicial body interpreting Slovak law. Resp. Ex. 163. It sets the standards for judicial impartiality so low that the European Court of Human Rights has found a number of times that the Slovakian standards do not meet the European Court's own requirements. Resp. 163. Nor do they meet the standards of the United States Constitution.

Dr. Niku is correct that the Slovakian Supreme Court did not consider Judge Železníková to be partial—but that is exactly the problem in the Slovakian judiciary. (Resp. 163). Such a position is unacceptable from the perspective of international human rights standards and United States constitutional standards.

In a different case addressing the relationship between Dr. Niku and Judge Železníková, the Slovak Supreme Court attempted to apply the European Court of Human Rights case law on impartiality to the Judge Železníková and Dr. Niku situation. The Slovak Supreme Court held that it does not matter if "it appears" that the judge is impartial, and even if the judge herself "feels impartial," that is not a reason for recusal. (Tr. 291-293); *see also* (Resp. Ex. 163; Resp. Ex. 165). According to the Slovak Supreme Court, only if there are objective criteria which undermine the judge's impartiality will recusal be warranted. *Id*.

That warped application of law is a violation of the European Court of Human Right's jurisprudence. The European Court of Human Rights, like the United States, considers that the "appearance of impartiality" itself can be a reason for a judge's recusal, and has found a violation of the right to a fair trial solely on that factor. (Tr. 291-293); *see also* (Resp. Exs. 163, 165); *Micallef v. Malta* (no. 17056/06, 15 October 2009, §98). The Slovak Supreme Court has therefore set the wrong standard for Slovak law, by wrongly interpreting and wrongly applying the law of the European Court of Human Rights, which it is bound to follow.

The standard set by the Supreme Court in Slovakia does not comport with United States standards. In the United States, the impartiality test for its judiciary is:

> The standard in any case for a § 455(a) recusal is **whether the judge's impartiality could be questioned by a reasonable, well-informed observer**. In Hook, we explained that § 455(a) "asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits. This is an objective inquiry." An objective standard creates problems in implementation. Judges must imagine how a reasonable, well-informed observer of the judicial system would react.... [D]rawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard under § 455(a) into a demand for proof of actual impropriety. So although the court tries to make an external reference to the reasonable person, **it is essential to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be**."

Matter of Hatcher, 150 F.3d 631, 637 (7th Cir. 1998) (emphasis added) (internal citations omitted).

Because the Supreme Court in Slovakia had held that their relationship is not problematic, neither Dr. Niku nor Judge Železníková disclosed it to the Father or his attorney in the Slovakian case in the first place. It follows that the Father and his attorney had no opportunity to make a decision whether to challenge it or not. Even if they had known about it, challenging it before the Slovak courts would be futile. The Supreme Court already decided on the matter of the relationship between the same judge and the same attorney. Because the Supreme Court set the standard untenably low, any of the Father's attempts would only have achieved confirmation that this relationship is in compliance with Slovak domestic procedural standards.

The district court here held that the relationship between Dr. Niku and Judge Železníková is not problematic because it did not influence the outcome of the cases. But that position fundamentally misunderstands the legal issue. From the perspective of the fundamental right to a fair trial, a judge's impartiality is problematic not only if it is proven that it actually influenced the

outcome of the decision, but if the relationship "could be questioned by a reasonable, well-informed observer." *Matter of Hatcher*, 150 F.3d 631, 637 (7th Cir. 1998). Neither the European Court of Human Rights, nor the courts of the United States, require litigants to prove that the partial judge was corrupt, or the outcome would have been different had a different, impartial judge decided on the case. The right to a fair trial is violated by the fact of the impartiality or not itself, or the appearance thereof, regardless of the proceeding's outcome. And the European Court makes clear that if a compromised judge sits on a panel, that result undermines the impartiality of the whole panel, even if the panel's other members' impartiality is not questioned. *See Sander v. the United Kingdom* (no. 34129/96, 9 May 2000, §§18-35).

It is not whether Judge Železníková herself is corrupt, or whether she influenced the Hulsh family proceeding in favor of Dr. Niku in a particular way that is problematic. No one will ever know what role exactly Judge Železníková played, for example, when the judges of her panel discussed the case among themselves.. Rather, the relationship of Judge Železníková and Anna Niku is the problem in and of itself because it undermines the appearance of impartiality of the Slovakian courts. Consequently, the decisions violate the Father's right to a fair trial.

The United States Department of State identifies problems of fair trial rights in Slovakia in its Country Report on Human Rights Practices from 2018, which states that in Slovakia "[u]npredictability of court decisions and inefficiency remained major problems in the country's judiciary, leading to long trials, which in civil cases discouraged individuals from filing suit." Resp. Exs. 145; 163.

E. Lack of Fair Trial and Constitutional Remedies.

Slovakia's Constitutional Court is unable to fulfill its mandate and ensure that fundamental rights are respected in Slovakia. (Resp. Ex. 163). Fair trial standards, including impartiality of

judges, are theoretically protected by the Slovak Constitution and are protected by the European Convention on Human Rights. *Id*. General trial and appellate level courts are required to uphold these standards, but if they fail, the Slovak Constitutional Court was established to provide a remedy against decisions of the general courts, which violate fundamental rights. *Id*. In this respect, the Constitutional Court is meant to play a similar role to the Supreme Court of the United States. The European Court of Human Rights has found with respect to Slovakia a number of times that it is often the proceedings before the Constitutional Court itself that fail to meet the standards of a fair trial. (Tr. 295:16-24); *see also* (Resp. Ex. 163); *Čičmanec v. Slovakia* (no. 65302/11, 28 June 2016); *Franek v. Slovakia* (no. 14090/10, 11 February 2014); *Kovárová v. Slovakia* (no. 46564/10, 23 June 2015); *Majchrák v. Slovakia* (no. 21463/08, 23 October 2012); *Zborovský v. Slovakia* (no. 14325/08, 23 October 2012)). In addition to the failures of the general courts, the country is unable to provide an effective remedy for violations of fundamental rights, including the right to a fair trial, because of systemic problems existing in the Constitutional Court.[4]

F. Lack of Enforcement of Child Custody Orders.

Slovakia has a specific problem upholding the rights of parents in child custody proceedings. The European Court of Human Rights has found in a number of cases that Slovakia fails to enforce child custody orders, including orders under the Hague Convention. *See, e.g., Frisancho Perea v. Slovakia* (no. 383/13, 21 July 2015); *Mansour v. Slovakia* (no. 60399/15, 21 November 2017). This is a problem of systemic nature in Slovakia as explained by the Father's Slovakian human rights expert, Dr. Fiala-Butora, and uncontroverted by the Mother or her Slovakian family law attorney. (Tr. 301:15-25; 304:1-8; 314:4-6); *see also* (Resp. Ex. 163). The

[4] Declaration by the Venice Commission on undue interference in the work of Constitutional Courts in its member Stateshttps://www.venice.coe.int/webforms/events/?id=2193 (last accessed July 23, 2020); *see also* (Resp. Exs. 143, 144).

lack of enforcement of these rights is not merely a violation of the right to a fair trial, but also of the right to family life protected under Article 8 of the European Convention on Human Rights, and a violation of the United States constitutionally protected fundamental rights to due process and fundamental right to parent.

The nature of the problem was corroborated by a recent domestic charity study. The study found that from all the cases where one parent was obstructing the enforcement of custody orders, courts ordered enforcement in only 19.8 percent of the cases, and actual enforcement took place in only 7.3 percent of the cases.[5] This means that in 92.7 percent of the cases, even if the courts found in favor of a specific parent, parents are not getting access to their children because the other parent can obstruct court orders with impunity.

The European Court of Human Rights has identified systemic problems stemming from the Slovakian legal framework, which frustrate the enforcement of child custody orders. In the *Frisancho Perea v. Slovakia* case, the father, a resident of the United States, obtained a court judgment in his favor in Slovakia. That judgment was never enforced because the domestic system of extraordinary remedies allowed the other party to obstruct enforcement. The Slovakian courts expressed their opinion that it is the Slovakian legal framework itself that is deficient, and the European Court endorsed that opinion. The European Court specifically stated:

> 76. In addition, as regards the existing procedural framework for Hague Convention proceedings in Slovakia, which in the present case ultimately restarted as a result of the Constitutional Court's intervention, the Court notes in particular the opinion expressed by the President of the Bratislava II District Court (see paragraph 40 above), which may be understood as suggesting that there is a systemic problem in that appeals and extraordinary appeals on points of law are allowed in the course of return proceedings, with the attendant effect of negating the object and purpose of the Hague

[5] https://komentare.sme.sk/c/22233684/cestuju-za-detmi-zdaleka-no-roky-ich-nevidia-a-rozsudok-nestaci.html (last accessed July 23, 2020).

> Convention. It is of the view that the unfolding of the recommenced Hague Convention proceedings (see paragraphs 29 and 30 above) bears witness to these systemic concerns.

Frisancho Perea v. Slovakia (no. 383/13, 21 July 2015) § 76.

These problems stem directly from deficiencies in the laws of Slovakia. As the European Court stresses, it is not failures by individual judges which leads to this situation, but the deficient legislative design of the system of legal remedies in Slovak law. *See, e.g., Frisancho Perea v. Slovakia* (no. 383/13, 21 July 2015); *Mansour v. Slovakia* (no. 60399/15, 21 November 2017).

That is why the European Court requires "exceptional diligence" in child custody matters. *See Ribić v. Croatia* (no. 27148/12, 2 April 2015, §92). It further stresses that this does not involve merely resolving the dispute with a court decision, but also the decision's enforcement. *See Malec v. Poland* (no. 28623/12, 28 June 2016, § 78); *Raw and Others v. France* (no. 10131/11, 7 June 2013); *Vorozhba v. Russia* (no. 57960/11, 16 January 2015). Slovakia does not exercise this required diligence.

The systemic failing of the Slovak judiciary played out against the Father in his Slovakian proceedings. It is undisputed that on several occasions the Mother refused to permit the children to see their Father. (Tr. 405-409). The Father submitted complaints regarding these violations to the authorities, the court and the police. *Id*. He asked for enforcement of his visitation rights. *Id*. He regularly updated the request with new information. *Id*. The enforcement proceedings were still pending at the time the children left Slovakia on October 24, 2019. (Tr. 261:3-15).

Yet the court in Slovakia took little to no action to enforce its own orders. The court only issued its resolution to enforce its own order on July 10, 2018. Resp. Ex. 163. In terms of actual enforcement, it imposed two fines each in the paltry sum of €100 Euros on September 10, 2018. Consistent with the systemic enforcement problems in Slovakia, the courts of Slovakia took no

effective action to enforce the Father's visitation rights to the children. Effective actions do not exist in Slovakia. There is no indication in the record that the Slovak courts would act any differently in the future, which will lead to the intolerable situation of the Hulsh children never seeing their father again.

II. THE BALANCE OF EQUITIES STRONGLY SUPPORTS A STAY.

The grave risk of harm and the constitutional violations here are legitimate exceptions to the return to Slovakia. The balance weighs strongly in favor of a stay. The Slovakian legal system does not enforce even its own orders. There can therefore be no confidence whatsoever that any re-return order, as contemplated by the Court in *Chafin*, would ever be enforced if the Father here prevails in his appeal. *See Chafin*, 568 U.S. at 173-76; *see also* Section I(F) *supra*. The harm to the Father and children if the children return to Slovakia while the Father's appeal is pending is therefore irreparable.

Conversely, the harm to the Mother and the children if the children remain in the United States pending the outcome of the expedited appeal is negligible. Courts across the nation routinely hear expedited *de novo* appeals in Hague Convention cases. *See Khan v. Fatima*, 680 F.3d 781, 785 (7th Cir. 2012) (staying a return order and remanding for further proceedings on grave risk); *Koch v. Koch*, 450 F.3d 703, 709–10 (7th Cir. 2006) (granting a stay pending resolution of the appeal and ordering expedited briefing); *da Silva v. de Aredes*, 953 F.3d 67, 72 (1st Cir. 2020) (issuing a stay of the removal to provide time to consider the matter and expedite the appeal); *Abou-Haidar v. Sanin Vazquez*, 945 F.3d 1208, 1213 (D.C. Cir. 2019) (expediting appeal and inviting government to submit *amicus* brief on short notice); *Mendez v. May*, 778 F.3d 337, 343 (1st Cir. 2015) (reversing the district court's return order on appeal within one month); *Whallon v. Lynn*, 230 F.3d 450, 454 (1st Cir. 2000) (granting a stay of the district court's return order,

requiring reasonable access rights to the child, and ordering an expedited appeal). The Seventh Circuit Court of Appeals has already entered an expedited briefing schedule. (7th Cir., DE # 1-2). The Father's Opening Brief is due by August 31, 2020. *Id.*

The children are enrolled in school. (D.C., DE #72). They have attended the Ogden School in Chicago since the beginning of this year. *Id.* The children's Guardians *ad Litem* confirmed to the District Court that the children are thriving here. (D.C. Tr. 6/17/20, pp. 592:8–593:14) (noting H.P.H. has "done quite well in school" and "the boys are healthy"). The parties by agreement and pursuant to the District Court's Orders have shared approximately equal parenting time with the children in Illinois. (D.C., DE #83, #164). Granting the stay will not unduly prolong the case because the appeal is already expedited.

CONCLUSION

We have every reason to doubt the Slovakian courts' power and capacity to deal with the legal issues posed by the disputes between the father and the mother. The Courts of Appeal are equipped to decide expedited Hague Convention cases in a matter of weeks. Slovakia is not yet equipped to participate in the league of re-return nations because of political interference in the country's judiciary and its lack of due process. The response to this stay application should not be that article 20 is never available because such an approach ignores the text-based approach to treaties that the Court has always adopted. *Abbott*, 560 U.S. 1 at 12 (2010). As the nation's final guardian of private rights, the stay should be granted.

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Respectfully Submitted,

/s/ Stephen J. Cullen

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