No. _____

In the Supreme Court of the United States

PERSEPHONE JOHNSON SHON,

Applicant,

v.

BOGDAN RADU,

Respondent.

APPLICATION FOR STAY OF RETURN OF CHILDREN TO GERMANY PENDING FILING AND DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

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Dated: April 4, 2023

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

I. INTRODUCTION

This application is the second time this Hague Convention[1] case is before this Court. The Court granted the Applicant, Persephone Johnson Shon's (the "Mother") first petition for a writ of certiorari on June 27, 2022, vacated the Ninth Circuit's judgment in the Mother's first appeal to the Ninth Circuit, and remanded the case to the Ninth Circuit for further consideration in light of this Court's opinion in *Golan v. Saada*. *See* No. 21-825; *see also* App. E. The Court of Appeals mandate issued today.

The parties' two sons remain in Tucson, Arizona with the Mother, where they have been living in safety since June 10, 2019. The United States District Court for the District of Arizona has ordered the return of the children to Germany (the "Third Return Order"), with certain ameliorative measures, which do not protect the children, despite having made an article 13*b* grave risk finding because of the abusive behavior of the Respondent, Bogdan Radu (the "Father").

There have been three appeals to the Ninth Circuit in this case, and three remands to the district court. *See* Section III *infra*. There has never yet been an evidentiary hearing in this case at which grave risk and ameliorative measures were assessed under the correct legal standard. The district court's return orders have been repeatedly stayed either by the district court, or by the Ninth Circuit at each stage of the case—until the Ninth Circuit's most recent Opinion was issued on March 13, 2023, in which it affirmed the district court's Third Return Order, and denied the

[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"), T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10494-501 (Mar. 12, 1986); *see also* International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9001 *et seq*.

Mother's request for a stay of the return. *See* App. A. The Mandate was issued today, April 4, 2023. *Id.*

The Mother therefore requests a stay of the district court's Third Return Order pending the filing and disposition of the Mother's second petition for a writ of certiorari in this Court. Staying the Third Return Order balances the Convention's equal and competing objectives of protection of the children's welfare and "secur[ing] the prompt return of children wrongfully removed to or retained in any Contracting State." Convention, art. 1; *Chafin v. Chafin*, 568 U.S. 165, 178 (2013); *see also Lozano v. Montoya Alvarez*, 572 U.S. 1, 16 (2014) (although the Convention is designed to discourage child abduction, it "does not pursue that goal at any cost").

"[S]huttling children back and forth between parents and across international borders may be detrimental to those children[''] and "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 178-79. And so "courts can achieve the ends of the Convention and ICARA—and protect the well-being of the affected children—through the familiar judicial tools of expediting proceedings and granting stays where appropriate." *Id.* at 178. This case is such an appropriate case. Here a stay will balance the Convention's competing objectives. The Mother consents to expediting proceedings in this Court as she has done throughout the proceedings in the lower courts.

II. DECISION UNDER REVIEW

The Mother seeks a stay pending the filing and disposition of the Mother's second petition for a writ of certiorari in this Court, which will seek review of the Ninth Circuit's March 13, 2023 Opinion. The Mandate was issued on April 4, 2023. The Opinion and Mandate are attached collectively as Appendix A.

The district court's Third Return Order, and further clarification Order, which are the subject of the Ninth Circuit's Opinion, are attached collectively as Appendix B. The Ninth Circuit's limited remand Order is attached as Appendix C.

In accordance with this Court's Rule 23.3, the Mother moved in the district court and the Ninth Circuit for a stay of the district court's Third Return Order. The district court entered a temporary stay. The Ninth Circuit denied any further stay when it issued its Opinion. *See* App. A. The district court's order granting the temporary stay is attached hereto as Appendix D.[2]

III. BACKGROUND

A. Factual Background Leading to Hague Convention Case.

The Mother and Father are the parents of two young sons. App. E at App. 63. The parties were married in California in 2011. *Id.* The parties' older son, O.S.R., was born in the United States in 2013. *Id.* Their younger son, M.S.R., was born in Germany in 2016. *Id.* The Mother, Father, and both children are United States citizens. *Id.* None of the family members are German citizens. *Id.* The Father is also a Romanian citizen. *Id.*

After O.S.R.'s birth in 2013, the Father began a pattern of systematic and severe psychological abuse and coercive control over the Mother. *Id.* In December 2015, the Father obtained employment as a contractor with the United States Department of State in Germany. *Id.* at App. 64. He relocated to Germany in mid-December 2015. *Id.* The Mother and O.S.R. joined the Father in Germany in March 2016. *Id.* Later in 2016 the parties' second son, M.S.R., was born in Germany. *Id.*

[2] The Mother's previous petition for a writ of certiorari filed in this Court, which was granted, is also attached hereto for the Court's reference as Appendix E, along with a copy of the Clerk's letter advising the Ninth Circuit of the same.

After the birth of the parties' second son in Germany, the Father's severe psychological abuse and coercive control of the Mother increased in intensity and fury. *Id*. The Father exploded with yelling at the Mother and children using "inappropriate, degrading, and/or derogatory language." *Id.*[3]

The Mother did not work outside the home in Germany. App. 65. The Father financially supported the family through his State Department contracting position until his contract ended in September 2017. *Id.* From September 2017 through the summer of 2019, the Father was unemployed. *Id.* His outbursts then morphed into extreme abuse in front of the children. App. 65-66. The Father's verbal abuse inevitably became physical abuse. *Id.* He slammed the table, clenched his fists, and his movements became "jerky" and forceful. *Id.* His behavior had become unbearable for the Mother. *Id.*

In October 2017, the Father's abusive behavior directly targeted the children, as well as the Mother. *Id*. Now the Father's physical manifestations of his outbursts worsened and he had become increasingly violent. App. 66-67. The Father hit the older child. App. 67 He threw chairs and other household items, banged on doors and tables, and assaulted the Mother. *Id.*

During one horribly violent incident in May 2018, the children had been noisy in the bathroom (they were being children) during their bath time and when the Mother was bathing them and working on potty-training the younger son. *Id.* The Father burst open the bathroom door, slapped the older child across the face, and berated the Mother and children. *Id.* He called the Mother an "f---ing b----" in front of the children. *Id.*

[3] He uses the same inappropriate, degrading, and derogatory language in his filings in the district court and in his pro se filings in the Court of Appeals. *See, infra.*

By the summer of 2018, the Father's unemployment benefits in Germany ended. *Id.* Neither party had a paying job. *Id.* The abuse continued to escalate. *Id.* After the Father became unemployed, his abusive behaviors worsened. App. 67-68.

In another violent episode during potty-training for the younger child, the Father threatened to "knock the whole door down" when the Mother was in the bathroom with the younger child trying to get him to use the toilet. App. 68. The Father screamed and banged, terrifying the Mother and both children. *Id.* The Mother was eventually able to escape the bathroom, find the older child (who had been hiding in the kitchen during the incident) and lock herself and the two children in her bedroom. *Id.* She packed a suitcase for herself and the children to leave the apartment, and found a place for them to go for a few days. *Id.* When the Father realized the Mother was leaving, he threatened to commit suicide. *Id.* The Mother managed to get out of the apartment with the children and stayed away for a few days before returning. *Id.* When she arrived back at the apartment, the Father claimed he had no memory of the incident in the bathroom or of threatening suicide. *Id.* He demanded "make up sex." *Id.*

Throughout the rest of 2018 and 2019, the Father's abusive behavior continued to get worse. *Id.* The Father sexually assaulted the Mother in March 2019. *Id.* The Mother ". . . decided that she was not going to stay with [the Father]." *Id.* In May 2019, the Mother was able to obtain one-way airline tickets for herself and the children to leave Germany for the United States. *Id.* The Mother and children left Germany on June 9, 2019 for Arizona, and they have been safe in Arizona from the Father's abuse ever since. *Id.*

B. Summary of Procedural Background.

The first evidentiary hearing in the district court on the Father's Petition for Return and the Mother's defenses was held three years ago in July and August 2020. The district court found that

the Mother established an article 13*b* grave risk defense. But it ordered the children returned to Germany with certain ameliorative measures (the "First Return Order"). The Mother appealed to the Ninth Circuit, and the district court stayed the First Return Order during the pendency of the Mother's appeal. The Ninth Circuit vacated the First Return Order and remanded the case to the district court for further proceedings on ameliorative measures.

On November 3 and 9, 2021, following the Mother's first appeal to the Ninth Circuit, the district court held an evidentiary hearing. During the hearing, the district court did not permit the Mother's child psychology expert to testify. And after the hearing, the district court conducted ex parte communications with the executive branch about the case without any record being made.

The Mother's German law expert, Dr. Andreas Hanke, appeared and testified by Zoom. The Father failed to appear for the hearing. Tr. 11/3/21, 3:19-4:25. The lower court advised counsel and the Mother at the start of the hearing that in an ex parte off the record communication to the lower court, the Father had sent the lower court an email ". . . requesting to be excused from today's Zoom meeting. There appears to be a medical issue, and the time frame was not working well." Tr. 11/3/21, 3:20-24. The lower court decided it would proceed that day with receiving testimony from the Mother's German law expert, and that it would schedule a second day of the evidentiary hearing for all other evidence. Tr. 11/3/21, 3:35-4:3. The lower court then stated "I am also calling someone from the State Department, but we are trying to coordinate what date that would work, whether that person would be available Tuesday, the 9th, or whether they will be available on Wednesday afternoon. That might be another time." Tr. 11/3/21, 4:3-7.

The lower court proceeded with the testimony of the Mother's German law expert, Dr. Andreas Hanke. Tr. 11/3/21, 5:14-36:25. The lower court accepted Dr. Hanke as an expert in German family law and comparative law relating to United States Hague orders and German law

and procedure. Tr. 11/3/21, 9:6-10. Dr. Hanke had prepared a report and a supplemental report providing the Father notice of Dr. Hanke's opinions. Dr. Hanke's report and supplemental report were admitted into evidence at the remand evidentiary hearing. Tr. 11/3/21, 10:12-11:3. Dr. Hanke's opinions and testimony are uncontroverted.

Dr. Hanke provided expert testimony on the availability of legal measures in Germany to mitigate any risk of harm to the children, and the feasibility of obtaining protective measures abroad or initiating German custody proceedings from abroad. Tr. 11/3/21, 18:10-20:9. Dr. Hanke confirmed it is not possible under German law to initiate either type of proceedings from outside Germany until the children arrive in Germany if a return were to be ordered. Tr. 11/3/21, 18:15-20:9.

Next, Dr. Hanke explained that under German law, a German court only has jurisdiction to determine custody of a child if the child's habitual residence is Germany as the term "habitual residence" is defined in German domestic law. Tr. 11/3/21, 19:12-20:9. He further explained that in German domestic law in order to be considered habitually resident in Germany, a child must have lived in Germany for at least six months, and must be a part of German society, such as enrolled at school and other activities. Tr. 11/3/21, 19:12-19. Dr. Hanke further explained that in Germany, the German court's determination of habitual residence for domestic jurisdictional purposes is not impacted in any way by one parent's lack of consent to a child being outside Germany. Tr. 11/3/21, 19:20-23.

In support of his opinion, Dr. Hanke directed the lower court to an order that had been entered by the German court on July 6, 2020, following a request by the Father, which held that Germany did not have jurisdiction over the children at issue in this case. Tr. 11/3/21, 19:24-20:9; Resp. Ex. 65. The German court held that it does not have jurisdiction to decide the Father's

petition, nor do any other courts in Germany. *Id.* It explained that Germany is not the children's habitual residence as that term is defined under German domestic law. *Id.* It further explained that in determining habitual residence, the German court must assess the children's "actual focal point of life" and to assess where the children "have stayed for more than around six months." *Id.* The German Court further explained that it does not make a difference whether the other parent with custody rights agrees with the children's new residence. *Id.* It explained that under German law, the concept of habitual residence is "purely of a factual nature" and "not legally fashioned" and not contingent on the will of the other parent. *Id.* It therefore held that the children had been in the United States for a year and that the center of their social and personal relationships is in the United States. *Id.* It further held that the change of the children's residence is no longer short-term on the basis of the time that had elapsed, and that the "legality of the change of residence no longer matters." *Id.* Dr. Hanke confirmed in his direct examination testimony that he had reviewed the German Court's order. Dr. Hanke confirmed that the German ruling means that the German court determined that the German system does not have jurisdiction over the children. Tr. 11/3/21, 20:10-23:20.

Dr. Hanke confirmed that during the period in which no custody orders exist relating to the children if they were to be returned to Germany, the parents continue to have joint rights of custody to the children under German law, and that those rights are in parity, with neither parent having any greater rights than the other. Tr. 11/3/21, 31:8-32:9. In practical terms, he explained this rule means that if the Mother and children arrive in Germany, the Mother has no power to prevent the Father from, for example, taking the children from the Mother upon their arrival. Tr. 11/3/21, 32:13-21. Dr. Hanke further confirmed there is no mechanism in Germany by which the Mother

could seek "protective measures" to alter the parity between the parties either immediately upon arrival in Germany or before leaving the United States. Tr. 11/3/21, 35:1-18.

Dr. Hanke's evidence was the only German law evidence presented at the remand evidentiary hearing. And it is the only expert evidence on German law presented to the district court. His testimony is uncontroverted.

The remand evidentiary hearing continued the following week. At the beginning of day 2, the lower court advised the parties as follows with respect to the State Department:

> I also informed counsel that I would be contacting someone from the State Department to try to see if we could get them to come in, or get a representative to come in and testify either this morning or later this week as to any questions we might have. The response that we received was that the department typically does not participate in hearings on the record on these matters, but they did agree to speak to me informally as to any questions I might have, and they also offered some names of U.S. Hague network judges and made them available in the event that I had additional questions. So I will be contacting the State Department representative with any questions I might have as to procedures.
>
> And mostly, my biggest concern would be the amount of time it would take for a hearing as to custody or any protections that might be necessary for the children once the children arrive in Germany and the length of time it would take and if there are any other matters, any other -- also other, other forms of protection that might be in place where [the Mother] could call and contact, or resources that are available, such as our Child Protective Services and agencies to that effect. So those would be my questions for them.

Tr. 11/9/21, 6:7-7:2.

The Mother's counsel objected to the lower court's plan to conduct ex parte off-the-record evidence gathering with the United States Department of State:

> You'll appreciate I do want to say on the record I would object to any inquisitorial approach in this case. I would respectfully, as the Court knows, and again for the record, Your Honor, state that we have an adversarial system, not an inquisitorial system . . . .

> So we do respectfully object to that approach. I would like an opportunity to cross-examine the State Department on their position. And I would just, again, respectfully, for the record, make it clear that we do object to an approach whereby the respondent and the petitioner have no opportunity to examine a witness in the adversarial system.

Tr. 11/9/21, 7:9-23.

After the Mother's objections were preserved on the record, the lower court continued with the evidentiary hearing. Tr. 11/9/21, 10:22-79:25. The Mother and Father each testified. Additional documentary evidence was received by the lower court. Tr. 11/9/21, 11:1-34:16 (Mother) and 34:18-72:7 (Father); Resp. Exs. 66-72; 74-76.

The lower court concluded the remand evidentiary hearing by reiterating its intent to conduct ex parte off-the-record evidence gathering through the State Department. Tr. 11/9/21, 79:16-20. It advised that "I will have an order shortly after my telephonic meeting with someone from the State Department to answer the specific questions I have raised regarding any legal issues, timing, and issue an order forthwith." *Id.*

At the time of the November 2021 remand hearing before the district court, the Mother's deadline to file a petition for a writ of certiorari in this Court as to the Ninth Circuit's opinion had not yet passed. Also at the time of the November 2021 remand hearing before the district court, this Court had not yet decided *Golan v. Saada*, which explains the correct legal standard to be applied in a grave risk and ameliorative measures analysis. The same issues that were before this Court in *Golan* were before the lower courts in this case. The Mother therefore filed her petition for a writ of certiorari in this Court on November 29, 2021. This Court granted certiorari in *Golan* in December 10, 2021.

The district court then entered its Second Return Order on December 30, 2021. The Mother appealed the Second Return Order to the Ninth Circuit on January 10, 2021, and sought to stay the

Second Return Order pending the resolution of her second appeal to the Ninth Circuit and her petition for a writ of certiorari in the first appeal in this Court. The district court granted the stay of the Second Return Order on January 27, 2022.

Briefing in the Ninth Circuit then proceeded on the Mother's second appeal. After the Mother's Opening Brief had been filed in the Ninth Circuit in the second appeal, the appellate court entered an order for the remaining briefing to proceed in the second appeal under the previously ordered deadlines, but that all further proceedings in the case would be held in abeyance pending the issuance of this Court's judgment in *Golan v. Saada*.

This Court issued its Opinion in *Golan v. Saada* on June 15, 2022, holding that consideration of ameliorative measures in grave risk Hague Convention cases is not mandatory after a finding of grave risk. 142 S. Ct. 1880. If a district court considers ameliorative measures, it "must be guided by the legal principles and other requirements of the Convention and ICARA." *Id.* at 1893. Appellate courts' previous instructions to "order return if at all possible, improperly elevated return over the Convention's other objectives." *Id.* A lower court's consideration of ameliorative measures must: (1) prioritize the child's physical and psychological safety; (2) abide by the Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute; and (3) accord with the Convention's requirement that courts act expeditiously in Convention proceedings. *Id*. District courts are not prohibited from considering ameliorative measures, but they have no obligation to do so. *Id.* at 1895. This Court remanded *Golan* to the lower court and reiterated that the lower court had ". . . never had the opportunity to engage in the discretionary inquiry as to whether to order or deny a return under the correct legal standard . . ." and that previous rules in the Circuits *requiring* consideration of ameliorative measures (as in the Ninth Circuit) ". . . improperly weighted the

scales in favor of return." *Id.*

On June 21, 2022, the Ninth Circuit entered an order in the Mother's second appeal remanding the case to the district court to reconsider its ruling in light of *Golan*. The Ninth Circuit did not substantively address any of the Mother's questions presented in her second appeal. Rather, it summarily remanded the case to the district court.

This Court then granted the Mother's petition for a writ certiorari as to the first Ninth Circuit appeal on June 27, 2022, and vacated the Ninth Circuit's judgment and remanded the case to the Ninth Circuit for further consideration in light of *Golan v. Saada*. Having already remanded the case to the district court in the Mother's second appeal in light of *Golan*, the Ninth Circuit entered an order dismissing the Mother's first appeal as moot.

The case then proceeded on the second remand in the district court. The district court received written briefing but did not hold an evidentiary hearing after the Ninth Circuit's second remand. To date there has therefore never been an evidentiary hearing in this case at which grave risk and ameliorative measures are assessed under the correct legal standard. And there is no contemporary evidence before the district court relating to grave risk and ameliorative measures.

The district court entered its Third Return Order on August 22, 2022. The Third Return Order required that the children be returned to Germany within 30 days of entry of its order. The district court then temporarily stayed its order, pending further order of the Ninth Circuit, to allow the Mother to request a further stay from the Ninth Circuit in the third appeal. The Mother timely requested a further stay in the Ninth Circuit. The Ninth Circuit declined to rule on the Mother's timely request, thereby leaving the district court's temporary stay in place for the duration of the third appeal.

After briefing and oral argument in the Ninth Circuit in the third appeal, the Ninth Circuit again remanded the case to the district court. It entered an order for a limited remand on seven specific questions relating to the "*current*" grave risk and any logistics it deemed necessary for a return to Germany. *See* App. C. The district court again did not hold an evidentiary hearing on remand. It entered a "clarification" Order on January 10, 2023. *See* App. B at App. 31-36. The Ninth Circuit ordered supplemental briefing on the district court's further order. It then issued its Opinion affirming the district court's Third Return Order and denying the Mother's request for a stay on March 13, 2023. *See* App. A. The Mandate issued today, April 4, 2023. *Id.*

IV. REASONS FOR GRANTING THE STAY

The well-being of children is at stake in every case under the Hague Convention. *Chafin*, 568 U.S. at 178. Protection of children's welfare is therefore an equal and competing objective to the Convention's goal of "secur[ing] the prompt return of children wrongfully removed to or retained in any Contracting State." Convention, art. 1. This Court has reconciled the Convention's two competing objectives by explaining that ". . . courts can achieve the ends of the Convention and ICARA – and protect the well-being of the affected children – through the familiar judicial tools of expediting proceedings and granting stays where appropriate." *Chafin*, 568 U.S. at 178; *see also* Convention, art. 1; International Child Abduction Remedies Act, 22 U.S.C. § 9001 *et seq*. ("ICARA"). It is appropriate for the Court to grant the stay here. The Mother consents to the case being expedited.

The official[4] Explanatory Report to the Convention instructs that the overall purposes of the Convention "give[] way before the primary interest of any person in not being exposed to

[4] *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 that the Perez-Vera Report is "recognized by the Hague . . .

physical or psychological danger or being placed in an intolerable situation." Elisa Perez-Vera, Explanatory Report ¶ 29, in 3 *Hague Convention on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction* 1069 (1982) ("Perez-Vera Report"). The Perez-Vera Report emphasizes that the actions of the States Parties must reflect the philosophy of the Convention whereby "the struggle against . . . international abduction must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests." *Id.* at ¶ 24.

Instead of seeking to balance the Convention's competing objectives, the district court (and the Court of Appeals in affirming the district court), was motivated and distracted by the time this case has been pending and its perception that conducting the required further evidentiary hearing would "violat[e] the Convention's requirement that this Court act expeditiously." App. B at App. 29, line 19. However, speed is not the only requirement—and certainly not the most important requirement—of the treaty. The Court must consider the well-being of the children even if properly doing so prolongs the proceedings. *See, e.g., Gaudin v. Remis*, 415 F.3d 1028, 1036 (9th Cir. 2005) (*abrogated on other grounds by Golan v. Saada*) (remanding the case to the lower court after the third appeal, when the case had been pending for nearly five years, for the required evidentiary hearing on grave risk and ameliorative measures at the time of the third remand). Here, focusing on speed to the exclusion of the Convention's competing objective, namely the protection of the well-being of the affected children, deprived the children of ever having had the proper evidentiary hearing on grave risk and ameliorative measures that is needed to protect them from harm.

. . . 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").

A. Standard for Granting a Stay.

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v Perry*, 558 U.S. 183, 190 (2010). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* (citations omitted). The Circuit Justice or the Court may also consider, in close cases, the interests of the public. *Indiana State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (internal quotations omitted). Those standards are met here.

B. Factor 3: Irreparable Harm if Children Are Returned to Germany.

In light of the Convention's purpose—the protection of children—the Mother addresses the irreparable harm factor first and foremost. In its Third Return Order, the district court characterizes the Father's abusive behavior as his parenting style. App. B at p. 3, lines 15-16. Abuse and threats are not a parenting style; they are domestic violence plain and simple. Return of the children to Germany for these children means for all practical purposes return of the children to domestic violence being meted out on them and the Mother.

Just the Father's statements in his opposition to the stay filed in the district court, along with statements in other pleadings and papers he has filed throughout the court of this case, show the irreparable harm the children immediately face if a stay is not entered in this case. The Father's stated positions are alarming, and all seek to undermine any ameliorative measures:

- He is pursuing "civil lawsuits and potential criminal indictments" against the Mother in Germany. (Father's *pro se* Answering Brief in Ninth Circuit first appeal, Case No. 20-17022, Dkt. 22-1 at ¶ 2);

- He refers to "pending police dockets" and an "active prosecutorial case" against the Mother pending in Germany. (*Id.* at ¶ 3; *see also* Case No. 20-17022, Dkt. 23);

- He refers to the "precarious legal predicament and perilous situation" for the Mother in Germany and refers to the "eventuality that she is taken into legal custody or incarcerated in Germany, US or Romania . . ." (*Id.* at p. 6);

- He requests that the Ninth Circuit "issue an immediate search and seizure order/warrant" for the mother's home to obtain the children's travel documents, which were held by the district court clerk, not the Mother. (Case No. 20-17022, Dkt. 23);

- He accuses the Mother, her parents, and her Arizona trial counsel of "obstruction of justice" and "cover-up actions." (*Id.* at Dkt. 32, 43);

- He requests that the Mother and her trial and appellate counsel be prosecuted for (as he claims) stealing U.S. government files from the Father's computer (Father's 6/30/22 Mot. For Criminal Prosecution Referral, No. 4:20-cv-00246, Doc. No. 101).

In his Opposition to the third stay the Mother sought in the district court, the Father continues to threaten criminal proceedings against the Mother. Worse (if that is possible) he threatens to re-abduct the children to a third country when they are in transit to Germany. Father's 9/8/22 Opp. to Third Mot. to Stay, No. 4:20-cv-00246, Doc. No. 118.[5] If the Mother and children even make it to Germany without the Father re-abducting the children, the Mother has no power to prevent the Father from taking the children with him from the airport upon their arrival. Tr. 11/3/21, 32:13-21; *see also* pp. 6-9 *supra*.

The district court excluded the Mother's psychological expert witness, Sherri Mikels-Romero, LCSW from testifying at the first remand hearing. Ms. Mikels-Romero therefore prepared an updated report, because she had been excluded from testifying on the current grave risk at each remand, summarizing the testimony she would have provided had she not been excluded. A copy

[5] In a footnote to its Order granting a temporary stay of the Third Return Order, the district court noted that it disagrees with the Mother's interpretation of the Father's threat. *See* App. D at App. 43, n. 2.

of Ms. Mikels-Romero's affidavit with attached updated report was filed in the district court on September 15, 2022 and is attached here as Appendix F.

Ms. Mikels-Romero explains that she has continued to provide clinical psychological treatment to the Mother and children. With respect to the older child in particular, Ms. Mikels-Romero has recently conducted updated assessments of the child regarding the impact of trauma. *See* App. F at App. 87-88. Ms. Mikels-Romero's assessment is that the older child has been traumatized by the Father's ". . . physically and emotionally abusive behaviors towards [the older child and the Mother] and the pet cat, as well as his father's threatening and intimidating behaviors." *Id*. Ms. Mikels-Romero's assessment highlights the older child as ". . . particularly high on hypervigilance, exaggerated startle response, poor sleep, intrusive thoughts of the traumatic events, avoiding mention or talk of anything related to the trauma, such as angry men who are probably someone's father, and hating himself . . ." *Id.* Ms. Mikels-Romero explains that these findings are symptoms of Post Traumatic Stress Disorder ("PTSD").

Ms. Mikels-Romero concludes her updated report by opining that she ". . . has grave concerns, at this point, about physical and emotional safety of [the Mother and both children], were they to be, in any way supervised or unsupervised in the presence of [the Father]." *Id.*

There are no orders or any other protective measures in place in Germany. Nothing. As explained by the uncontroverted testimony of Mother's German law expert at the hearing on the first remand in this case, German courts cannot take any steps until the children arrive in Germany. *See* pp. 6-9 *supra*. The German court has previously dismissed the Father's attempts to obtain orders relating to the children in Germany for the same reason—lack of jurisdiction to do so. *Id.*

Here, unlike in the remand decision at the same stage of proceedings in *Saada v. Golan,* if the Father acts on his threats—and there is no reason to suppose he will not do so—by taking the

children through re-abduction efforts or criminal efforts, or removing the children at the airport upon their arrival, the children will be left with their abusive Father, without any protection of this Court, the German court system, or the Mother. Such an outcome is exactly what Ms. Mikels-Romero has grave concerns will cause further trauma and physical and psychological harm to the children—and it is not what this Court has intended to happen in any return orders. It is an intolerable situation.

In *Saada v. Golan*, after the Supreme Court's remand and thereafter the Second Circuit's remand, the district court received briefing and counsel's oral argument on how to proceed with the remand. *Saada*, 2022 WL 4115032, *1-2 and n. 2; No. 1:18-cv-5295 (E.D.N.Y. Aug. 31, 2022). The district court in *Saada* then made findings that ameliorative measures were already in place in Italy to protect the child, including: (i) that the Italian courts are actively involved with the parties; (ii) a custody case is up and running in Italy; (iii) both parties have counsel in Italy; (iv) the Italian court has entered a "comprehensive order" addressing the measures to facilitate the child's safe return; and (v) the Italian court had entered a domestic violence protective order in favor of the mother, which could be extended beyond its one-year effective period. *Id*. at *2-3. The district court in *Saada* also noted that the parties had been engaged in settlement efforts and that ". . . their relationship appeared at times to be commendably civil." *Id.* at n. 1 (internal quotations omitted). Nothing is in place in Germany nor can it be.

The respondent in *Saada* argued that an evidentiary hearing was required to assess *current* grave risk and ameliorative measures. *See, e.g.*, *Saada*, No. 1:18-cv-5295, at Doc. No. 157 (filed August 5, 2022) (letter reply brief requesting evidentiary hearing and citing *Blondin v. DuBois*, 78 F. Supp. 2d 283, 288-293 (S.D.N.Y. 2000) for the proposition that an evidentiary hearing is required). The district court entered its return order with ameliorative measures without holding a

further evidentiary hearing, based largely on its findings that its previously-ordered ameliorative measures had already been put in place in Italy. *Id.*[6]

There are no such ameliorative measures in place already in the German courts in this case, nor could there be, as explained by the Mother's German law expert. *See* pp. 6-9 *supra*. The Father continues to threaten criminal action against the Mother, her attorneys, and her family and friends, despite representing to the Court that he will comply with future ameliorative measures. *Id.* And he has threatened re-abduction of the children to a third country. *Id.* Here, there are no ameliorative measures in place, and there is no "commendably civil" behavior by the Father.

Moreover, if the children are returned to Germany, but the appeal in this case proceeds, and results in reversal of the lower courts' orders, there is no mechanism in Germany by which there can be a re-return of the children to the United States. Unlike the Supreme Courts of the United States and the United Kingdom, Germany has not recognized the concept of re-returns of children if a respondent prevails on an appeal after the children have been returned pursuant to a lower court's order. *See, e.g., Chafin*, 568 U.S. at 174-75 (this Supreme Court recognizing the concept of re-returns in United States appeals); *In the Matter of KL (A Child)*, [2013] UKSC 75 (the United Kingdom Supreme Court recognizing the concept of re-returns and ordering the re-return of the child to the United States).[7]

Returning the children to Germany here means returning the children to an abusive Father with no safeguards in place. There are no protections in place in Germany to protect the children

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[6] The respondent in *Saada* has noted her appeal of the district court's decision. *Saada*, No. 1:18-cv-5292, at Doc. No. 163 (E.D.N.Y., filed September 8, 2022). The issue of the lower court's failure to hold an evidentiary hearing on remand in *Saada* has not been decided by the appellate court. The respondent/mother, Narkis Golan, was found dead in her New York City apartment on October 18, 2022.

[7] Available at: https://www.supremecourt.uk/cases/docs/uksc-2013-0212-judgment.pdf (last accessed April 4, 2023).

and the Mother from the Father's abuse. Subjecting the children to the Father's abusive and threatening behavior in Germany results in irreparable harm to their physical and psychological safety and is abhorrent to the aims of the Convention.

C. Factors 1 & 2: Probability of Grant of Certiorari and Reversal of Opinion Below.

Despite this case having already been appealed three times to the Ninth Circuit and once to this Court, vital questions on the interpretation of the Hague Convention and United States jurisprudence on the Convention remain unanswered. The Mother addresses Factors 1 and 2 together here, in each of the areas in which in the Mother's submission there is a likelihood of certiorari being granted, and the decision below being reversed.

1. Which party has the burden to proffer and prove the ameliorative measures?

The issue of which party has the burden of proof in a discretionary ameliorative measures analysis has not yet been decided by either this Court or the Ninth Circuit. In the Ninth Circuit's first opinion in this case, it "decline[d] to allocate a burden of proof on the reasonableness of" an ameliorative measure." *Radu v. Shon*, 11 F.4th 1080, 1089 (9th Cir. 2021) [*Radu I*], *cert. granted, judgment vacated by*, 142 S. Ct. 2861 (2022). The Mother had raised and argued the question in her first appeal to the Ninth Circuit, and in her first petition for a writ of certiorari in this Court.

Chief Judge Murguia of the Ninth Circuit has now belatedly and after further consideration determined that the Ninth Circuit should not have declined to address the issue in the Mother's first appeal. *Radu v. Shon*, -- F.4th--, 2023 WL 2470014, at *9 (Mar. 13, 2023) (Murguia, CJ concurring). In her concurring opinion, Judge Murguia recognizes that the Convention and ICARA allocate the burden of proving a *prima facie* case of wrongful removal to the petitioner, and then shift the burden to the respondent to prove a grave risk defense. *Id.* (*citing Golan v. Saada*, 142 S. Ct. 1880, 1888-89 (2022)). But she notes that neither the Convention nor ICARA mentions

ameliorative measures. *Id*. Instead ameliorative measures are a "judicial construct." *Radu II*, 2023 WL 2470014, at *9 (citing *Danaipour v. McLarey*, 286 F.3d 1, 21 (1st Cir. 2002)).

Judge Murguia opines in her concurring opinion that after further consideration she now believes that when a petition proffers an ameliorative measure, "it should be the petitioner's burden to establish that the measure is reasonably appropriate and effective." *Radu II*, 2023 WL 2470014, at *9. She explains that "[t]hree of our sister circuits have adopted this view, and we should have adopted it in *Radu I*." *Id*. (citing *Simcox*, 511 F.3d at 611; *Acosta v. Acosta*, 725 F.3d 868, 877 (8th Cir. 2013); *Danaipour*, 286 F.3d at 21). She further explains that placing the burden of proof on the petitioner would not preclude district courts from considering ameliorative measures not raised by either party that are "obviously suggested by the circumstances" in accordance with *Golan*. *Radu II*, 2023 WL 2470014, at *9. But clear resolution of the allocation of the burden of proof would "assist[] district courts' decisionmaking and guide[] their discretion." *Id*.

Judge Murguia concludes by noting that the burden of proof allocation issue was no longer squarely before the Ninth Circuit in the Mother's third appeal. *Id*. But she noted that "because the Supreme Court vacated *Radu I* in light of *Golan*, a future panel may—and in [her] view, should—properly allocate the burden of proof in an appropriate case." *Id.*

This case is the appropriate case to resolve the burden of proof on ameliorative measures. Three circuits (the First, Sixth, and Eighth) have allocated the burden of proof on ameliorative measures to the petitioner. *Radu II*, 2023 WL 2470014, at *9. The Ninth Circuit has now, in Chief Judge Murguia's concurring opinion, noted that in hindsight it should have addressed the proper allocation of the burden of proof in this very case, and that if it had done so, it would have allocated the burden to the petitioner. *Id.* But it has not yet held in binding precedent that the burden of proof is on the petitioner. *Id.* Uniform and consistent allocation of the burden of proof on ameliorative

measures across the circuits is essential to ensure consistent application of the Convention in this country.

Proper allocation of the burden of proof frames the entire presentation and analysis of the parties' claims and defenses. If the Ninth Circuit had allocated the burden of proof to the petitioner, as Chief Judge Murguia now says it should have done, the three remands to the district court would have followed an orderly framework. The district court would have been able to make decisions on ameliorative measures based on whether the petitioner had met his burden of proof or not. It would have removed from the district court the temptation to go beyond the permissible bounds of Rule 44.1 to determine for herself (without the petitioner having proven) whether ameliorative are available, reasonable, and enforceable in Germany. *See* § IV(C)(2) *infra*. If the requirement here had been that the Father must proffer and prove the reasonableness of ameliorative measures—as Chief Judge Murguia now opines it should have been—the Father would not have met his burden.

Chief Judge Murguia's concurring opinion therefore brings into doubt the entire framework of the ameliorative measures analysis on remand in this case following this Court's Opinion in *Golan* and its granting of the Mother's first petition for a writ of certiorari. The Third Return Order should therefore be stayed pending resolution of the Mother's second petition for a writ of certiorari in this Court.

2. What are the limitations on a district court's off-the-record research under Federal Rule of Civil Procedure 44.1 in Hague Convention cases?

Because the burden of proof was not allocated to either of the parties at the time of the district court's orders—as Chief Judge Murguia now opines it should have been—the district court undertook its own ex parte evidence gathering on ameliorative measures. The Father had not put on any expert or other evidence relating to ameliorative measures in Germany. The Mother's

expert evidence was uncontroverted. Under the mantle of Federal Rule of Civil Procedure 44.1 and Hague Convention article 7, the lower court conferred ex parte and off-the-record with the State Department and with a foreign government – the German Central Authority. It conducted inadmissible hearsay conversations with the State Department and then materially relied on them. It considered inadmissible hearsay statements conveyed to the State Department by the German government and then materially relied on them. It failed to create a record.

Federal Rule of Civil Procedure 44.1 does not authorize courts to conduct inquisitorial ex parte evidence gathering. The Rule permits a court to conduct its own legal research on foreign law in the same way a court may conduct its own legal research on American domestic law. The Rule authorizes the court to receive testimony offered by the parties or obtained by the court itself on foreign law, even if that testimony would not ordinarily be admissible under applicable evidentiary rules. Nothing about the Hague Convention or ICARA changes the bounds of Rule 44.1 or authorizes ex parte or off-the-record evidence gathering by a court in United States Hague Convention proceedings. Such an approach violates the Mother's constitutional due process rights and is not permitted in Hague Convention cases. District and circuit courts would be assisted by clear guidance from this Court on the interplay between Federal Rule 44.1 and the Hague Convention.

Rule 44.1 was adopted in 1966 to "change . . . the treatment of foreign law by the federal courts." *de Fontbrune v. Wofsy*, 838 F.3d 992, 997 (9th Cir. 2016) (citing *Twohy v. First Nat'l Bank of Chicago*, 758 F.2d 1185, 1192-93 (7th Cir. 1985)). Before the adoption of the Rule, foreign law was a question of fact that had to be proven like all other facts. *de Fontbrune*, 838 F. 3d at 997. The purpose of the rule is to make the process of ascertaining foreign law no different than the process for determining domestic law, insofar as possible. *Id.*

This Court has reiterated that the Rule is intended "to make the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so." *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 138 S. Ct. 1865, 1873 (2018) (internal quotations and citations omitted). Indeed, "[j]udicial research into domestic law provides an appropriate analog" to judicial research into foreign law. *de Fontbrune*, 838 F.3d at 999.

The Rule does not authorize courts to conduct inquisitorial ex parte evidence gathering. Justice Gorsuch made this very point in his question to respondent's counsel in oral argument in *Golan v. Saada* on March 22, 2022. *See* Transcript of Oral Argument at 69, *Golan v. Saada*, 142 S. Ct. 638 (2021) (No. 20-1034). Justice Gorsuch pointed out to counsel in his question that ". . . we – you know, we don't normally have, as Justice Sotomayor says, an inquisitorial justice system. It's an adversarial one . . ." *Id.*

Recognizing our adversarial system, the Ninth Court itself has articulated the boundaries of judicial legal research as follows:

> Although our common law system relies heavily on advocacy by the parties, judges are free to undertake independent *legal* research beyond the parties' submissions. It is no revelation that courts look to cases, statutes, regulations, treatises, scholarly articles, legislative history, treaties and other legal materials in figuring out what the law is and resolving legal issues. Independent judicial research into the content of foreign law thus leaves undisturbed a bedrock principle of our adversarial system—that adversarial testing is the surest route to truth, and the failure to expose facts to such rigorous testing can undermine the quality of [factual] findings.

de Fontbrune, 838 F.3d at 999 (quoting Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 Duke L.J. 1, 3, 6 (2011))(internal quotations omitted) (emphasis in original).

The Ninth Court has explained that in order to keep within the boundaries of Rule 44.1, "[i]ndependent research, plus the *testimony* of foreign legal experts, together with extracts of foreign legal materials, 'has been, and likely will continue to be the basic mode' of determining foreign law." *Id.* at 997 (citations omitted) (emphasis added). Recognizing that the Rule only permits *legal* research, not factual investigation, the Ninth Circuit has further explained that a court's independent legal research on foreign law "does not implicate the judicial notice and ex parte issues spawned by independent factual research undertaken by a court." *de Fontbrune*, 838 F.3d at 999.

A bright line exists between a court undertaking independent legal research, and a court undertaking independent factual investigation. The former is permitted; the latter never. Yet the Ninth Circuit here muddied the distinction in this Hague Convention case when it affirmed the district court having conducted ex parte and off-the record factual evidence gathering. Conducting a factual inquisitorial interview of Executive Branch and foreign government personnel, off the record and without any opportunity for the parties to challenge the evidence obtained, is outwith the boundaries of permissible independent judicial research.

The Ninth Circuit recognizes that "despite Rule 44.1's seemingly clear language . . . confusion and contradiction continue to plague the application of Rule 44.1." *de Fontbrune*, 838 F.3d 998. So here; and this case presents the vehicle for this Court to resolve the "confusion and contradiction."

Enshrined in the United States Constitution, as one of the most basic human rights and fundamental freedoms, is the right to raise one's child. This Supreme Court has long held that "the 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, 65 (2000) (citations omitted). As a fundamental liberty interest, this right is entitled to the highest level of due process protection. *Id.* at 65 (citing *Washington v. Glucksburg*, 521 U.S. 702, 719 (1997); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993)). Resolving the "confusion and contradiction" of the lower court in the application of Rule 44.1, particularly in Hague Convention cases, is necessary to protect the constitutional due process rights of Hague Convention litigants from perhaps well-meaning but ultimately misguided courts pursuing off-the-record fact evidence. The Third Return Order should therefore be stayed pending resolution of the Mother's second petition for a writ of certiorari in this Court.

D. Balance of the Equities and the Interests of the Public Weigh in Favor of a Stay.

The public interest is served by the issuance of a third stay pending resolution of the Mother's second petition for a writ of certiorari. This Court has recognized and articulated the public interest in avoiding "shuttling children back and forth between parents and across international borders." *Chafin*, 568 U.S. at 178. And the Court further explained that ". . . courts can achieve the ends of the Convention and ICARA – and protect the well-being of the affected children – through the familiar judicial tools of expediting proceedings and granting stays where appropriate." *Id.* The public interest weighs in favor of maintaining the children's safety and stability in Arizona while this Court provides the necessary direction on the grave risk and intolerable situation issues, when mixed with ameliorative measures, to be raised in the Mother's petition.

The public has a compelling interest in being assured that the well-being of children will be guaranteed to the extent possible while appeals are pending, and that children will not be subjected to return to unsafe conditions; nor will children be returned without the courts ever having held an evidentiary hearing under the correct legal standard, and relying on contemporary

evidence in support of a return order. The public interest is squarely aligned with the issuance of a stay and proceeding with the second expedited certiorari petition in this case.

V. CONCLUSION

This Court should stay the Third Return Order pending the filing and disposition of the Mother's second petition for a writ of certiorari in this Court. The Mother has no objection to expediting proceedings in this Court. This measured and proportionate approach balances the competing objectives of the Convention and protects the children.

WHEREFORE, for the foregoing reasons, the Mother respectfully requests:

A. That the Court STAY the Third Return Order pending the filing and disposition of the Mother's second petition for a writ of certiorari in this Court; and

B. That any applicable requirement for the posting of a bond related to this Court's Order being stayed be WAIVED in accordance with article 22 of the Hague Convention, which provides that "[n]o security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention." *See Patrick v. Rivera-Lopez*, 708 F.3d 15, 22 (1st Cir. 2013); and

C. Such other relief as the interest of justice and her cause may require.

Dated: April 4, 2023

/s/ Stephen J. Cullen

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