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Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOGDAN RADU, *Petitioner-Appellee*, v. PERSEPHONE JOHNSON SHON, *Respondent-Appellant*.	No. 22-16316 D.C. No. 4:20-cv-00246-RM OPINION

Appeal from the United States District Court
for the District of Arizona
Rosemary Márquez, District Judge, Presiding

Argued and Submitted November 21, 2022
San Francisco, California

Filed March 13, 2023

Before: Mary H. Murguia, Chief Judge, and Ryan D. Nelson and Danielle J. Forrest, Circuit Judges.

Opinion by Judge R. Nelson;
Concurrence by Chief Judge Murguia

SUMMARY*

Hague Convention

The panel affirmed the district court's order granting, on a second remand, Bogdan Radu's petition against Persephone Johnson Shon for the return, pursuant to the Hague Convention, of the parties' two children to Germany.

The district court held an evidentiary hearing and granted Radu's petition. The district court found a grave risk of psychological harm if the children were returned to Germany in the custody of Radu, but it determined that those risks would be mitigated if the children returned in Shon's temporary custody. The district court ordered Shon to return with the children and retain full custody until the German courts resolved the merits of the parties' custody dispute. On appeal, in *Radu I*, the panel vacated and remanded for the district court to determine whether the sole-custody measure would be enforceable in Germany.

On remand, the district court held a second hearing. In a second return order, the district court concluded that the enforceability of the sole-custody remedy was uncertain but was no longer necessary. Based on new evidence that a German court would take months to resolve custody, the district court held that ordering Shon to return with the children to Germany, where the default rule was joint custody, sufficiently ameliorated the risk of psychological harm. Shon again appealed. The panel remanded for

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

reconsideration in light of *Golan v. Saada*, 142 S. Ct. 1880 (2022), which clarified that, where there is a grave risk that a child's return would expose the child to physical or psychological harm, consideration of ameliorative measures is discretionary rather than mandatory.

On remand, the district court ordered return based on the existing record. Following *Golan*, the district court exercised discretion to consider ameliorative measures. The district court again stated that ordering Shon to return to Germany with the children would ameliorate the risk of psychological harm. Shon filed the current appeal. On a limited remand, the district court issued a clarifying order.

Agreeing with other circuits, the panel held that, in cases governed by the Hague Convention, the district court has discretion as to whether to conduct an evidentiary hearing following remand and must exercise that discretion consistent with the Convention. The panel held that, on the second remand, the district court did not abuse its discretion in declining to hold a third evidentiary hearing when the factual record was fully developed.

The panel held that, in making determinations about German procedural issues, the district court neither abused its discretion nor violated Shon's due process rights by communicating with the State Department and, through it, the German Central Authority. The panel further held that the Federal Rules of Evidence and its hearsay rules do not apply to foreign law materials.

Finally, the panel held that the record provided adequate support for the district court's fact findings underlying its clarified return order, and the law-of-the-case doctrine did not prevent the district court from revisiting its prior ruling on grave risk. The panel therefore affirmed the district

court's grant of the petition for the children's return with the ameliorative measures ordered by the district court.

Concurring, Chief Judge Murguia wrote that she concurred fully in the principal opinion. She wrote separately to express her view that, in *Radu I*, the panel should not have declined to allocate a burden of proof on the reasonableness of an ameliorative measure. Chief Judge Murguia wrote that a future panel should follow other circuits and hold that, when a petitioner proffers a measure to ameliorate the grave risk of harm, it is the petitioner's burden to establish that the measure is reasonably appropriate and effective.

COUNSEL

Kelly A. Powers (argued) and Stephen J. Cullen, Miles & Stockbridge PC, Washington, D.C.; Shaun P. Kenney, The Kenney Law Firm PC, Tucson, Arizona; for Respondent-Appellant.

Michelle E. Irwin (argued), Fenwick & West LLP, Seattle, Washington; Rina Plotkin and Todd R. Gregorian, Fenwick & West LLP, San Francisco, California; for Petitioner-Appellee.

OPINION

R. NELSON, Circuit Judge:

This is the third appeal in an international child custody dispute between Persephone Johnson Shon and Bogdan Radu over their minor children. While the family was residing in Germany, Shon took the children to the United States and has refused to return them. The Hague Convention generally requires children to be returned to the state of habitual residence so that country's courts may adjudicate the merits of any custody disputes. We previously vacated and remanded the district court's first order to return the children to Germany. *See Radu v. Shon*, 11 F.4th 1080 (9th Cir. 2021) [*Radu I*], *vacated*, 142 S. Ct. 2861 (2022), *in light of Golan v. Saada*, 142 S. Ct. 1880 (2022). Because the Supreme Court issued its decision in *Golan* while we were considering Shon's appeal of the second return order, we also remanded that order for the district court's reconsideration. The district court then granted the petition a third time. We now affirm.

I

A

The Hague Convention on the Civil Aspects of International Child Abduction (Convention), Oct. 25, 1980, T.I.A.S. No. 11670, "address[es] 'the problem of international child abductions during domestic disputes.'" *Lozano v. Montoya Alvarez*, 572 U.S. 1, 4 (2014) (quoting *Abbott v. Abbott*, 560 U.S. 1, 8 (2010)). It aims "to secure the prompt return of children wrongfully removed" and "ensure that rights of custody and of access" are respected across Contracting States. Convention Art. 1. All

signatories must "use the most expeditious procedures available" to implement these goals. Convention Art. 2. Contracting States must also create Central Authorities to facilitate cooperation. Convention Art. 6 & 7. Domestically, the International Child Abduction Remedies Act (ICARA) implements the Convention's rules, creates the United States Central Authority, and gives our courts jurisdiction to adjudicate disputes under the Convention. 22 U.S.C. § 9001 et seq.

"The Convention's central operating feature is the return remedy." *Abbott*, 560 U.S. at 9. This remedy is "provisional" because it merely "fixes the forum for custody proceedings" and leaves the merits to the country of habitual residence. *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020) (internal quotation marks and citation omitted). Under the Convention, courts "shall order the return" of "a child [who] has been wrongfully removed or retained." Convention Art. 12. Article 13 provides exceptions. Relevant here, the court "is not bound to order the return" of a child if the party opposing return establishes that "there is a grave risk that [the child's] return would expose the child to physical or psychological harm." Convention Art. 13(b). Under Article 13(b), courts have "the discretion to grant or deny return." *Golan v. Saada*, 142 S. Ct. 1880, 1892 (2022). That discretion allows for the consideration of measures that would ameliorate the grave risk. *See id.* at 1893.

B

Radu and Shon married in 2011 in the United States. Their older child, O.S.R., was born in the United States in 2013, and their younger child, M.S.R., was born in Germany in 2016. Both children are citizens of the United States but not Germany. From 2016 to 2019, Radu, Shon, and their

children lived in Germany. Shon took O.S.R. and M.S.R. from Germany to the United States in June 2019. Shon and the children have since lived with Shon's parents in Arizona, despite Radu's wishes for the children to be brought back to Germany.

1

Radu petitioned for the children to be returned to Germany in federal district court in Arizona in June 2020. The district court held an evidentiary hearing and granted Radu's petition. The court found a grave risk of psychological harm if the children were returned to Germany in the custody of Radu. The court determined, however, that those risks would be mitigated if the children returned to Germany in Shon's temporary custody. So the court ordered Shon to return with the children and retain full custody until the German courts resolved the merits of the custody dispute. At that time, *Gaudin v. Remis* made the consideration of ameliorative measures mandatory. *See* 415 F.3d 1028, 1035 (9th Cir. 2005) ("Courts applying ICARA have consistently held that, before denying the return of a child because of a grave risk of harm, a court must consider alternative remedies that would allow both the return of the children to their home country and their protection from harm." (internal quotation marks and citation omitted)).

Shon appealed. We vacated and remanded for the district court to determine whether the sole-custody measure would be enforceable in Germany. *See Radu I*, 11 F.4th at 1089–90.

2

On remand, the district court held a second hearing at which Shon presented expert testimony and the parties

testified. Shon's expert, a Germany-licensed attorney, stated that the temporary sole-custody order would not be enforceable because Germany does not recognize ameliorative measures. He also testified that a German court may take up to six months to decide custody because the children would not be considered habitually resident in Germany until then. Furthermore, because the children are not German citizens, he testified that neither Shon nor Radu could initiate German custody proceedings or obtain protective measures from abroad.

Shon testified that her savings would not cover travel or living expenses in Germany but conceded that her parents, who had assisted her financially during this case, had paid for her plane tickets for her previous return from Germany. She was also afraid of being arrested upon returning to Germany but did not know of any pending legal matters at that time. Radu testified that he would pay for airfare and housing for Shon and their children pending the custody determination. He promised to maintain a separate household and to cooperate with Shon. He also testified that Germany has a child-protection agency that could ensure the children's safety if Shon became unavailable.

The district court then contacted the State Department, Office of Children's Issues' country officer for Germany, who contacted the German Central Authority for the court. The court did not receive a binding statement on the time needed for a German court to determine custody. But the German Central Authority cited Section 155 of the Act on Proceedings in Family Matters and Matters of Non-Contentious Jurisdiction, which provides for handling of custody issues "in an expedited manner." The German Central Authority also confirmed that Germany has youth

welfare offices that may conduct home visits or take custody of children if necessary.

In a second return order, the district court concluded that the enforceability of the sole-custody remedy was uncertain. But that was no longer necessary because the district court had considered the risk of psychological harm over too long of a time period. Based on the new evidence that a German court would take months to resolve custody, the court held that ordering Shon to return with the children to Germany—where the default rule was joint custody—sufficiently ameliorated the risk of psychological harm.

Shon again appealed. We stayed the appeal pending the Supreme Court's resolution of *Golan* and eventually remanded for reconsideration in light of *Golan*'s clarification that consideration of ameliorative measures is discretionary rather than mandatory. *See* 142 S. Ct. at 1892–93.

3

The district court did not hold another hearing on the second remand but ordered return based on the existing record. Following *Golan*, the district court exercised discretion to consider ameliorative measures. Relying on the second return order's analysis, the district court again stated that ordering Shon to return to Germany with the children would ameliorate the risk of psychological harm. It denied Shon's request for a new evidentiary hearing, partially because there was no new evidence about Radu's interactions with the children and partially because a hearing would contravene the Convention's directive for expeditious resolution.

The present appeal arises from the third return order. Given the parties' uncertainty about aspects of the ordered remedy, and unresolved logistical issues, we ordered a limited remand while retaining jurisdiction to avoid further delay. *See Friery v. L.A. Unified Sch. Dist.*, 448 F.3d 1146, 1150 (9th Cir. 2006) (ordering "a limited remand to the district court").

We directed the district court to clarify (1) its current Article 13(b) grave-risk finding and ameliorative measure(s) ordered, (2) whether Radu must pay for airfare, (3) whether Radu must pay for separate living arrangements, (4) the custody arrangements (sole or joint) while Shon was temporarily residing in Germany, (5) the custody arrangements if Shon is no longer able to legally reside in Germany before a German court decides custody, (6) the need to notify German child protective services upon the children's arrival, and (7) whether, if necessary, German child protective services have jurisdiction to oversee the children's wellbeing.

The district court answered those questions. First, it explained that the grave risk of psychological harm arose only if the children remained in Radu's sole custody for a longer time, and that no harm would arise if Shon and Radu had joint custody or if Radu had sole custody for a limited duration. *Radu v. Shon*, No. CV-20-00246-TUC-RM, 2023 WL 142908, at *2 (D. Ariz. Jan. 10, 2023). Second, Shon must pay for her and the children's airfare back to Germany. *Id.* at *3. Third, Radu must pay for separate living arrangements because Shon would take unpaid leave and could not work in Germany. *Id.* Fourth, the parties would have joint custody, as German law provides, pending a final custody determination. *Id.* Fifth, in the event Shon could not remain until the merits decision, the children would enter

Radu's physical custody. *Id.* Sixth, the court determined that notifying German child protective services was unnecessary. *Id.* Seventh, the court judicially noticed the existence of *jugendamt*, the German child protective services agency, and explained that the record suggests that the agency would have authority over the children once they arrive in Germany. *Id.*

We asked for supplemental briefs about the clarification order's effect. The issues currently before us are whether the district court should have conducted an evidentiary hearing during the second remand or the limited remand, refrained from contacting the State Department, or ultimately determined that the record supported its ameliorative measure.

II

The Convention is in force between the United States and Germany. *See Holder v. Holder*, 305 F.3d 854, 859 (9th Cir. 2002). We have jurisdiction under 28 U.S.C. § 1291 and "review the district court's factual determinations for clear error, and the district court's application of the Convention to those facts *de novo*." *Flores Castro v. Hernandez Renteria*, 971 F.3d 882, 886 (9th Cir. 2020).

III

A

Shon contends that the district court should have held a new evidentiary hearing during the second remand or the limited remand. She relies on *Gaudin*'s instruction that "[t]he questions before the district court on remand will be whether a grave risk of harm *now* exists, and if so, whether that risk can be minimized through an alternative remedy,"

415 F.3d at 1036, for her position that a new hearing is necessary to determine the current conditions.

Neither ICARA nor the Convention specify when a court must hold an evidentiary hearing. ICARA instructs courts to "decide the case in accordance with the Convention." 22 U.S.C. § 9003(d). And the Convention directs courts to "act expeditiously in proceedings for the return of children." Convention Art. 11. It also permits a court to "order the return of the child at *any time*" notwithstanding the other provisions. Convention Art. 18 (emphasis added). We accordingly review the district court's decision not to hold a new evidentiary hearing for abuse of discretion. Under that standard, we affirm the district court unless it commits a legal error in interpreting the Convention, or clearly errs in determining the facts from the record. *See United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc).

Any categorical rule requiring new hearings would contravene the Convention's directive for expeditious resolution. The district court is far better situated to determine the exact procedures necessary—whether a hearing or supplemental briefing, for example—to aid its resolution of the case. A per se rule would impede that flexibility with minimal upside. Under some circumstances, a refusal to hold a new hearing could constitute an abuse of discretion. But the district court here declined a third evidentiary hearing because the evidence of Radu's treatment of the children—on which the court based its ameliorative measure and grave-risk finding—had not changed; Radu had not had contact with the children since the earlier hearings. Under these circumstances, another

hearing would add little to a well-developed record and needlessly delay proceedings.[1]

Our sister circuits agree. In *March v. Levine*, the question presented was whether the district court improperly granted summary judgment to a father petitioning for his children's return without allowing discovery or a hearing on the merits. *See* 249 F.3d 462, 468 (6th Cir. 2001). The Sixth Circuit affirmed. Recognizing that Convention cases are unique, the court explained that "neither [the Convention nor ICARA] expressly requires a hearing or discovery"; instead they require "expeditious action." *Id.* at 474. The court also found persuasive that "courts in other Contracting States to the treaty have also upheld summary proceedings on review." *Id.* at 475 (discussing Australian court proceedings).

The Tenth Circuit reached the same conclusion in *West v. Dobrev*, reasoning that Article 18's permission to order return at any time provides trial courts "a substantial degree of discretion in determining the procedures necessary to resolve a petition filed pursuant to the Convention and ICARA." 735 F.3d 921, 929 (10th Cir. 2013).

We find these decisions persuasive and conclude that *Gaudin* does not require otherwise. There, we said that the lapse of time made it "unnecessary for us to evaluate the merits of the district court's finding that a grave risk of psychological harm" existed five years ago. *Gaudin*, 415 F.3d at 1036. This was because the court should "consider

[1] Shon asserts that she would have presented a child psychology expert at the new hearing. When Shon previously tried to introduce that expert at the second hearing, she did not object to the district court's exclusion of the expert.

the effect of any possible remedies in light of circumstances as they exist in the present." *Id.* We did not, however, specify the way the district court should consider present circumstances or mandate a new evidentiary hearing upon every remand.

We now hold that, in cases governed by the Convention, the district court has discretion as to whether to conduct an evidentiary hearing following remand and must exercise that discretion consistent with the Convention.[2] The district court did not abuse its discretion in declining to hold a third evidentiary hearing when the factual record was fully developed.

B

Shon next asserts that the district court's communications with the State Department and the German Central Authority were ex parte, resulted in hearsay evidence, and violated Shon's due process rights.

We once "treat[ed] questions of foreign law as questions of fact to be pleaded and proved." *de Fontbrune v. Wofsy*, 838 F.3d 992, 994 (9th Cir. 2016). But Federal Rule of Civil Procedure 44.1 clarified that an interpretation of foreign law "must be treated as a ruling on a question of law." Accordingly, like any legal issue, "the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the

[2] Contrary to Shon's argument, we did not direct the district court to hold a hearing on the limited remand. Even if the district court wrongly interpreted our order as forbidding an evidentiary hearing, we did not require one. Nor was one needed when the existing evidence already sufficiently addressed the factual issues identified in our limited remand order. Thus, any error would have been harmless.

Federal Rules of Evidence." Fed. R. Civ. P. 44.1. Moreover, "the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found." Fed. R. Civ. P. 44.1 advisory committee's note to 1966 amendment. That said, "expert testimony accompanied by extracts from foreign legal materials has been and will likely continue to be the basic mode of proving foreign law." *Universe Sales Co., Ltd. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999).

Courts nonetheless have an "independent obligation to adequately ascertain relevant foreign law, even if the parties' submissions are lacking." *de Fontbrune*, 838 F.3d at 997. Though international comity requires American courts to "carefully consider a foreign state's views about the meaning of its own laws," that deference has its limits. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1873 (2018). "The appropriate weight in each case . . . will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials." *Id.*

Understanding the laws and procedures of another country can be difficult—especially when trying to make such determinations expediently, as the Convention directs. And the State Department and foreign Central Authorities are proper and useful resources when evaluating a foreign legal landscape. *See* Convention Art. 7. A sister circuit, for instance, has directed a district court "to make any appropriate or necessary inquiries of the [foreign government] . . . and to do so, *inter alia*, by requesting the aid of the United States Department of State, which can communicate directly with that foreign government." *Blondin v. Dubois*, 189 F.3d 240, 249 (2d Cir. 1999). Indeed, we contemplated the district court's ability to seek

assistance from the State Department when we remanded the first return order. *See Radu I*, 11 F.4th at 1090–91.

Shon does not contest any foreign legal conclusion but challenges the methods the court used to determine German procedural issues. Though a legal conclusion on foreign law is reviewed de novo, *see de Fontbrune*, 838 F.3d at 1000, we have indicated that a district court's selection of methods to evaluate foreign law is discretionary. *See Tobar v. United States*, 639 F.3d 1191, 1200 (9th Cir. 2011) (noting that the district court could "inquire further into the content of Ecuadorian law" "in its discretion"). Accordingly, we review the district court's methods of foreign law research for abuse of discretion. This deferential standard is necessary to preserve the flexibility that Rule 44.1 affords courts to research foreign law. And our de novo review of the ultimate legal conclusion ensures that foreign legal issues are treated like domestic ones.

The district court neither abused its discretion nor violated Shon's due process rights by communicating with the State Department and, through it, the German Central Authority. "[I]ndependent judicial research" on a legal question "does not implicate the judicial notice and ex parte issues spawned by independent factual research." *de Fontbrune*, 838 F.3d at 999; *see also G&G Prods. LLC v. Rusic*, 902 F.3d 940, 948 (9th Cir. 2018) ("formal notice" of court's intent to research foreign law not required). Nor do the Federal Rules of Evidence and its hearsay rules apply to foreign law materials, much as legal research on domestic law cannot trigger evidentiary objections. *See de Fontbrune*, 838 F.3d at 999.

Of course, "both trial and appellate courts are urged to research and analyze foreign law independently," *Twohy v.*

First Nat. Bank of Chi., 758 F.2d 1185, 1193 (7th Cir. 1985); *see also de Fontbrune*, 838 F.3d at 997, and with due consideration for the parties' submissions. But here, the district court did not view itself bound by information received from the State Department; it properly considered and weighed that information alongside the testimony of the parties and Shon's expert. Shon—who does not challenge any of the legal conclusions that the district court reached—fails to persuade that the district court abused its discretion in the way it reached them.

C

Finally, Shon challenged several factual findings underlying the district court's third return order and asserted that the law-of-the-case doctrine prohibited the court from revisiting its grave-risk finding. We review factual findings for clear error, which occurs if "the finding is illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Doe v. Snyder*, 28 F.4th 103, 106 (9th Cir. 2022) (internal quotation marks and citation omitted). "While a district court has no obligation under the Convention to consider ameliorative measures that have not been raised by the parties, it ordinarily should address ameliorative measures raised by the parties or obviously suggested by the circumstances of the case . . . ." *Golan*, 142 S. Ct. at 1893.

On remand, the district court clarified that the minor children would be at a grave risk of psychological harm only if they returned to Germany and remained in Radu's sole custody for years due to the cumulative nature of psychological harm. *Radu*, 2023 WL 142908, at *2. If Shon could not remain in Germany past the expiration of her tourist visa (around ninety days), then the court found no

issue with Radu taking physical custody of the children for a short time until the final custody determination is made by German authorities. *Id.* Because no exception to return would apply under those circumstances, the court ordered the children's return.

Many of the specific findings that Shon first challenged—such as the enforceability of sole custody as an ameliorative measure and her parents' willingness to travel to Germany—are immaterial under the clarified return order, which does not rely on these facts. As to the findings that remain at issue, the record provides adequate support. *See Landis v. Wash. State Major League Baseball Stadium Pub. Facilities Dist.*, 11 F.4th 1101, 1105 (9th Cir. 2021) ("This is deferential review; we reverse only if we are left with a definite and firm conviction that a mistake has been committed." (internal quotation marks and citation omitted)).

First, the record supports the district court's determination that the time frame in which a German court would determine custody would be a few months rather than years. The district court found that a merits decision would be made within months. *Radu*, 2023 WL 142908, at *2. Shon's German law expert's testimony supports this finding. He testified that a German court would likely require the children to live in Germany for up to six months before determining custody but that the court would also have discretion to make an earlier decision. And the district court cited a German statute providing that the determination of custody issues "shall have priority" and "shall be handled in an expedited manner." That the waiting period is likely to be months instead of years is supported by the record.

Second, the hearing testimony supports the court's determination that Shon could return with the children. When asked during the hearing if she would accompany the children, Shon answered, "Of course." She also said that she could take humanitarian leave of up to six months from her job with her manager's approval. Although Shon expressed some financial concerns, the district court relied on other evidence, such as her employment, lifestyle, and ability to obtain her parents' financial support. That the district court ordered Radu to pay for a separate household for Shon and the children, *Radu*, 2023 WL 142908, at *3, further minimizes these concerns. Shon's ability to remain in Germany until the final custody decision is no longer relevant: The district court clarified that no grave risk arises if the children enter Radu's physical custody for the remaining time.

Third, based on the lack of any evidence or testimony about pending criminal charges in Germany, the court drew the supported inference that none existed.

Finally, the law-of-the-case doctrine did not prevent the district court from revisiting its prior ruling on grave risk. "[T]he law-of-the-case doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Messinger v. Anderson*, 225 U.S. 436, 444 (1912)). It "applies most clearly where an issue has been decided by a higher court." *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1042 (9th Cir. 2018). We did not decide the grave-risk issue in the first appeal because Radu did not challenge the district court's finding, but we noted that "the facts here do seem to be a borderline case whether an Article 13(b) finding is warranted." *Radu I*, 11 F.4th at 1089. Even

though the district court found grave risk in its first return order, it was free to revisit this ruling based on updated evidence about the likely time frame for German courts to decide the merits of the custody dispute. *See Radu*, 2023 WL 142908, at *2. As we have discussed, *Gaudin* instructs district courts to decide whether grave risk exists based on the current circumstances. 415 F.3d at 1036.

IV

The district court did not err in refusing to hold a new evidentiary hearing or in consulting the State Department. Adequate evidence supports the factual findings that Shon challenges. We thus affirm the district court's grant of the petition for the children's return with the ameliorative measures ordered by the district court.[3]

AFFIRMED.

[3] Shon's motion to stay the lower court action is denied as moot.

MURGUIA, Chief Judge, concurring:

I concur fully in the principal opinion. I write separately to express my view that, in *Radu I*, we should not have "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*, 142 S. Ct. 2861 (2022). When we did so, we noted: "Congress is capable of assigning burdens of proof and has already done so under [the International Child Abduction Remedies Act ("ICARA")]. We need not add judicial constraints absent from ICARA or the [Hague Convention on the Civil Aspects of International Child Abduction ("Convention")]." *Id.* (citation omitted).

It is true that the Convention and ICARA provide that the petitioner has the burden to establish a prima facie case of wrongful removal. *See Golan v. Saada*, 142 S. Ct. 1880, 1888–89 (2022). And both the Convention and ICARA then shift the burden onto the respondent to prove that, if returned, the removed children would be subject to a grave risk of physical or psychological harm. *See id.* But neither the Convention nor ICARA mentions measures that could ameliorate such a grave risk. *Id.* at 1892. Rather, ameliorative measures are a "judicial construct." *Danaipour v. McLarey*, 286 F.3d 1, 21 (1st Cir. 2002) (citation omitted).

After further consideration, I now believe that when a petitioner proffers a measure to ameliorate the grave risk of harm, it should be the petitioner's burden to establish that the measure is reasonably appropriate and effective. Three of our sister circuits have adopted this view, and we should have adopted it in *Radu I*. *See Simcox v. Simcox*, 511 F.3d 594, 611 (6th Cir. 2007); *Acosta v. Acosta*, 725 F.3d 868, 877 (8th Cir. 2013); *Danaipour*, 286 F.3d at 21. Placing this

burden on the petitioner does not preclude district courts from considering, on their own, potential ameliorative measures not raised by the parties that are "obviously suggested by the circumstances of the case." *Golan*, 142 S. Ct. at 1893. It only assists district courts' decisionmaking and guides their discretion as to the measures raised by a petitioner seeking to mitigate a grave risk of harm.

This issue is no longer squarely presented in this case, and accordingly, we cannot resolve it. But because the Supreme Court vacated *Radu I* in light of *Golan*, a future panel may—and, in my view, should—properly allocate the burden of proof in an appropriate case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 04 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BOGDAN RADU,

Petitioner - Appellee,

v.

PERSEPHONE JOHNSON SHON,

Respondent - Appellant.

No. 22-16316

D.C. No. 4:20-cv-00246-RM
U.S. District Court for Arizona, Tucson

MANDATE

The judgment of this Court, entered March 13, 2023, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Howard Hom
Deputy Clerk
Ninth Circuit Rule 27-7

Appendix B

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Bogdan Radu,

Petitioner,

v.

Persephone Johnson Shon,

Respondent.

No. CV-20-00246-TUC-RM

ORDER

On December 30, 2021, this Court granted Petitioner Bogdan Radu's Petition for Return of Children to Germany ("Petition") and ordered Respondent Persephone Johnson Shon to return minor children O.S.R. and M.S.R. to Germany within thirty days. (Doc. 77.) Respondent appealed (Doc. 78), and the Ninth Circuit Court of Appeals remanded for this Court to reconsider its ruling in light of *Golan v. Saada*, __ U.S. __, 142 S. Ct. 1880 (2022). (Doc. 99; *see also* Docs. 105, 110, 111.) At this Court's request, the parties submitted supplemental briefs regarding the impact of *Golan*. (Docs. 107, 109; *see also* Doc. 102.)

Also pending before the Court is Petitioner's pro se Motion for Criminal Prosecution Referral (Doc. 101), which Respondent opposes (Doc. 108).

I. Procedural History

On June 8, 2020, Petitioner filed his Petition pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("Convention") and its implementing legislation, the International Child Abduction Remedies Act, 42 U.S.C. § 9001, *et seq.*

(Doc. 1.) The Court held a three-day evidentiary hearing on July 29, 2020 and August 26-27, 2020. (Docs. 15, 21-22.) On September 17, 2020, the Court issued an Order granting the Petition and ordering the return of minor children O.S.R. and M.S.R. to Germany. (Doc. 26.) The Court found, under Article 13(b) of the Convention, that the children would be at grave risk of psychological harm if returned to Germany in the custody of Petitioner, but it further found that such harm could be mitigated by ordering that the children be returned in the temporary custody of Respondent. (*Id.* at 5-6.)

On August 31, 2021, the Ninth Circuit vacated and remanded for this Court "to reasonably ensure compliance with its alternative remedy in Germany." (Doc. 51-1 at 4.) This Court held a further evidentiary hearing on November 3, 2021 and November 9, 2021 (Docs. 63, 67), and contacted the United States Department of State for assistance. On December 30, 2021, this Court again ordered Respondent to return O.S.R. and M.S.R. to Germany. (Doc. 77.) The Court recognized that this is "a borderline case whether an Article 13(b) finding is warranted." (*Id.* at 6 (internal quotation marks omitted).) The Court further found that the alternative remedy of ordering Respondent to return with O.S.R. and M.S.R. to Germany would ameliorate the risk of psychological harm to O.S.R. and M.S.R. given the unique circumstances of this case, including Germany's child protection services (*see* Doc. 58 at 2), the ability of a German court to prioritize child custody matters for expedited processing pursuant to Section 155 of the Act on Proceedings in Family Matters and Matters of Non-Contentious Jurisdiction, Respondent's joint custody rights under German law, Respondent's ability to stay in Germany for at least three months, and Petitioner's commitment to paying, if necessary, for the airfare of O.S.R. and M.S.R., as well as rent for a separate residence for Respondent and the children until a German court makes a custody determination. (*Id.* at 7-8.)

II. *Golan v. Saada*

On June 15, 2022, the United States Supreme Court issued *Golan*, holding that "consideration of ameliorative measures" after an Article 13(b) finding is not required

under the Convention but, rather, "is within a district court's discretion." 142 S. Ct. at 1893. The Supreme Court also clarified that a district court's consideration of ameliorative measures (1) "must prioritize the child's physical and psychological safety," (2) must "not usurp the role of the court that will adjudicate the underlying custody dispute," and (3) "must accord with the Convention's requirement that the courts act expeditiously in proceedings for the return of children." *Id.* at 1893-94 (internal quotation marks omitted). "[A] district court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings." *Id.* at 1895.

III. The Parties' Supplemental Briefs

Petitioner argues that *Golan* should not affect the outcome of this case, since district courts are still permitted to consider ameliorative measures and the ameliorative measure ordered by this Court meets the requirements outlined in *Golan*. (Doc. 107; Doc. 107-1.)

Respondent argues that this Court should order a further evidentiary hearing on grave risk and ameliorative measures. (Doc. 109.) Respondent argues that a further evidentiary hearing is necessary for this Court to assess ameliorative measures under the proper legal standard and for this Court to assess grave risk based on the current physical and psychological safety of O.S.R. and M.S.R. (*Id.* at 7-8.)

IV. Discussion

The Court, in its discretion, finds that consideration of ameliorative measures is appropriate in this case. The Court further finds that the ameliorative measure set forth in its December 30, 2021 Order—namely, that Respondent return with O.S.R. and M.S.R. to Germany—satisfies the requirements outlined in *Golan*. The Order complies with the Convention's requirement that courts act expeditiously in proceedings for the return of children, and it avoids usurping the role of the German courts in adjudicating the parties' underlying custody dispute. Ordering Respondent to return to Germany with the children

is workable for the reasons discussed in the December 30, 2021 Order, and the Ninth Circuit has held that a district court has discretion to order the relocation of an abducting parent (or a responsible family member) if doing so "can help alleviate any grave risk of harm from repatriation of the kids." *Radu v. Shon*, 11 F.4th 1080, 1090 (9th Cir. 2021), *judgment vacated on other grounds by Shon v. Radu*, __ S. Ct. __, 2022 WL 2295109 (2022). Finally, the ameliorative measure of requiring Respondent to return with the children to Germany appropriately prioritizes the physical and psychological safety of O.S.R. and M.S.R. The Court has already found that Respondent failed to show that O.S.R. and M.S.R. would be at grave risk of physical harm if returned to Germany. (Doc. 26 at 5.) The Court found that the children would be at grave risk of psychological harm if returned to Germany in the sole custody of Petitioner (*id.*), but the Court has also found that this is a borderline Article 13(b) case and that ordering Respondent to return with the children to Germany, where Petitioner and Respondent currently have joint custody rights, would ameliorate any risk of psychological harm to the children (Doc. 77 at 8). The Court notes that Petitioner's testimony at the evidentiary hearings in this case has been credible—more credible than Respondent's—and that Petitioner has complied with this Court's Orders throughout these proceedings.

The Court finds that a further evidentiary hearing would only unnecessarily prolong these proceedings, thereby violating the Convention's requirement that this Court act expeditiously. The Court's grave-risk finding was based on evidence concerning Petitioner's treatment of O.S.R. and M.S.R. (Doc. 26 at 5.) Respondent has not provided any indication that Petitioner has had any contact with O.S.R. and M.S.R. since the Court made its grave-risk finding or that current circumstances would support a different conclusion concerning Petitioner's treatment of O.S.R. and M.S.R. In support of her request for a further evidentiary hearing, Respondent cites to *Blondin v. DuBois*, a case in which the Second Circuit Court of Appeals held that the fact that a child is settled in his or her new environment may be considered as "part of a broader analysis of whether repatriation will create a grave risk of harm" under Article 13(b). 238 F.3d 153, 164 (2d

Cir. 2001), *abrogated on other grounds by Golan*, 142 S. Ct. 1880. But *Blondin* is not binding precedent, and the Ninth Circuit Court of Appeals has held that "[t]he fact that a child has grown accustomed to her new home is never a valid concern under the grave risk exception, as it is the *abduction* that causes the pangs of subsequent return." *Cuellar v. Joyce*, 596 F.3d 505, 511 (9th Cir. 2010) (internal quotation marks omitted; emphasis in original).

V. Petitioner's Motion for Criminal Prosecution Referral

In his pro se Motion for Criminal Prosecution Referral, Petitioner asks that this Court refer Respondent, as well as her legal representative, attorneys, and family members, for criminal prosecution regarding leaks of United States government data and the abduction of O.S.R. and M.S.R. (Doc. 101.) Respondent denies the factual allegations in Petitioner's Motion and argues that there is no basis for the relief that Petitioner requests. (Doc. 108.)

Petitioner has failed to show that this Court has any authority to grant the relief requested in his pro se Motion and, therefore, the Motion will be denied.

IT IS ORDERED that Petitioner's pro se Motion for Criminal Prosecution Referral (Doc. 101) is **denied**.

IT IS FURTHER ORDERED that the Petition (Doc. 1) is **granted**. Respondent Persephone Johnson Shon shall return with minor children O.S.R. and M.S.R. to Germany within **thirty (30) days** of the date this Order is filed. The Clerk of Court is directed to enter judgment accordingly and close this case.

Dated this 19th day of August, 2022.

Honorable Rosemary Márquez
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Bogdan Radu, Petitioner, v. Persephone Johnson Shon, Respondent.	No. CV-20-00246-TUC-RM **ORDER**

On December 1, 2022, the Ninth Circuit Court of Appeals remanded the above-captioned case to this Court on a limited basis for purposes of clarification of this Court's Orders requiring the return of minors O.S.R. and M.S.R. to Germany. (Doc. 121.)

I. Procedural Background

On June 8, 2020, Petitioner Bogdan Radu ("Petitioner") filed a Petition pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention") and its implementing legislation, the International Child Abduction Remedies Act ("ICARA"). (Doc. 1.) After an evidentiary hearing, this Court issued an Order on September 17, 2020 requiring Respondent Persephone Johnson Shon ("Respondent") to return minor children O.S.R. and M.S.R. to Germany. (Doc. 26.) Pursuant to Article 13(b) of the Convention, the Court found the children would face a grave risk of psychological harm if returned to Germany in the custody of Petitioner and therefore ordered, as an ameliorative measure, that the children be returned in the temporary custody of Respondent. (*Id.* at 5-6).

The Ninth Circuit vacated and remanded for this Court to reasonably ensure compliance with its ameliorative measure. (Doc. 51-1.) On December 30, 2021, after a further evidentiary hearing, this Court again granted the Petition and ordered Respondent to return O.S.R. and M.S.R. to Germany. (Doc. 77.) The Court found that ordering the return of the children in the sole custody of Respondent was not necessary to mitigate a grave risk of psychological harm and that ordering Respondent to return with the children to Germany, where Petitioner and Respondent have joint custody rights, was sufficient. (*Id.* at 6-7.) The Court further found that Respondent would be able to stay in Germany for up to 90 days as a tourist and that Petitioner, if necessary, would commit to purchasing the airfare for O.S.R. and M.S.R.'s return to Germany and to paying rent for a separate residence in Germany for Respondent and the children to live in until a German court makes a custody determination. (*Id*. at 7-8.)

Respondent appealed the December 30, 2021 Order, and the Ninth Circuit remanded for consideration of the recently decided United States Supreme Court case *Golan v. Saada*, __ U.S. __, 142 S. Ct. 1880 (2022), which ruled that a court is not required to consider ameliorative measures upon an Article 13(b) grave-risk finding. (Doc. 99.) On remand, this Court found in its discretion that consideration of ameliorative measures was appropriate in this case and that the ameliorative measures as stated in its December 30, 2021 Order satisfy the standards articulated in *Golan*. (Doc. 112.) Respondent appealed (Doc. 114), and the Ninth Circuit remanded on a limited basis for clarification of the logistics of the children's return (Doc. 121).

II. Limited Remand

The Ninth Circuit has directed this Court to address seven questions:

> (a) what, specifically, is the district court's current Article 13(b) grave-risk finding and ameliorative measure(s), (b) whether Radu must pay for the children's airfare, (c) whether Radu must pay for separate living arrangements for the children and Shon, (d) what the custody arrangements for the children will be (sole or joint) while Shon is temporarily residing in Germany, (e) what the custody arrangements for the children will be if Shon is no longer able to legally reside in Germany on a tourist visa before a German court decides custody, (f) whether the parties should notify

> German child protective services upon the children's arrival in Germany, and (g) whether, if necessary, German child protective services has jurisdiction to act in overseeing the children's wellbeing while they are present in Germany.

(Doc. 121.)

A. Article 13(b) Grave-Risk Finding and Ameliorative Measures

Under Article 13(b) of the Convention, a court is not required to return a child if "there is a grave risk that his or her return would expose the child to physical or psychological harm . . ." The respondent must establish a grave-risk defense by clear and convincing evidence. 22 U.S.C. § 9003(e)(2)(A).

The Court's initial September 17, 2020 Order found that O.S.R. and M.S.R. would face a grave risk of psychological harm if returned to Germany in the custody of Petitioner. (Doc. 26 at 5.) The Court later clarified that its grave-risk finding was limited to a situation in which the children were returned in Petitioner's sole custody. (Doc. 77 at 6-7.) The Court also noted that the grave-risk finding in its September 17, 2020 Order considered the risk of harm over a time period longer than the one likely at issue in this case. (*Id.* at 7.) The Court had considered the risk of harm to the children over years given Petitioner's parenting style. However, it is likely that a German court would be able to make a custody determination within months. *See Gaudin v. Remis*, 415 F.3d 1028, 1037 (9th Cir. 2005), *abrogated on other grounds by Golan*, 142 S. Ct. 1880 (grave-risk finding should be based only on time period necessary to obtain custody determination).

The Court now clarifies that its finding under Article 13(b) of the Convention is that O.S.R. and M.S.R. would be at grave risk of psychological harm if they were to return to Germany and remain in the sole custody of Petitioner for an extended period. The Court does not find that the children would be at grave risk of psychological harm if Petitioner and Respondent have joint custody of them in Germany. Furthermore, the Court does not find that the children would be at grave risk of psychological harm if Petitioner has sole custody of them for a limited duration. *See Gaudin*, 415 F.3d at 1037 ("Because psychological harm is often cumulative, especially in the absence of physical abuse or extreme maltreatment, even a living situation capable of causing grave psychological harm

over the full course of a child's development is not necessarily likely to do so during the period necessary to obtain a custody determination.")

Accordingly, the Court orders as an ameliorative measure that Respondent return with O.S.R. and M.S.R. to Germany and remain there on a tourist visa for 90 days, sharing joint custody of the children with Petitioner in Germany while she remains there. Based on the record evidence, the Court finds that a German court will likely be able to make a custody determination within six months of the children's arrival in Germany. Therefore, even if Respondent departs Germany 90 days after the children's arrival, the children would remain in Germany in Petitioner's custody only for a limited duration. Furthermore, by that point, the children will be re-acclimated to life in Germany and to the care of Petitioner. Respondent may attempt to obtain a resident visa to stay with the children in Germany in a joint-custody arrangement until a German court makes a final custody determination. But even if Respondent leaves Germany after 90 days, and even if a German court has not made a final custody determination by the time Respondent departs, the Court finds that requiring Respondent to return with O.S.R. and M.S.R. to Germany remains a sufficient ameliorative measure to mitigate the borderline grave risk of psychological harm that exists in this case.

B. Cost of Children's Airfare and Living Arrangements

Any court ordering the return of a child pursuant to Convention must order the respondent to pay "transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate." 22 U.S.C. § 9007(b)(3).

At the post-remand evidentiary hearing, Respondent testified that she had only $700 in savings and would be unable to afford plane tickets to Germany or rent in Germany. (Doc. 77 at 3.) The Court did not find that testimony to be entirely credible because it conflicted with other testimony concerning Respondent's employment, lifestyle, and expenses. (*Id.* at 3, 7-8.)

The Court now clarifies that it finds Respondent to be capable of paying for airfare

for herself and the children to return to Germany. Respondent has not shown that ordering her to pay for airfare to Germany is clearly inappropriate. Accordingly, pursuant to 22 U.S.C. § 9007(b)(3), the Court orders Respondent to bear the costs of transporting herself, O.S.R., and M.S.R. back to Germany. However, the Court finds that Respondent has established that she would likely have difficulty paying rent in Germany, since she is eligible only for unpaid leave from her job in Tucson, Arizona, and she would be staying on a tourist visa in Germany without the ability to work there. (*See* Doc. 76 at 13; Doc. 77 at 3.) Accordingly, the Court orders Petitioner to pay the costs for a separate residence for Respondent—and the children when they are in Respondent's care—to live in while Respondent is in Germany, until a German court makes a final custody determination or for 90 days, whichever time period is shorter.

C. Custody Arrangements in Germany

As discussed above, the Court's ameliorative measure requires Respondent to return with O.S.R. and M.S.R. to Germany. Once in Germany, Petitioner and Respondent will have joint custody of the children pursuant to German law, until a German court makes a custody determination. (Doc. 77 at 8; Doc. 112 at 4; Doc. 120 at 4).

If Respondent's tourist visa expires before a German court makes a custody determination, and Respondent has been unable to obtain a resident visa by that time, then Petitioner will have custody of the children after Respondent departs and until a German court makes a custody determination.

D. Notification of German Child Protective Services

Respondent may choose to notify Germany's child protective services upon her arrival in Germany, and she may also choose to notify any other agencies available to assist her with initiating custody proceedings or obtaining counseling services for the children. However, the Court declines to order Respondent to notify any agencies, as it does not find such an order to be necessary under the circumstances.

E. Jurisdiction of German Child Protective Services

The Convention is premised on a recognition that "courts in contracting states" will

"decide what is in the child's best interests . . . in a responsible manner." *Abbott v. Abbott*, 560 U.S. 1, 20 (2010). The principles of comity underlying the Hague Convention favor respecting contracting states' ability to ensure the protection of children within their borders.

The Court finds that the existence of the German equivalent of child protective services, *jugendamt*, is supported by the evidence of record and is also an appropriate matter for judicial notice. The Court also finds, based on the record evidence, that there is no reason to doubt that Germany's child protective services would have authority to ensure the children's safety if necessary while the children are living in Germany. It does not appear that a further evidentiary hearing is within the scope of the Ninth Circuit's limited remand. However, this Court will hold an evidentiary hearing on this issue if instructed to do so by the Ninth Circuit.

IT IS ORDERED that the Clerk of Court is directed to forward a copy of this Order to the Clerk of the Ninth Circuit Court of Appeals.

Dated this 9th day of January, 2023.

Honorable Rosemary Márquez
United States District Judge

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BOGDAN RADU, Petitioner-Appellee, v. PERSEPHONE JOHNSON SHON, Respondent-Appellant.	No. 22-16316 D.C. No. 4:20-cv-00246-RM District of Arizona, Tucson ORDER

Before: MURGUIA, Chief Judge, and R. NELSON and FORREST, Circuit Judges.

Persephone Johnson Shon appeals the district court's order granting Bogdan Radu's petition for the return of their minor children to Germany under the Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501, and its implementing statute, the International Child Abduction Remedies Act, 22 U.S.C. §§ 9001–9011. The district court ordered Shon to accompany the children to Germany to ameliorate a grave risk of psychological harm. **1-ER 19.** To achieve "expeditious" resolution of this issue, *Golan v. Saada*, 142 S. Ct. 1880, 1895 (2022), we remand to the district court for the limited purpose of clarifying the logistics it deems necessary to return the children, *Friery v. L.A. Unified Sch. Dist.*, 448 F.3d 1146, 1150 (9th Cir. 2006) (ordering "a limited remand to the district court"); 28 U.S.C. § 2106.

We direct the district court to address (a) what, specifically, is the district court's current Article 13(b) grave-risk finding and ameliorative measure(s), (b) whether Radu must pay for the children's airfare, (c) whether Radu must pay for separate living arrangements for the children and Shon, (d) what the custody arrangements for the children will be (sole or joint) while Shon is temporarily residing in Germany, (e) what the custody arrangements for the children will be if Shon is no longer able to legally reside in Germany on a tourist visa before a German court decides custody, (f) whether the parties should notify German child protective services upon the children's arrival in Germany, and (g) whether, if necessary, German child protective services has jurisdiction to act in overseeing the children's wellbeing while they are present in Germany. The district court shall clarify those issues—and enter any necessary orders—before January 20, 2023.

The parties shall promptly notify the Clerk of this court when the district court has decided the issues on remand. We will consider the need for supplemental briefing at that time. Subject to the limited remand ordered here, this panel retains jurisdiction of this case.

REMANDED.

Appendix D

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Bogdan Radu,

Petitioner,

v.

Persephone Johnson Shon,

Respondent.

No. CV-20-00246-TUC-RM

ORDER

On August 22, 2022, the Court granted Petitioner Bogdan Radu's Petition for Return of Children to Germany and ordered Respondent Persephone Johnson Shon to return with minors O.S.R. and M.S.R. to Germany within thirty days (hereinafter, "Third Return Order"). (Doc. 112.)[1] Respondent filed a Notice of Appeal (Doc. 114) and a Motion to Stay the Court's Third Return Order pending the appeal (Doc. 115). The Court temporarily stayed the Third Return Order pending resolution of Respondent's Motion to Stay. (Doc. 117.) Petitioner filed a Response in opposition to the Motion to Stay (Doc. 118), and Respondent filed a Reply (Doc. 119).

I. Legal Standard

In considering whether to stay a return order in a Hague Convention case, courts consider the traditional stay factors: "(1) whether the stay applicant has made a strong showing that [s]he is likely to succeed on the merits; (2) whether the applicant will be

[1] The Court previously ordered the return of O.S.R. and M.S.R. to Germany on September 17, 2020 ("First Return Order") (Doc. 26) and on December 30, 2021 ("Second Return Order") (Doc. 77). As the parties are familiar with the procedural history of this case, the Court does not recount it here.

irreparably inured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Chafin v. Chafin*, 568 U.S. 165, 179 (2013).

II. Motion to Stay

Respondent argues that she is likely to prevail on appeal because (1) this Court failed to hold an additional evidentiary hearing after the Ninth Circuit's second remand of this case; (2) this Court did not allow Respondent's child psychology expert to testify again following her August 26, 2020 testimony; (3) this Court engaged in speculation in its Second and Third Return Orders that an "order for the children to return to Germany" in Respondent's "temporary custody . . . is enforceable in Germany"; (4) this Court did not reasonably ensure compliance with its alternative remedy in Germany; (5) this Court improperly assessed the likelihood of Petitioner's compliance with voluntary commitments; (6) this Court engaged in *ex parte* inquisitorial evidence gathering with the executive branch; (7) this Court erred in characterizing the grave risk to O.S.R. and M.S.R. as "borderline," because the Hague Convention does not create a spectrum of grave risk; (8) this Court should have ordered Petitioner to confirm there are no criminal proceedings pending against Respondent in Germany; (9) this Court erred in finding Petitioner's testimony more credible than Respondent's; and (10) this Court placed speed and return above the required prioritization of the children's physical and psychological safety. (Doc. 115 at 7-14, 18-19.) Respondent further argues that she and the children will suffer irreparable harm absent a stay; that Petitioner will not be substantially injured in the event of a stay because Respondent's appeal is being expedited by the Ninth Circuit Court of Appeals; and that the public interest in avoiding the shuttling of children back and forth between parents and across international borders favors granting a stay. (*Id.* at 19-20 (internal quotation marks omitted).)

In his pro se Response, Petitioner argues that a further evidentiary hearing is unnecessary. (Doc. 118 at 1-2.) He urges the Court to deny Respondent's Motion to Stay, to consider limiting Respondent's freedom of movement, and to explore the option

of returning the children to Germany without Respondent. (*Id.* at 2-3.) He states that "the legal situation of the Respondent may become legally insurmountable in the near future if a trip overseas will be considered an aggravating factor, not only for the children to be safely returned to Germany as they may be re-abducted in transit, but also seriously detrimental to the national security interests of the United States Govt, the United States Army, the United States Air Force and the public interest at large." (*Id.* at 3 (emphasis omitted).)

In reply, Respondent argues that Petitioner's Response demonstrates the need for a stay because Petitioner threatens in the Response "to 're-abduct' the children to a third country when they are in transit to Germany"; he "renews his threats of criminal proceedings against" Respondent; he falsely accuses Respondent of not complying with Court Orders; and he threatens Respondent "by claiming that she is a threat to the national security interests of the United States and its military agencies." (Doc. 119 at 2, 4.)[2] Respondent argues that there are no orders or protective measures in place in Germany, as the German courts are unable to take any such steps prior to the children's arrival in Germany. (*Id.* at 4-7.) She states that returning the children to Germany means, as a practical matter, returning them to Petitioner, which would expose them to physical or psychological harm. (*Id.* at 7.) Respondent also reiterates her arguments that this Court was required to hold an evidentiary hearing after the Ninth Circuit's second remand; that this Court was required to allow Respondent's psychological expert to testify at the hearing; and that a stay would not cause substantial injury to Petitioner given the expedited basis of Respondent's appeal. (*Id.* at 2-9.) Respondent attaches to her Reply an affidavit and updated report by her psychological expert Sherri Mikels-Romero, LCSW (Doc. 119-1), which Respondent offers as a summary of "the testimony

[2] The Court disagrees with Respondent's characterization of portions of the Response. Nowhere does the Response mention abduction to a third country, and nowhere does Petitioner threaten to abduct the children himself. Petitioner expresses concern in the Response that the children could be re-abducted in transit instead of safely returned to Germany, and it is not clear who Petitioner fears would re-abduct the children, but from the context of the surrounding paragraph, it appears Petitioner fears Respondent would re-abduct the children. Furthermore, nowhere in the Response does Petitioner threaten to file criminal proceedings against Respondent.

Ms. Mikels-Romero would have provided had she not been excluded" (Doc. 119 at 3).

III. Discussion

The Court does not find that Respondent has made a strong showing that she is likely to succeed on the merits of her appeal. Respondent mischaracterizes this Court's Third Return Order in arguing that this Court "engaged in speculation . . . that its order for the children to return to Germany in the temporary custody of the Mother is enforceable in Germany." (Doc. 115 at 9 (internal quotation and alteration marks omitted).) Contrary to Respondent's characterization, this Court's Second and Third Return Orders did not order the return of O.S.R. and M.S.R. in the temporary sole custody of Respondent. Instead, this Court ordered Respondent to return with O.S.R. and M.S.R. to Germany, where Respondent and Petitioner have joint custody rights under German law. (Doc. 77 at 8; Doc. 112 at 5.) The Court found in its Second Return Order that an ameliorative measure requiring the children to be returned in the temporary sole custody of Respondent was unnecessary to mitigate a grave risk of psychological harm to O.S.R. and M.S.R. (Doc. 77 at 6.) The joint custody rights that Petitioner and Respondent have under German law are enforceable by German courts, and the Ninth Circuit has already held that a district court has discretion to order the relocation of an abducting parent if doing so "can help alleviate any grave risk of harm from repatriation of the kids." *Radu v. Shon*, 11 F.4th 1080, 1090 (9th Cir. 2021), *judgment vacated on other grounds by Shon v. Radu*, 142 S. Ct. 2861 (2022). Accordingly, Respondent has failed to make a strong showing that this Court engaged in speculation or failed to ensure compliance with its ameliorative measure.

Respondent also criticizes this Court for doubting her credibility, arguing that a domestic violence survivor's trauma must be taken into account when assessing the credibility of her testimony concerning her abuse. (Doc. 115 at 12-14.) However, this Court credited Respondent's testimony concerning Petitioner's treatment of her and the children. (*See* Doc. 26 at 5.) The testimony that the Court found to be less than credible—as explained in its Second Return Order—concerned Respondent's ability to

afford plane tickets to Germany or rent in Germany. (*See* Doc. 77 at 3, 7-8.) Because the Court did not find Respondent's testimony concerning her inability to pay for plane tickets or rent to be entirely credible, it was not convinced that ordering Petitioner to pay for those costs was necessary or appropriate. However, it did find credible Petitioner's testimony that he would be willing to pay for such costs if necessary. Petitioner has failed to show why this Court erred in its evaluation of the credibility of Respondent's testimony concerning her finances or Petitioner's testimony concerning his willingness to pay for airfare and rent until a custody determination can be made in Germany. (*See* Doc. 115 at 10-11.)

Petitioner likewise has failed to show why this Court erred in refusing to require Petitioner to confirm that there are no criminal proceedings pending against Respondent in Germany. (*See* Doc. 115 at 12.) Respondent abducted O.S.R. and M.S.R. from Germany in June 2019. (Doc. 26 at 2.) Petitioner initiated this action in June 2020. (Doc. 1.) This Court first ordered the return of O.S.R. and M.S.R. to Germany in September 2020. (Doc. 26.) Respondent has had ample time to ascertain whether there are criminal proceedings pending against her in Germany, and she has not shown why this Court erred in faulting her for failing to do so.

Petitioner has also failed to show that this Court erred in characterizing the grave risk of harm in this case as "borderline." (*See* Doc. 115 at 12.) The Ninth Circuit itself characterized this Court's grave risk finding as "borderline." (Doc. 77 at 6 (quoting *Radu*, 11 F.4th at 1089).) And although a grave risk of harm either exists or does not exist for purposes of an Article 13(b) finding, the degree of harm is nevertheless relevant to a court's consideration of ameliorative measures. *See, e.g.*, *Radu*, 11 F.4th at 1088 (explaining that voluntary commitments or agreements may be sufficient to ameliorate a grave risk of harm, depending "on the severity of risk of harm to the children (which must be low)").

Petitioner criticizes this Court for contacting the United States Department of State for assistance in this matter (Doc. 115 at 11-12.) But the Ninth Circuit specifically

instructed this Court to contact the United States Department of State Office of Children's Issues for assistance. *See Radu*, 11 F.4th at 1088.

Finally, Petitioner argues that this Court erred in failing to hold another evidentiary hearing after the Ninth Circuit's second remand of this case and in failing to allow Ms. Mikels-Romero to testify again following her August 26, 2020 testimony. (Doc. 115 at 7-9.) Petitioner argues that a further evidentiary hearing was required because grave risk[3] and ameliorative measures must be assessed in light of present circumstances. (*Id.*) It is true that ameliorative measures should be evaluated "in light of circumstances as they exist in the present." *Gaudin v. Remis*, 415 F.3d 1028, 1036 (9th Cir. 2005), *abrogated on other grounds by Golan v. Saada*, 142 S. Ct. 1880 (2022). But it is also true that when the abduction itself "causes the pangs of subsequent return," those pangs are not valid concerns under the grave risk exception. *Cuellar v. Joyce*, 596 F.3d 505, 511 (9th Cir. 2010) (internal quotation marks omitted). Here, there is no evidence or indication that Petitioner has had any physical contact with his children since Respondent abducted them from Germany in 2019. Respondent points to no changed circumstances concerning Petitioner's treatment of the children that would necessitate a further evidentiary hearing. Furthermore, Respondent has not shown that the United States Supreme Court's decision in *Golan* necessitated a further evidentiary hearing in this Court.[4]

Instead, Respondent points to the updated report of Ms. Mikels-Romero concerning her psychological evaluation of O.S.R. Respondent first presented that report to this Court when she filed her Reply in support of her Motion to Stay. At the evidentiary hearing held on November 3, 2021, following the Ninth Circuit's first remand, Respondent indicated only that Ms. Mikels-Romero would testify that it would be traumatic to O.S.R. if Petitioner were to come to Tucson, Arizona in order to take the

[3] The Ninth Circuit has not directed this Court to re-consider its grave risk finding. (*See* Docs. 51, 105, 111.)

[4] The Court notes that the district court in *Golan*, upon remand from the United States Supreme Court, issued a decision granting the Hague Petition in that case, without holding a further evidentiary hearing. *See Saada v. Golan*, No. 1:18-CV-5292 (AMD) (RML), 2022 WL 4115032 (E.D.N.Y. Aug. 31, 2022).

children back to Germany. (Doc. 74 at 37-40, 45.) The Court found the proposed testimony unnecessary because the Court was not inclined to allow Petitioner to take the children to Germany himself. (*Id.*) Respondent did not mention Ms. Mikels-Romero in her brief following the Ninth Circuit's second remand. (Doc. 109.) The Court did not err in failing to predict Ms. Mikels-Romero's newly presented, updated report.

Furthermore, even if this Court had allowed Ms. Mikels-Romero to testify at a further evidentiary hearing to the matters stated in her updated report, the testimony would not have changed the Court's decision. The Court found, and has continued to find, a grave risk of psychological harm if the children are returned to Germany in the sole custody of Petitioner.[5] However, Petitioner and Respondent have joint custody rights that are enforceable under German law, and this Court did not find—and would not find, even in light of Ms. Mikels-Romero's updated report—a grave risk of psychological harm if the children are returned to Germany in the joint custody of their parents. Furthermore, as discussed below, Ms. Mikels-Romero's updated report indicates that at least some of O.S.R.'s psychological problems stem from his lack of contact with Petitioner—a lack of contact caused by Respondent's abduction and subsequent actions.

The second factor weighs in favor of a stay because returning to Germany while Respondent's appeal is pending will be disruptive to Respondent and the children. *See Chafin*, 568 U.S. at 178 ("shuttling children back and forth between parents and across international borders may be detrimental to those children"). The fourth factor is neutral, as the public interest favors both the prompt return of wrongfully removed children and the safeguarding of the well-being of children.

The third factor weighs strongly against a stay, even though Respondent's appeal has been expedited. Petitioner has joint custody rights under German law and yet, as a result of Respondent's actions, he has been unable to see his children in over three years. The updated report of Ms. Mikels-Romero states that O.S.R. has repeatedly questioned

[5] To the extent Respondent argues that the children would be at grave risk of physical harm if a stay is denied (*see, e.g.*, Doc. 119 at 7), the Court rejects that argument. The Court has never found that the children would be at grave risk of physical harm if returned to Germany. (*See* Doc. 26 at 5.)

why Petitioner does not contact him and why Petitioner is not interested in him or his activities. (Doc. 119-1 at 6.) But the testimony and evidence before this Court indicates that Respondent has interfered with Petitioner's ability to contact his children. (*See, e.g.*, Doc. 75 at 45 (Petitioner testifying that Respondent cut him off from phone contact with his children).) Respondent's interference with Petitioner's ability to see and contact his children has and continues to cause substantial and irreparable injury to Petitioner—and, based on Ms. Mikels-Romero's updated report, appears to be causing injury to O.S.R., as well.

On balance, the relevant factors weigh against granting a stay pending resolution of Respondent's appeal. However, the Court will grant Respondent's alternative request to temporarily stay its Third Return Order until the Ninth Circuit Court of Appeals rules on a timely filed motion to stay. (*See* Doc. 115 at 21.)

Accordingly,

IT IS ORDERED that Respondent's Motion to Stay (Doc. 115) is **partially denied**. The Court declines to stay its Third Return Order pending resolution of Respondent's appeal. However, the Third Return Order (Doc. 112) is **temporarily stayed** pending the Ninth Circuit's resolution of a motion to stay timely filed before that Court. Respondent shall notify this Court within **two (2) business days** of the Ninth Circuit's resolution of such a motion. Respondent shall also promptly notify this Court if no such motion is timely filed in the Ninth Circuit.

Dated this 27th day of September, 2022.

Honorable Rosemary Márquez
United States District Judge

Appendix E

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

June 27, 2022

Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Persephone Johnson Shon
v. Bogdan Radu
No. 21-825
(Your No. 20-17022)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Golan* v. *Saada*, 596 U. S. ___ (2022).

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

December 3, 2021

Mr. Stephen J. Cullen
Miles & Stockbridge P.C.
1201 Pennsylvania Avenue, N.W.
Suite 900
Washington, DC 20004

Re: Persephone Johnson Shon
v. Bogdan Radu
No. 21-825

Dear Mr. Cullen:

The petition for a writ of certiorari in the above entitled case was filed on November 29, 2021 and placed on the docket December 3, 2021 as No. 21-825.

Forms are enclosed for notifying opposing counsel that the case was docketed.

Sincerely,

Scott S. Harris, Clerk

by

Michael Duggan
Case Analyst

Enclosures

No. _____

In the
Supreme Court of the United States

PERSEPHONE JOHNSON SHON,
Petitioner,

v.

BOGDAN RADU,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Counsel for Petitioner

November 29, 2021

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction generally requires that children wrongfully removed or retained from their country of habitual residence be returned promptly so that custody disputes may be adjudicated in the requesting country. Article 13*b* of the Convention provides an exception to that requirement when there is a grave risk that returning the child would expose the child to physical or psychological harm or place the child in an intolerable situation.

The questions presented are:

1. After finding that a return would expose the child to grave risk, is a district court required to consider ameliorative measures?

2. If a district court considers ameliorative measures, which party has the burden to prove the ameliorative measures?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

STATEMENT OF RELATED PROCEEDINGS

The court of appeals' opinion is reported at 11 F.4th 1080 (9th Cir. 2021). The district court's opinion is unreported.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Persephone Johnson Shon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 11 F.4th 1080 (9th Cir. 2021). Pet. App. 1-18. The district court's opinion is unreported. Pet. App. 19-27.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2021. Pet. App. 1-18. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

Article 13 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention" or "the Convention"), Oct. 25, 1980, 1343 U.N.T.S. 89, and § 9003(e) of the treaty's enabling statute, the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9001 *et seq*., provide as follows:

Convention Article 13

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested States is not bound to order the return of the child if the person, institution or

other body which opposes its return establishes that—

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of the removal or retention or had consented to or subsequently acquiesced in the removal or retention; or

b) There is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

ICARA § 9003(e)

Burdens of proof

(1) A petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence—

(A) in the case of an action for return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) By a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

STATEMENT

The Convention is a text-based treaty. *Abbott v. Abbott*, 560 U.S. 1, 12 (2010). The decision below perpetuates the trend of lower courts writing in additional requirements not permitted by the text of the Convention, and writing out requirements

contained in the plain text of the Convention. The decision below does the former. It writes into the Convention alternative remedies (also known, *inter alia*, as ameliorative measures and undertakings), which ***must*** be considered in every case in which a court finds the Article 13*b* defense has been established, before a court declines to return a child based on the grave risk defense.[1] The non-text-based approach to treaty interpretation taken by the lower courts here is contrary to this Court's precedent in *Abbott v. Abbott*, *Chafin v. Chafin, Lozano v. Montoya Alvarez*, and *Monasky v. Taglieri*, all of which require a text-based interpretation of the Convention.

The United States Government supports review on this very issue in *Golan v. Saada*, No. 1034, which is currently pending on the Court's petition docket, and scheduled for conference on December 3, 2021. In *Golan*, the Second Circuit mandated the consideration of ameliorative measures in analyzing the respondent's article 13*b* grave risk defense. 903 F.3d 533 (2d Cir. 2019); *Saada v. Golan*, 833 F. App'x. 829 (2d Cir. 2020), *petition for cert. filed* (U.S. Jan. 26, 2021) (No. 1034).

The concept of ameliorative measures appears nowhere in the Convention. *See*, Brief of United States as Amicus Curiae at 9, *Golan v. Saada*, No. 1034 (U.S.

[1] The terms ameliorative measures, alternative remedies, and undertakings have developed in American Hague Convention jurisprudence to be used interchangeably, even though originally derived from the concept of undertakings in English family law (not from the text of the Convention). *See, e.g.*, *Simcox v. Simcox*, 511 F.3d 594, 605 (6th Cir. 2007); *Van de Sande v. Van de Sande*, 431 F.3d 567, 571-72 (7th Cir. 2005).

Oct. 27, 2021). Yet several circuits require a consideration of whether ameliorative measures would mitigate the grave risk of harm in returning a child to their habitual residence after a respondent meets their burden to establish grave risk by clear and convincing evidence. *Id*. at 20. The Government's position is that no such requirement exists in the treaty, and therefore an analysis of ameliorative measures is not required. It is not a part of the treaty's text. *Id*. at 8.

The Court should grant review to impose consistent, text-based interpretation and application of the Convention's Article 13*b* grave risk defense.

1. Petitioner Persephone Johnson Shon (the "Mother") and Respondent Bogdan Radu (the "Father") are the parents of two sons. Pet. App. 2. 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. Pet. App. 2. None of the family members are German citizens. *Id*. The Father is also a Romanian citizen. *Id*.

Almost immediately after O.S.R.'s birth in 2013, the Father began a pattern of psychological abuse and coercive control of the Mother. Immediately after O.S.R.'s birth, the Father told the Mother it was her job and responsibility to care for O.S.R. without his help. Tr. 8/26/20, 80-81. He refused to care for O.S.R., other than occasionally changing diapers, even during periods in which the Mother was employed outside the home and he was not. *Id*. The Mother was forced to obtain a babysitter for O.S.R. while she worked, even

though the Father was home, because the Father refused to participate in the care of the child. Tr. 8/26/20, 80-84.

In December 2015, the Father obtained employment as a contractor with the United States Department of State in Germany. Pet. App. 2; Tr. 8/26/2020, 82-83. 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. Pet. App. 2. The family lived together in a rented apartment in Germany. Pet. App. 2-3.

After the birth of the parties' second son in Germany, the Father's psychological abuse and coercive control of the Mother increased in intensity and frequency. The Father had an explosive temper and frequently yelled at the Mother and children, using "inappropriate, degrading, and/or derogatory language." Pet. App. 41.

One example from June 2016 is an incident involving some soured milk, very shortly after the younger son's birth, when the Father became violently enraged. Pet. App. 3, Tr. 8/26/2020, 89. The Mother had given the older son some milk in a child's cup. *Id*. The parties later realized the milk had soured. *Id*. The Father slammed his hand on the table, yelled at the Mother, threatened her, and claimed she had tried to poison their son. *Id*.

The Father also required the Mother to keep the parties' newborn son completely quiet at night so the Father could sleep. Tr. 8/26/2020, 89-90. The Mother

stayed up all night most nights, attempting to anticipate when the newborn might cry so that she could feed him before he cried and awoke the Father. *Id*. The Mother did so because she felt threatened and scared of the Father. *Id*. The Father constantly threatened the Mother and yelled and screamed at her, calling her a variety of profanities. The Father would say she was not a good mother and blamed her for anything that happened in the family that he did not like. Tr. 8/26/2020, 92. The Mother was "scared all the time." Tr. 8/26/2020, 92.

The Mother did not work outside the home in Germany. Tr. 8/26/2020, 96. 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*.

After the Father became unemployed, his abusive behaviors worsened. *Id*. After September 2017, the Mother would not leave the children home alone with the Father, even when she went out in the community to do volunteer work with a U.S. military breastfeeding support group, or to do necessary errands. Tr. 8/26/2020, 96-99. She did not trust the Father because he "would rage and get angry and mean and mad, and it would seem to happen all the time." Tr. 8/26/2020, 96-97. The Father appeared unable to control himself and his anger. Tr. 8/26/2020, 96. The Father's anger worsened the longer the family was in Germany. His furious outbursts started to happen in front of the children. *Id*. The Father's outbursts became physical. Tr. 8/26/2020, 97. 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, in addition to the Mother. Tr. 8/26/2020, 97-99. In one such incident, the Mother and children were in the family's kitchen while the Mother was making dinner. *Id*. The older son, just a toddler at the time, had a step stool out on the kitchen floor. *Id*. The Mother did not see it, tripped over it, landed forcefully on her knee, and spilled a plate of broccoli that had been in her hands. Pet. App. 3; Tr. 8/26/2020, 97-99. The Father stormed into the kitchen, screamed and yelled at the older child, and called him stupid for having left the stool out. *Id*. The child cowered, turned pale, held his ears, and his body became stiff. Pet. App. 3; Tr. 8/26/2020, 97-99. The younger child also witnessed the incident and vomited on himself. Tr. 8/26/2020, 97-99.

The Father's behavior continued to get worse. The Father raged over minor matters, such as a child putting shoes on backwards, the family being unable to find a parking spot, or a child wetting his pants. Tr. 8/26/20, 103-04. At one family dinner, the older child asked to serve himself sour cream. Tr. 8/26/20, 104. The Father instead put the sour cream on the child's plate. *Id*. The toddler became upset. The Father responded by saying to the child "f--- you. You don't have to do it yourself." *Id*. The Father screamed at the family and stormed out. *Id*.

By the time of the Christmas holidays in 2017, the Mother described the family's situation as ". . . walking

on eggshells all the time because we were -- basically, it was survival. We had to survive every hour of every day, and that's how I was living. I was trying to get through the day, trying to protect my children. And he was scary. He was scary." Tr. 8/26/20, 104.

At this point the Father's physical manifestations of his furious outbursts had also worsened and he had become increasingly violent. Tr. 8/26/20, 105. The Father hit O.S.R. He threw chairs and other household items, banged on doors and tables, and assaulted the Mother. *Id*.

During one particularly violent incident in May 2018, the children had been noisy in the bathroom during their bath time, when the Mother was bathing them and working on potty-training the younger son. Tr. 8/26/20, 105-06. The Father burst open the bathroom door, slapped the older child across the face, and berated the Mother and children. He called the Mother an "f---ing b----" in front of the children. Pet. App. 3; Tr. 8/26/20, 105-06.

By the summer of 2018, the Father's unemployment benefits in Germany ended. Tr. 8/26/20, 107-08. Neither party had a paying job. There were times when they did not have enough food. *Id*. The Father's abuse escalated even more. *Id*. The Mother tried to quell the escalating abuse by ". . . try[ing] so hard to do all of his demands, to do everything for the kids, for the house, to do all his ultimatums that he constantly gave me all the time. I tried everything." Tr. 8/26/20, 109. The abuse continued to escalate.

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. Tr. 8/26/20, 110-12. The Father again 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 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 retuning. *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. Tr. 8/26/20, 112-17. The Father sexually assaulted the Mother in March 2019. Pet. App. 4; Tr. 8/26/20, 109, 116. The Mother ". . . decided that she was not going to stay with [the Father]." Pet. App. 4.

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. Tr. 8/26/20, 118-21. The Mother and children left Germany on June 9, 2019 for Arizona, and they have been in Arizona ever since. Tr. 8/26/20, 126-22.

2. The Father filed his Hague Convention petition in the district court seeking return of the children to Germany on June 8, 2020. Pet. App. 4, 21. The Mother admitted the Father's *prima facie* case in her Answer. Pet. App. 21-22. She conceded that Germany was the children's habitual residence on the date of removal, that the Father had rights of custody to the children under German law on the date of removal, and that the Father was exercising his German rights of custody on the date of removal. *Id*. The Mother asserted two of the Hague Convention's defenses: the well-settled and grave risk of harm defenses. *Id*. Only the grave risk defense is relevant here.

The district court held an evidentiary hearing over three non-consecutive days in July and August 2020. Both parties testified at the evidentiary hearing. Tr.7/29/20, 15-47; Tr. 8/26/20, 78-159; Tr. 8/27/20, 23-48. The Mother's three witnesses testified. Tr. 7/29/20 48-59; Tr. 8/26/20, 6-77. The Mother's mother and the Mother's German landlord corroborated the Mother's testimony with respect to the Father's abusive behavior. Tr. 7/29/20, 48-59; Tr. 8/26/20, 6-51.

The Mother's treating psychotherapist, Sherri Mikels-Romero, testified. Tr. 8/26/20, 55-78. Ms. Mikels-Romero testified that she had treated the Mother weekly since approximately September 2019. Tr. 8/26/20, 57. She further testified that the Mother ". . . has, and had, symptoms to meet the criteria for a diagnosis of posttraumatic stress disorder. And the things that she described to me and related from her history of her marital relationship with her husband explained the trauma and the effects and impact of the

trauma on her." Tr. 8/26/20, 57. Ms. Mikels-Romero explained the symptoms of posttraumatic stress disorder ("PTSD") exhibited by the Mother. Tr. 8/26/20, 58-61. She explained that the Mother's PTSD symptoms include dissociation when speaking about the details of the Father's domestic violence towards her, anxiety, trembling hands, blocked speech, intrusive thoughts of the traumatic events, hypervigilance, and an exaggerated startle response. *Id*.

The psychotherapist testified that she had also treated the parties' older son. Tr. 8/26/20, 64-68. She testified that O.S.R. exhibited some dissociative episodes, particularly when describing an incident where the Father had hit him. Tr. 8/26/20, 64-65. She testified that O.S.R. described the Father as someone who "was mostly being mean with his words," that the Father had called O.S.R. "stupid," and that the Father also yelled at his younger brother but O.S.R. felt like "he was getting more anger from his father and more of the bad names, bad words." Tr. 8/26/20, 65.

On the final day of the evidentiary hearing, before the Father's rebuttal testimony to the Mother's defenses case, the Father moved for judgment on the Mother's grave risk case. Tr. 8/27/20, 3-23. The Father argued that the Mother had not met her burden as a matter of law to prove her article 13*b* grave risk defense. *Id*. He argued that there was no evidence of physical or psychological abuse of the children. *Id*. He argued that the *Gaudin v. Remis* case required the lower court must ". . . consider alternative remedies by means of which the children could be transferred back

to [Germany] without risking psychological harm." Tr. 8/27/20, 4-5. The district court noted that it had read the *Gaudin* case and asked the Father ". . . what are you suggesting? What are the alternatives, alternative remedies?" Tr. 8/27/20, 5.

The Father's counsel responded that "[t]here is nothing stopping [the Mother] from travelling with the children to Germany, to filing something there, requesting custody . . ." Tr. 8/27/20, 5. The Father's counsel stated that the Father now ". . . lives 25 miles away from the apartment that he had lived in with the children." Tr. 8/27/20, 7. The district court inquired further, as follows:

> THE COURT: If I did find that there was a grave risk, what would be the alternative remedy available – other than similar to the *Gaudin* case? And I don't know if I read the whole – what they decided in that case, but I don't see how in this case the children would be able to be returned. And I guess [the Mother] can take them. But what's to prevent, once she arrives, I guess she would have to address it with the court there as to – I mean, what would be the alternative in order to avoid grave risk of psychological harm from the father?

Tr. 8/27/20, 8.

The Father's counsel, in response, suggested that "there could be undertakings." *Id*. The Father's counsel suggested that the Mother and children could stay with friends in Germany. Tr. 8/27/20, 9. The district court pressed the Father's counsel further:

> THE COURT: But the problem with that is the father would still have custody in that country, so what's to say that if – I mean, I can't issue an order saying the children are going to live with her and – until there is a custodial hearing in that court.

Id.

The Father's counsel then suggested that the district court could "reserve jurisdiction," order the Father "not to assume physical custody of the children, make a referral to German child protective services, or order the Mother to obtain a temporary order in Germany." Tr. 8/27/20, 9-10.

The district court then inquired of the Mother's counsel on the issue of alternative remedies. Tr. 8/27/20, 12-13. In framing its question to counsel, the lower court explained that it found the Mother's testimony on the Father's treatment of the children to be credible. Tr. 8/27/20, 12. The district court noted that it "struggled with . . . the alternative remedies . . . [and] what would be alternative remedies that I would have jurisdiction over or have supervisory powers over once the children go back." Tr. 8/27/20, 13. The Mother's counsel argued that the only remedy was for the district court to decline to return the children to Germany. Tr. 8/27/20, 20.

The district court took the Father's motion under advisement. Tr. 8/27/20, 23. The Father then continued with his rebuttal case to the Mother's article 13*b* case. Tr. 8/27/20, 23-48. Only the Father testified in his rebuttal case. *Id*. In his rebuttal case, the Father did

not testify, or present any other witnesses to testify, as to any aspect of the "undertakings" or "alternative remedies" submitted by his counsel in argument of her motion. *Id*. The Father's testimony was limited to partially denying the Mother's testimony with respect to the Father's behavior towards the Mother and children. *Id*.

The district court entered its Order with incorporated memorandum opinion on September 17, 2020. Pet. App. 19-27. In its Order, the district court held that the Mother had met her burden to establish the grave risk of psychological harm defense by clear and convincing evidence. Pet. App. 25. The district court explained as follows:

> The evidence presented at the evidentiary hearing—including testimony from [the Mother], Frick, and Johnson, as well as from [the Father] himself—supports a finding that [the Father] behaved in ways that could be characterized as psychologically or emotionally abusive.
>
> The record indicates that he had an explosive temper and that, when angry, he yelled at [the Mother] and the children and also used inappropriate, degrading, and/or derogatory language. [The Mother, her landlord, and her mother] each testified to being scared of [the Father].
>
> * * *
>
> The evidence is insufficient to show that O.S.R. and M.S.R. would be at grave risk of physical harm if returned to Germany. However, the

> Court finds that the children would be at grave risk of psychological harm if returned to Germany in the custody of [the Father].

Pet App. 24-25.

Instead of denying the return to Germany, the district court ordered that "[t]o mitigate this risk of psychological harm, the Court will order that O.S.R. and M.S.R. be returned to Germany in the custody of [the Mother] until a custody determination can be made by a German court of competent jurisdiction." Pet. App. 26. The district court did not provide any analysis of its decision to order the alternative remedy of return with the Mother. Pet. App. 19-27.

3. The Mother timely appealed to the circuit court. She argued that if alternative remedies are considered after a grave risk finding, any such remedies must be limited in scope, effective, and enforceable, and that alternative remedies do not mitigate domestic violence. Appellant's Br. 16-36, Nov. 13, 2020, ECF No. 14. The Mother further argued that the burden to prove the availability of enforceable alternative remedies sufficient to protect the children rests with the petitioner (the parent seeking the children's return)—not the respondent (the parent asserting the grave risk defense). *Id*. at 21-24. The Father did not file any cross-appeal. He therefore does not challenge the district court's grave risk finding. The district court temporarily stayed its Order for the return of the children to Germany with the Mother pending the final outcome of the case after appeal. Pet. App. 28-29, 39-43.

The circuit court vacated and remanded the district court's order. Pet. App. 18. The circuit court held that "[w]hile the district court's order is permissible under the Convention, we vacate and remand for the district court to reasonably ensure compliance with its alternative remedy in Germany." Pet. App. 2. The circuit court recognized in its Opinion that "[a]n alternative remedy is a judicial construct not found in the text of the Convention or ICARA." Pet. App. 8, n. 2. Yet it explained that under its controlling precedent on alternative remedies, "[i]f a court decides that the record supports an Article 13(b) defense, it ***must*** proceed to consider whether that risk can be minimized or eliminated through some alternative remedy." Pet. App. 8 (citing *Gaudin v. Remis*, 415 F.3d 1028, 1037 (9th Cir. 2005)) (emphasis added). The circuit court also relied on the Second Circuit's *Saada v. Golan* case for the proposition that district courts ". . . must determine whether there exist alternative ameliorative measures that are either enforceable by the district court or, if not directly enforceable, are supported by other sufficient guarantees of performance." Pet. App. 10 (citing *Saada v. Golan*, 930 F.3d 533, 541 (2d Cir. 2019)); *see also Saada v. Golan*, 833 F. App'x. 829 (2d Cir. 2020), *petition for cert. filed* (U.S. Jan. 26, 2021) (No. 1034).

The circuit court held that with the "governing framework outlined" it vacated and remanded the district court's alternative remedy order ". . . since the record does not adequately support whether the order of the children's return in [the Mother's] custody has a high likelihood of performance through supportive reinforcements." Pet. App. 14. Although the circuit

court remanded the case for further proceedings in the district court, the circuit court ". . . decline[d] to allocate a burden of proof on the reasonableness of an alternative remedy." Pet. App. 14-15. It explained contrary to its analysis on alternative remedies that "[w]e need not add judicial constraints absent from ICARA or the Convention." Pet. App. 15.

REASONS FOR GRANTING THE PETITION

A. The Text of the Convention Does Not Mandate Consideration of Ameliorative Measures.

The Convention is a text-based treaty. *Abbott*, 560 U.S. at 12. Courts must therefore "begin with the text of the treaty and the context in which the written words are used" in analyzing treaty claims. *Monasky v. Taglieri*, 140 S. Ct. 719, 726 (2020) (citing *Air France v. Saks*, 470 U.S. 392, 397 (1985) (internal quotations omitted)).

All four of the Hague Convention cases this Court has decided address the problems created by lower courts either writing in or writing out requirements of the treaty, rather than conducting a text-based interpretation. Previous substantive issues have been: *ne exeat* rights being written out of the Convention; mootness on appeal being written into the Convention; equitable tolling being written into the Convention; and certain categorical requirements for establishment of habitual residence being written into the Convention. *See Abbott*, 560 U.S. 1 (*ne exeat* rights as "rights of custody"); *Chafin v. Chafin*, 568 U.S. 165 (2013) (mootness); *Lozano v. Montoya Alvarez*, 572 U.S. 1

(2014) (equitable tolling); *Monasky*, 140 S. Ct. 719 (habitual residence).

In the present case, the Ninth Circuit has written into the treaty its judicial construct of mandatory ameliorative measures, even though the circuit court itself recognizes in its Opinion in this case that "[a]n alternative remedy is a judicial construct not found in the text of the Convention or ICARA." Pet. App. 8, n. 2. The concept of ameliorative measures appears nowhere in the Convention.

The United States Government supports review on this very issue in *Golan v. Saada*, No. 1034, which is currently pending on the Court's petition docket, and scheduled for conference on December 3, 2021. The petitioner in *Golan* seeks review on the very same issue presented in this case. In *Golan*, the Second Circuit has required the consideration of "ameliorative measures" in analyzing the respondent's article 13*b* grave risk defense. 903 F.3d 533 (2d Cir. 2019); *Saada v. Golan*, 833 F. App'x. 829 (2d Cir. 2020), *petition for cert. filed* (U.S. Jan. 26, 2021) (No. 1034). The United States Government has filed an *amicus* brief in support of the petition for writ of certiorari being granted. *Id*. at 8, 23. The United States explains that it is the long-held position of the United States that the concept of ameliorative measures appears nowhere in the Convention. *Id*. It advocates that an analysis of ameliorative measures is therefore discretionary—not mandatory—after an Article 13*b* grave risk finding because such an analysis is not mandated by the treaty's text. *Id*. at 8.

The circuit court's decision here perpetuates the trend of lower courts veering from the text of the Convention by writing in additional non-text-based requirements. Imposing a mandatory non-text-based analysis of ameliorative measures after a grave risk finding is not supported by the Convention and does not advance the purpose of the Convention. This Court should therefore grant certiorari to resolve this deviation from the plain text of the Convention.

B. The Circuits Are Divided on Whether Consideration of Ameliorative Measures is Mandatory or Discretionary.

The courts of appeals are in conflict on consideration of ameliorative measures after a grave risk finding. *See* Brief of United States as Amicus Curiae at 20, *Golan v. Saada*, No. 1034 (U.S. Oct. 27, 2021). The Second, Third, and Ninth Circuits require mandatory consideration of ameliorative measures before a district court may deny a petition for return based on an Article 13*b* grave risk finding. *See Saada*, 903 F.3d 533; *Saada*, 833 F. App'x. 829; *In re Adan*, 437 F.3d 381, 395 (3d Cir. 2006); *Gaudin*, 415 F.3d at 1035. In contrast, the First, Eighth, and Eleventh Circuits do not require district courts to consider ameliorative measures before denying a return based on an Article 13*b* grave risk finding. Rather, they consider an ameliorative measures analysis to be discretionary, not mandatory. *See Danaipour v. McLeary*, 386 F.3d 289, 303 (1st Cir. 2004) (rejecting argument that a district court must examine remedies available in country of habitual residence before properly finding Article 13*b* grave risk); *Acosta v.*

Acosta, 725 F.3d 868, 877 (8th Cir. 2013) (holding that once a district court makes an Article 13*b* grave risk finding, it has the discretion to refuse to order a return and placing the burden on the petitioning parent to proffer any undertakings); *Baran v. Beaty*, 526 F.3d 1340, 1346-52 (11th Cir. 2008) (explaining that a district court may consider evidence that a home country can protect an at-risk child, but neither the Convention nor ICARA require it to do so). The Sixth and Seventh Circuits have also addressed ameliorative measures, each recognizing abusive situations in which ameliorative measures may or may not be effective. But neither circuit has articulated whether an ameliorative measures analysis is mandatory or discretionary for a court to deny a return after an Article 13*b* grave risk finding. *See Simcox*, 511 F.3d at 608; *Van de Sande*, 431 F.3d at 571-72.

This conflict among the circuits results in the inconsistent application of the Convention within the United States and results in unfair and different outcomes by the circuits. In particular, the imposition of ameliorative measures results in survivors of domestic violence being treated differently between the circuits. For example, if the Mother here had family she could turn to for support in Georgia, or Pennsylvania, or Maine instead of in Arizona, a district court could have denied the return without consideration of ameliorative measures after if found the Article 13*b* grave risk.

The United States government acknowledges that the threat for such inconsistent treatment of similarly situated litigants is substantial. *See* Brief of United

States as Amicus Curiae at 22, *Golan v. Saada*, No. 1034 (U.S. Oct. 27, 2021). It recognizes that the United States is among the contracting states that receive the highest annual number of return applications. *Id*. (citation omitted). This case, as in *Golan*, therefore presents an appropriate vehicle to review this issue.

C. The Petitioner Bears the Burden of Proof in a Discretionary Ameliorative Measures Analysis.

Even in a discretionary analysis of ameliorative measures, the burden to prove the availability of enforceable measures sufficient to protect the children has been found to rest with the petitioner (the parent seeking the child's return)—not the respondent (the parent asserting the grave risk defense). *See, e.g. Danaipour I*, 286 F.3d at 21; *Simcox*, 511 F.3d at 605–06; *Van De Sande*, 431 F.3d at 571–72; *Sabogal v. Velarde*, 106 F. Supp. 3d 689, 710 (D. Md. 2015). After a respondent establishes an Article 13*b* grave risk, if there is to be any discretionary consideration of ameliorative measures, the burden shifts to the petitioner to establish sufficient reasonableness and enforceability of any such measures. *Id*.

The circuit court here ". . . decline[d] to allocate a burden of proof on the reasonableness of an alternative remedy." Pet. App. 14-15. It explained, contrary to its analysis on alternative remedies, that "[w]e need not add judicial constraints absent from ICARA or the Convention." Pet. App. 15. But other circuits that have considered the issue, hold that the burden of proof is on the petitioner. *Danaipour I*, 286 F.3d at 21; *Simcox*, 511 F.3d at 605–06; *Van De Sande*, 431 F.3d at

571–72; *Acosta*, 725 F.3d at 877; *Sabogal*, 106 F. Supp. at 710.

This case provides the opportunity for the Court to review the issue of the burden of proof in the context of imposing a consistent and complete Article 13*b* analytical framework for the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Appendix F

Exhibit 1

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BOGDAN RADU **Petitioner,** **v.** **PERSEPHONE JOHNSON SHON** **Respondent.**	**CASE No.: CV-20-00246-TUC-RM** **AFFIDAVIT OF** **SHERRI MIKELS-ROMERO, LCSW**

I, Sherri Mikels-Romero, LCSW, hereby depose and say as follows:

1. I am over the age of eighteen (18) years old, I am competent to be a witness, and I have personal knowledge of the facts and matters stated in this Affidavit.

2. I am a licensed clinical social worker. I testified before this Court at the original evidentiary hearing in this matter on August 26, 2020. My original report and my *curriculum vitae* were admitted into evidence at the original evidentiary hearing in this matter as Respondent's Exhibit 35.

3. I have updated my report and have provided my updated report to the Respondent's counsel. I incorporate by reference herein my updated report, dated September 11, 2022, which is attached hereto as **Exhibit A**.

4. I hold the above opinions set forth in **Exhibit A** to a reasonable degree of certainty in my field of expertise.

PURSUANT TO 28 U.S.C.A. §1746, I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON SEPTEMBER 14, 2022.

Sherri Mikels-Romero, LCSW

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Exhibit A

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September 11, 2022

Shaun Kenney, Attorney at Law
The Kenney Law Firm
485 South Main Avenue
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Re: Update of Psychotherapy Treatment of Persephone Shon and O[redacted] R[redacted]

Dear Mr. Kenney:

Per you request and the request of another attorney for Persephone, Kelly Powers, I am providing this update of treatment of Persephone Shon and her oldest son, O[redacted] R[redacted] (DOB: [redacted] 2013),

I have continued to meet with Persephone, almost weekly, since the date of my last letter to you dated July 6, 2020, in which I provided a summary of treatment for Persephone. I began providing therapy for her oldest son, O[redacted], individually and with Persephone and/or her youngest son, M[redacted], since July of 2020. I had met with O[redacted] approximately bi-weekly until December of 2021. There was a gap in services due to scheduling restrictions on my part, and also due to O[redacted]'s progress in treatment. Persephone's trauma-focused treatment has been frequently interspersed with crises at times and issues in parenting and supporting the children's needs-emotional and psychological. Some examples of crises are the times when she was court ordered to return to Germany with the children. Those were some of the times when I met with Persephone and both of her children for family therapy. Throughout my work with Persephone and her children, she has always focused on her concerns for the well being of her children, their safety, and their best interest. She has, many times, asked for my clinical input about what might be in their best interest, as well as information to support those opinions. I have been working with families that have been involved with the court systems and that have had children as victims and witnesses of abuse for more than 35 years, and have provided testimony as an expert witness in many cases on best interest of children in such cases as this family's case.

My assessment of O[redacted] is that he has been traumatized by his father's physically and emotionally abusive behaviors towards O[redacted] and Persephone and the pet cat, as well as his father's threatening and intimidating behaviors. He talked abut times when his father hit O[redacted]'s face (which left a mark at one time), hit the back of his head, called him stupid, and said other mean things to him and his mother. He also reported other violent bahaviors of his father, such as banging his fist on the table, overturning the table and throwing it across the room, and being physically abusive and cruel to the family pet cat, which was old already. O[redacted] would ofen dissociate in his earlier sessions when talking about his father. From approximately

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January 2022 until very recently, I met with O[redacted] monthly. In the past month or so, Persephone has reported that O[redacted] has been frequently angry for extended periods of time and often makes self-deprecating comments. He has noticed other kids at school and on his soccer team who have both parents and repeatedly asked me what about him is so bad, that it causes his father to be so mean to him, or not contact him or be interested in him or his activities, etc. I have recently conducted more updated assessments, once using the CPSS-V rating scales regarding impact of trauma. He rated 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, which he tells me is in his brain all the time. These are symptoms of Post Traumatic Stress Disorder. He has asked me many times, why his father can't get therapy to not be so mean and to learn how to be nice. He has talked about being afraid of his father's behaviors and moods, and missing his friends, family, school, soccer activity and team members, and the feelings about being safe with his mother and grandparents here in Tucson, were he to return to live in Germany. He once blurted out a question about what if his father got so mad at O[redacted] or his mother or brother, that his father would try to kill them. He then said that his father would never do that, and that his mother would protect them. He has stated that he would like to see his old friends in Germany, but otherwise would feel "terrified" to return to Germany to live.

While I believe that parent-child relationships are very important, I have grave concerns, at this point, about the physical and emotional safety of Persephone, O[redacted], and M[redacted], were they to be, in any way supervised or unsupervised in the presence of Mr. Radu. I believe that, if there were to be any contact with Mr. Radu and the children, that it should be supervised by a court approved agency or individual. That person should never be their mother, Persephone, for many reasons, such as her own trauma history with her husband. Victims of abuse can be easily re-traumatized by seeing or hearing the voice of the abusive person, even when supervised publicly by an identified "safe" person.

Respectfully Submitted,

Sherri Mikels-Romero, LCSW

Sherri Mikels-Romero, LCSW