

No. 23-_____

In The
Supreme Court of the United States

DMITRY NIKOLENKO,

Petitioner,

v.

LUIZA NIKOLENKO,

Respondent.

**On Petition For Writ Of Certiorari
To The Court Of Appeals For
The First District Of Texas**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- 1) Whether the Texas court violated the Fourteenth Amendment Due Process Clause and international comity when it exercised subject matter jurisdiction over a foreign marriage of two aliens, that a foreign court of competent jurisdiction had already dissolved.
- 2) Whether the Texas court violated the Fourteenth Amendment Due Process Clause when it exercised personal jurisdiction over defendant Dmitry Nikolenko, a foreign national who had insufficient contacts with Texas, had not been properly served, was not subject to the State's jurisdiction, and tried unsuccessfully to lawfully enter the United States to attend court proceedings.
- 3) Whether the Texas court violated the Fourteenth Amendment Due Process Clause when it refused to continue trial to allow defendant Dmitry Nikolenko time to obtain a United States visa and travel to attend court in person and denied Dmitry Nikolenko the promised alternative of attending trial remotely via video teleconferencing.
- 4) Whether the Texas court violated the Equal Protection Clause of the Fourteenth Amendment by rewarding Luiza Nikolenko, an alien not lawfully present in the United States, with access to court process and a favorable judgment while denying Dmitry Nikolenko, an alien who complied with United States immigration law and procedures, meaningful opportunity to appear and defend the court proceeding.

PARTIES AND RELATED PROCEEDINGS

Parties

- Petitioner Dmitry Nikolenko was Petitioner in the Supreme Court of Texas and Appellant in the Texas Court of Appeals, First District, and respondent in the Fort Bend County, Texas district court. Dmitry Nikolenko was earlier claimant in the prior divorce proceeding in the Judicial District No. 5 of Maykop, Republic of Adygea, Russian Federation.
- Respondent Luiza Nikolenko was Respondent in the Supreme Court of Texas and Appellee in the Texas Court of Appeals, First District, and petitioner in the Fort Bend County, Texas district court. Luiza Nikolenko was earlier respondent in the Judicial District No. 5 of Maykop, Republic of Adygea, Russian Federation.

Related Proceedings

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Nikolenko v. Nikolenko*, No. 22-0747, Texas Supreme Court. Per curiam denial of petition for review entered on June 16, 2023. Order denying rehearing entered on September 8, 2023.
- *Nikolenko v. Nikolenko*, No. 01-20-00284-CV, Court of Appeals for the First District of Texas. Memorandum Opinion and order affirming the district court entered on February 17, 2022.

PARTIES AND RELATED PROCEEDINGS –
Continued

- *Nikolenko v. Nikolenko*, No. 18-DCV-251118, 328th District Court, Fort Bend County, Texas. Final decree of divorce entered January 7, 2020. Findings of fact and conclusions of law filed on February 13, 2020.
- *Nikolenko v. Nikolenko*, No. 17-DCV-243694, 328th District Court, Fort Bend County, Texas. Complaint withdrawn by Luiza Nikolenko.
- *Nikolenko v. Nikolenko*, No. 2-127/5-2018. Justice of the Peace, Judicial District No. 5 for Maykop, Republic of Adygea, Russian Federation. Decision dissolving the marriage entered on March 15, 2018.

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OPINIONS BELOW

The unpublished Order of the Supreme Court of Texas denying review in *Nikolenko v. Nikolenko*, No. 22-0747 (June 16, 2023), is attached to this petition at App. 142. The unpublished Order of the Supreme Court of Texas denying rehearing (Sept. 8, 2023), is attached to this Petition at App. 143.

The unpublished opinion of the Court of Appeals for the First District of Texas in *Nikolenko v. Nikolenko*, No. 01-20-00284-CV, 2022 WL 479988 (Tex. App. Feb. 17, 2022), affirming the decision of the 328th District Court in Fort Bend County, Texas, is attached to this Petition at App. 1. The unpublished Order of the Court of Appeals for the First District of Texas denying rehearing en banc (June 30, 2022) is attached to this Petition at App. 56. The unpublished Order of the Court of Appeals for the First District of Texas denying rehearing (June 30, 2022) is attached to this Petition at App. 57.

The unpublished Final Divorce Decree by the 328th District Court in Fort Bend County, Texas, in *Nikolenko v. Nikolenko*, No. 18-DCV-251118 (328 Dist. Ct. Ft. Bend Cnty. Jan. 7, 2020), is attached to this Petition at App. 58. The Findings of Fact and Conclusions of Law of the 328th District Court (Feb. 13, 2020) are attached to this Petition at App. 112.

A translation of the unpublished decision of the Justice of the Peace [Magistrate], Judicial District No. 5 for Maykop, Republic of Adygea, Russian Federation,

in *Nikolenko v. Nikolenko*, No. 2-1127/5-2018 (Mar. 16, 2018), is attached to this Petition at App. 135.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The Supreme Court of Texas entered its order denying review on June 16, 2023, and its order denying rehearing on September 8, 2023. On November 17, 2023, Justice Alito granted Petitioner's application for an extension of time to file, setting a new deadline of January 7, 2024. Docket No. 23A448 (docketed Nov. 17, 2023).

Pursuant to Supreme Court Rule 29.4(c), notification has been made to the Attorney General of the State of Texas, by service of copies of this Petition, that the constitutionality of Texas law and court actions are drawn into question and 28 U.S.C. § 2403(b) may apply.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. Article VI.

... This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall

be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. amend. XIV.

Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Rule of Civil Procedure 106.

. . .(b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service

- (1) By leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or
- (2) In any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

STATEMENT OF THE CASE

The courts of the respective States have an obligation and duty to obey the limits on their jurisdiction set by the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. U.S. CONST. amend. XIV, § 1. Where a State's laws empower its courts to exceed those limits of Due Process and Equal Protection, those State laws are unconstitutional. This appeal presents a federal law question of Texas courts wielding their power and authority beyond those limits to harm an individual in his status, liberty and property, and to offend international comity and the foreign policy and immigration authority of the federal government.

A. Factual Background

Petitioner Dmitry Nikolenko, a Russian oil engineer, and Respondent Luiza Nikolenko, a citizen of Uzbekistan, married in Tashkent, Uzbekistan in March 2011. App. 2, 136. Neither party was a citizen of the United States. Later, after her first children were born, Luiza renounced the children's Uzbekistan citizenship in favor of Russian citizenship.

Dmitry worked for Schlumberger, the international oil services contracting company, for many years when he next had assignment to Texas in 2010. App. 2. The Nikolenkos entered the United States with a L-1 work visa for Dmitry and L-2 dependent visa for Luiza. App. 2. Eventually the couple resided in Katy, Texas, outside Houston. App. 2. Two daughters were

born to the marriage, the first in 2012 in Texas, and the second in 2015, in Brunei. App. 2.

In October 2014, Dmitry's American work tour ended as planned, and Schlumberger transferred him and his family to the southeast Asian country of Brunei. App. 2. The family remained for three years in Brunei. App. 2.

In June 2017, Dmitry discovered the infidelities and adultery of his wife Luiza. App. 97-98, 136. The relationship deteriorated, and as of June 2017, the two ceased to live together as husband and wife. App. 112. Luiza went from Brunei to Kuala Lumpur, Malaysia. App. 3. At a face-to-face meeting in Kuala Lumpur, Dmitry and Luiza agreed to seek a divorce in the Russian courts. App. 3, 17.

In July 2017, Luiza returned to Texas without Dmitry, unlawfully using her L-2 dependent family visa, which to be valid for her entry required her to accompany her spouse who had been authorized permission to enter to work in the United States. App. 4.

Dmitry returned to Russia and his hometown of Maykop. Dmitry retained Russian divorce lawyers who communicated with Luiza from June 2017 through March 2018. App. 4, 17. Numerous conversations with Luiza focused on settlement terms: Russian divorce law provides for absolute divorce of a marriage status, but the court leaves property and child custody arrangements entirely to party negotiations without court involvement. GRAZHDANSKII PROTSESSUAL'NYI KODEKS ROSSIISKOI FEDERATSII [GPK RF] [Civil

Procedural Code] art. 23 (Russ.). During late 2017 through early 2018, Dmitry did not know Luiza's whereabouts, but she had told him once that she was then in Uzbekistan. App. 3, 136.

Dmitry in September 2017 filed for divorce in Judicial District No. 5 for Maykop.¹ App. 135. Dmitry then was unaware of any divorce proceedings in Texas. The Russian court had jurisdiction of Dmitry Nikolenko and the marriage by virtue of Dmitry's residence and domicile in Russia. In accordance with Russian civil law and procedure, a court appointed attorney represented Luiza Nikolenko. App. 137. SEMINYI KODEKS ROSSIISKOI FEDERATSII [SK RF] [Family Code] art. 50 (Russ.). Luiza remained in contact during the proceedings to negotiate dispositions of property. App. 17.

On March 15, 2018, the Justice of the Peace [Magistrate] for Judicial District No. 5 entered a decision dissolving the marriage and granting a decree of divorce. App. 135. The divorce decree took effect on April 17, 2018, in accordance with Russian law affording the parties a 30-day cooling-off period to reconcile. App. 140. SK RF art. 25, ¶ 1. On that date, pursuant to the Family Code of the Russian Federation, the marriage of Dmitry and Luiza Nikolenko ceased to exist. SK RF, art. 25, ¶ 1.

¹ At first Dmitry began a divorce action in Tashkent, Uzbekistan, where the marriage was registered. The Uzbek court declined jurisdiction in favor of the matrimonial domicile of Russia.

In June 2018, lawfully freed by the divorce decree, Dmitry remarried to Svetlana Nikolenko (née Babakova). Brief of Appellant Dmitry Nikolenko at 1, *Nikolenko v. Nikolenko*, No. 01-20-00284-CV (Tex. App. Feb. 17, 2022), 2022 WL 149988. Dmitry and Svetlana remain married today in Russia and have two children from their marriage.

B. Proceedings Below

Luiza ignored or rejected the Russian divorce decree. During initial negotiations, she filed her own 2017 action for divorce in the local Texas district court. *Nikolenko v. Nikolenko*, No. 17-DCV-243694 (328th Dist. Ct. Ft. Bend Cnty., Tex. 2017). App. 4 n.1. Luiza withdrew that action when it became clear that she did not meet minimal residency requirements under Texas law. TEX. FAM. CODE § 6.301.

By May 2018, despite her unlawful federal immigration status, Luiza had established residency in Texas, and she filed a new petition for divorce in Fort Bend County, Texas. App. 4, 38. Luiza attempted under Texas Rule of Civil Procedure 106 to serve Dmitry by substituted service. App. 5, 39.

The district court proceeded in a June 2018 default hearing to enter temporary orders against Dmitry for payment of temporary child support and spousal support as well as health insurance and health care expenses, and payment of the mortgage on a property in Katy, Texas. App. 5.

Dmitry responded later in June 2018 by Special Appearance, contesting under both the Texas and United States Constitutions the court’s personal jurisdiction of him, and its subject matter jurisdiction of the marriage following the March 2018 Russian divorce decree. App. 5, 113.

A July 2018 hearing addressed the jurisdictional challenges. The district court admitted evidence that Dmitry, without knowledge of the abortive 2017 Texas divorce proceedings, had filed in Russia for divorce in September 2017. App. 5, 113. Luiza acknowledged that she had actual knowledge of the Russian divorce proceedings and had been in communication about it with Dmitry’s Russian lawyer. The district court also admitted into evidence the Russian divorce decree, on the basis of which Dmitry argued there was no longer any subject matter jurisdiction to be had by the district court. App. 6. No argument was ever made that the Russian decree was not in conformity with established Russian law and procedure. The district court overruled each of Dmitry’s objections to jurisdiction. App. 6, 113, 117.

When in May 2019 the district court set an August 2019 trial date, Dmitry moved for a continuance to allow him time to obtain a visa to travel to the United States and personally attend the trial. Dmitry’s prior visa for the United States expired in May 2019. App. 7.

At the motion hearing, Dmitry’s counsel stressed the complexity of the visa process. The court candidly admitted it “[didn’t] know anything about visas, other

than that you need one to travel internationally.” App. 7. Dmitry’s counsel asked the court if Dmitry might participate by Skype if Dmitry could not be physically present at trial, and the court stated “[i]f things go to where we have to do the Skype thing, as much as I hate doing that, we’re going to have to do it.” App. 8. Trial was reset for October 2019. App. 9.

Dmitry participated in discovery and attended a September 2019 mediation session by Skype. In October 2019, Dmitry’s deposition was taken via Skype; Dmitry stated then he intended to appear in person for the trial, and Dmitry’s counsel reserved all of his questions for Dmitry in deposition until the trial.

Dmitry was unsuccessful in continued pursuit of the visa, and on October 21, 2019, he again moved for continuance of the trial. App. 9. The district court opened the first day of trial on October 22, 2019, when it at first acknowledged its previous ruling that “[i]f [Dmitry] needs to appear by Skype, the Court will allow that,” and restated “ . . . he can appear by Skype.” App. 10. The court then recessed for approximately three hours with the understanding that preparations were under way for Dmitry to participate remotely. App. 10.

On resumption of court, the district court changed course and announced:

And the Court takes notice this June 27, 2019 docket entry which I previously read in to the record, last sentence that the docket entry says if [Dmitry] needs to appear by Skype, the

Court will allow that. Court finds that [Dmitry] does not need to appear by Skype given that since June 27, 2019 he has had the opportunity to appear in this court and has not and has had ample opportunity to obtain a Visa or do whatever he needs to do to get here and participate in this trial and with that, we're going to go forward with this case.

App. 10-11. The district court then began a two-day trial in which Dmitry was not allowed to testify, listen to or help rebut the opposing party's presentation of evidence, or otherwise confer with or assist his counsel. App. 11.

The district court in January 2020 entered a Final Decree of Divorce, appointing Luiza sole managing conservatorship of their minor children and ordered Dmitry a possessory conservator, with limited rights. App. 11, 60-62. The Final Decree further ordered that during Dmitry's periods of possession, the visitation will be supervised, and he is prohibited from removing the children from Texas or the United States, despite his visa status. App. 11, 68-75. The trial court also awarded Luiza a significantly disproportionate share of the marital estate (the court even reached and extinguished rights to property solely located within Russia). App. 11-12, 98-103. The Final Decree of Divorce was entered on January 7, 2020. App. 11, 58. Findings of Fact and Conclusions of Law were filed on February 13, 2020. App. 12, 112.

Dmitry in February 2020 moved for a new trial, and, during the March 2020 hearing on that motion,

had his first opportunity to testify, by telephone from Russia. App. 6, 12. Dmitry testified that at the time of the trial, he did not possess a work visa, tourist visa, or any other visa that would allow him to travel to and lawfully enter the United States. App. 12. Prior to trial, Dmitry's work visa had expired in May 2019 by its regular terms. Upon expiration of that visa, Dmitry tried to get a work visa through his employer and filed for both tourist and emergency visas to attend the Texas trial. App. 12.

Internal issues at the U.S. Embassy in Russia significantly prolonged wait times for visa interviews. *See* www.ru.usembassy.gov/visas/ (last visited Jan. 3, 2024). At the time of Dmitry's testimony, his visa application still had not been processed and approved.² Dmitry's travel was also hindered by the relinquishing of his passport for these efforts. The district court denied the motion for a new trial. App. 13.

Appeal to the Texas Court of Appeals

Dmitry appealed the Final Decree to the Texas Court of Appeals – First District in Houston, Texas. App. 1, 13. In his appellant brief, Dmitry argued, among other issues, that the district court's exercise of personal and subject matter jurisdiction violated due process under the United States Constitution's Fourteenth Amendment. App. 13; Brief of Appellant, *supra*, at 26. Further, the district court's refusal to accredit

² The American Embassy finally denied Dmitry's visa application on September 2, 2021.

the Russian divorce decree, to allow Dmitry to attend, testify or assist in his own defense, all denied Dmitry constitutional due process. App. 19-20, 28-29. Brief of Appellant, *supra*, at 12, 16, 19, 24.

The Texas Court of Appeals issued its decision in February 2022. App. 1. The appellate court vacated a portion of the district court's Final Divorce Decree concerning the arrearage judgments based on void temporary orders and affirmed the remainder of the Final Decree of Divorce. App. 1-2. The Court of Appeals rejected all of Dmitry's jurisdictional and constitutional due process arguments. App. 16-19, 34. In June 2022, the Court of Appeals denied motions for rehearing and for rehearing en banc. App. 56, 57.

Petition for Review to the Supreme Court of Texas

Dmitry Nikolenko petitioned the Supreme Court of Texas for discretionary review of the Court of Appeals opinion. App. 142. Among other issues raised, Dmitry argued that the Texas courts denied Dmitry due process of law under the Fourteenth Amendment to the United States Constitution. Petition for Review, at 10-17, *Nikolenko v. Nikolenko*, No. 22-0747 (Tex. June 16, 2023). In addition, Dmitry argued that the failure to recognize the Russian divorce decree violated longstanding federal law and international issues of judicial comity. Petition for Review, *supra*, at 20-24.

The Supreme Court of Texas denied the petition for review in June 2023. App. 142. The same court

denied a petition for rehearing in the matter on September 8, 2023. App. 143.

REASONS FOR GRANTING THE PETITION

Dmitry Nikolenko petitions the Court to grant a writ of certiorari to the Supreme Court of Texas.

A. This case presents an important issue of federal constitutional law with nationwide and international impact.

Left uncorrected, this case sets a precedent for State courts to upset a delicate balance of State and federal court authorities over international marriage and resulting family settlements. A significant number of American marriages (over 20% according to one 2013 survey) involve at least one non-citizen spouse. *1 in 5 Married Households in USA Has Foreign-Born Spouse*, USA TODAY, Sept. 6, 2013, www.usatoday.com/story/news/nation/2013/09/06/state (last visited Jan. 3, 2024). Globally, mixed citizenship marriages trend in double digit percentages. See LORENA CASTILLO, GITNUX MARKET DATA REPORT 2024: INTERNATIONAL MARRIAGE STATISTICS (Dec. 20, 2023), available at <https://gitnux.org/international-marriage-statistics/>. See generally Rhonda Wasserman, *Family Law Disputes Between International Couples in the United States Courts*, Nov. 1, 2020, ABA FAMILY LAW SECTION, available at https://www.americanbar.org/groups/family_law/publications/

family-advocate/2020/fall/family-law-disputes-between-international-couples-us-courts/

The Texas courts unfairly wielded jurisdiction to favor the alien unlawfully present over the law-abiding alien. The overreach of State judicial authority beyond limits of constitutional due process also threatens not only domestic family law disputes, but even conduct of international business transactions, by encouraging forum shopping.

Finally, the actions of the Texas courts intrude upon exclusively federal subjects such as immigration, visas, and foreign relations. The result will be significant disturbance in international comity and inevitable reciprocal harms to American interests both state and federal.

B. The decision of the Texas Court of Appeals is wrong.

The Fourteenth Amendment to the Constitution limits the exercise of State power against individuals. U.S. CONST. amend. XIV. State courts may not affect the status, property, or liberty interests of persons without following minimal due process. *Id.* amend. XIV, § 1. *Matthews v. Eldridge*, 424 U.S. 319, 3322 (1976) (“Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments.”). Aliens “have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and

Fourteenth Amendments.” *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953).

State courts also may not deny any person the equal protection of the laws. U.S. CONST. amend. XIV, § 1. *See Plyler v. Doe*, 457 U.S. at 216 (“The Equal Protection Clause was intended as a restriction on state . . . action inconsistent with elemental constitutional premises.”).

Interests protected under the Fourteenth Amendment include personal status. *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015). Marriage and divorce are personal status interests subject to judicial action and covered under the Fourteenth Amendment. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (“Choices about marriage, family life, and the upbringing of children” implicate the Fourteenth Amendment). The right of custody, care and visitation of one’s children is a liberty interest protected under the Fourteenth Amendment. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“fundamental liberty interest of natural parents in the care, custody and management of their child”).

1. The Texas court had no subject matter jurisdiction of a dissolved marriage, and the Texas court therefore exceeded the limits of Fourteenth Amendment due process to reach Dmitry Nikolenko, his status, his property, and his liberty interests.

“Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been

rendered by a court having jurisdiction of the cause, and upon regular proceedings, and due notice.” *Hilton v. Guyot*, 159 U.S. 113, 166-67 (1895); *see* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 98 (1971) (A valid judgment entered in a foreign nation will be recognized in the United States so far as the immediate parties and the underlying action are concerned.). “A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law.” 159 U.S. at 167; RESTATEMENT (SECOND) OF JUDGMENTS § 31(1) (1982) (“A judgment in an action whose purpose is to determine or change a person’s status is conclusive upon the parties to the action.”).

The “Court has often stated that judicial power to grant a divorce – jurisdiction, strictly speaking – is founded on domicil.” *Sosna v. Iowa*, 49 U.S. 393, 407 (1975); *Williams v. N. Carolina*, 325 U.S. 226, 229 (1945); *Andrews v. Andrews*, 188 U.S. 14 (1903); *Bell v. Bell*, 181 U.S. 175 (1901). Subject matter jurisdiction over divorce and marriage lies in the State of domicile of one or both spouses and the matrimonial domicile. *Williams v. N. Carolina*, 325 U.S. at 229-30; RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 71 (“A State has power to exercise judicial jurisdiction to dissolve the marriage of spouses one of whom is domiciled in the State.”); *see Williams v. N. Carolina*, 317 U.S. 287 (1942); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 7 (cross referencing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 70-79).

Domicile is the jurisdiction in which a person makes his or her permanent residence and intends to stay indefinitely. BLACK'S LAW DICTIONARY 559 (9th ed. 2009). The marriage domicile is the place of making and celebrating the marriage.

A controlling precedent is the Court's decision in *Atherton v. Atherton*, 181 U.S. 155 (1901). In *Atherton*, the husband sought a divorce from the court of his domicile State, Kentucky, where he and his wife both resided as matrimonial domicile. *Id.* at 17. The husband proceeded *ex parte*, because the wife had left to reside in her native home of New York. *Id.* at 155-57. The divorcing court followed local law, appointing an attorney *ad litem* to represent the absent wife, and he made constructive service on the wife by mail and actual notice. *Id.* at 161-62. The Kentucky court then granted an absolute divorce. *Id.* at 162. The wife challenged that divorce decree in the New York courts, which refused to recognize the decree and judgment. *Id.*

On appeal, this Court held the *ex parte* divorce valid. *Id.* at 173.

[T]he undisputed facts show that such efforts were required by the statutes of Kentucky and were actually made, to give the wife actual notice of the suit in Kentucky, as to make the decree of the court there, granting a divorce upon the ground that she had abandoned the husband, as binding on her as if she had been served with notice in Kentucky, or had voluntarily appeared in the suit.

Id. at 172-73. See *Andrews v. Andrews*, 188 U.S. 14, 38-39 (1903) (same).

The Russian court in Maykop was a regularly and lawfully constituted court of the Russian Federation empowered and competent to hear and decide matters of marriage and divorce. *Federal'nyi Konstitutsionnyi Zakon* [Federal Constitutional Law of RF] (Feb. 7, 2010) No. 1-FKZ, art. 1 (Russ.); GPK RF art. 42, ¶ 3.

The Maykop court had both subject matter and personal jurisdiction of Dmitry Nikolenko, a native of Maykop who had always retained his Russian citizenship and intended to return after his international travels to reside there indefinitely. Russia was also the matrimonial domicile, by virtue of treaty between Russia and Uzbekistan. Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases, art. 28, *adopted* Jan. 22, 1993, 1819 U.N.T.S. No. 31139 (entered into force May 19, 1994) (Minsk Convention).

Russian domestic law grants the Maykop court authority to dissolve the marriage of Luiza and Dmitry Nikolenko. *Federal'nyi Zakon* [Federal Law of the Russian Federation on Justice of the Peace in the Russian Federation] No. 188-FZ, art. 1 (Russ.), Dec. 17, 1998. See *RESTATEMENT (SECOND) OF JUDGMENTS* § 11 (“A judgment may be properly rendered against a party only if the court has authority to adjudicate the type of controversy involved in the action.”).

Russian divorce courts hear and decide the ultimate relational status of the two spouses, granting absolute divorce. No. 188-FZ, art. 3, ¶ 3. The Russian

court however does not address issues of property division or child custody; instead, those matters are specifically left to the parties for direct negotiations, or later claims to a district court. GPK RF art. 23. *Cf. May v. Anderson*, 345 U.S. 528, 534 (1953) (child custody nonjusticiable absent *in personam* jurisdiction of the parent); *Estin v. Estin*, 334 U.S. 541, 549 (1948) (holding “divorce divisible to give effect to the [divorce] decree insofar as it affects marital status” but not issue of alimony).

The Russian law of civil procedure in its courts afforded Luiza Nikolenko essential due process, in the provision of notice and opportunity to be heard. GPK RF arts. 28-29, 131-32, 402. *See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS* § 69 (“A State may . . . exercise judicial jurisdiction over the status of a person” if “a reasonable method is employed to give [her] notice of the action” and “a reasonable opportunity to be heard”); *see also Schroeder v. City of N.Y.*, 371 U.S. 208, 211 (1962) (constitutionally sufficient notice is “reasonably calculated under the circumstances to apprise interested parties of the pendency of the action”).

Dmitry and Luiza separated in June 2017; their last communication was in December 2017. App. 3, 112. Dmitry at the time did not know Luiza’s location, whether Uzbekistan, the United States, or another country. App. 3, 136.

In accordance with Russian civil procedure, Dmitry and the court gave notice by publication and by mailing to the last known address of Luiza Nikolenko.

App. 137. Luiza also received actual notice of the divorce proceeding via e-mail and telephone, and she acted upon that notice to communicate with Dmitry and his lawyer concerning property and other matters. App. 3-4, 17.

Because Luiza failed to appear formally or retain private counsel, the Maykop court followed Russian civil procedure law to appoint counsel *ad litem* for Luiza. GPK RF art. 50. App. 137. Luiza's interests were formally represented and protected throughout the Russian proceeding, which again centered only upon the relational status of the two spouses, without more. App. 137-39.

Under Russian domestic law, even had Luiza formally opposed dissolution of the marriage, the court ultimately would have been authorized to divorce her and Dmitry upon Dmitry's insistence that the marriage was irreconcilable. SK RF art. 22.

The final decree of the Russian court in Maykop, divorcing the Nikolenkos, was a valid decision of a competent court which had both subject matter and personal jurisdiction to render its decree. SK RF art. 25, ¶ 1. The decree took effect after expiry of the one-month period for appeal. SK RF art. 209, 321. A party can show good cause to reopen the time for appeal. SK RF art. 205. Luiza Nikolenko took no appeal.

"When a divorce cannot be attacked for lack of jurisdiction by parties actually before the court or strangers in the rendering State, it cannot be attacked by them anywhere." *Johnson v. Muelberger*, 340 U.S.

581, 589 (1951); *Sherrer v. Sherrer*, 334 U.S. 343, 352 (1948) (barring “a defendant from collaterally attacking a divorce decree on jurisdictional grounds . . . where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree.”).

Accordingly, the Texas court should have recognized the prior Russian decision as controlling and determined that there no longer remained a valid existing marriage providing the Texas court with any subject matter jurisdiction. *Hilton v. Guyot*, 159 U.S. at 167. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 102 (1827) (“if the foreign judgment has been pronounced by a court possessed of competent jurisdiction over the cause and the parties, and carried into effect, and the losing party institutes a new suit upon the same matter, the . . . former judgment constitutes an absolute bar. . . . It is a *res judicata* [and] . . . is final and conclusive.”); *Atherton*, 181 U.S. at 166 (“divorces pronounced according to the law of one jurisdiction and the new relations thereupon formed, ought to be recognized . . . as operative and binding everywhere”) (citing KENT).

2. The Texas court lacked personal jurisdiction over Dmitry Nikolenko, and the Texas court therefore violated Fourteenth Amendment due process in adjudicating his status, his property and his liberty interests.

The judgment of a court lacking personal jurisdiction violates the Due Process Clause of the Fourteenth

Amendment. *Pennoyer v. Neff*, 95 U.S. 714, 732 (1878); *accord, Burnham v. Super. Ct. of Calif., Cnty. of Marin*, 495 U.S. 604, 609 (1990). State courts exceed the bounds of due process when they exert their authority over persons lacking minimum sufficient contacts with the State. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011) (“The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a State tribunal’s authority to proceed against a defendant”); *Shaffer v. Heitner*, 433 U.S. 186, 207, 212 (1977) (“all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *Int'l Shoe* and its progeny.”).

Those minimum contacts are constitutionally sufficient only when they are enough to assure that “the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Int'l Shoe*, 326 U.S. at 316; *Burnham*, 495 U.S. at 609. “The substantial connection between the defendant and the forum State necessary for a finding of minimum contacts, must come about by ***an action of the defendant purposefully directed toward the forum State.***” *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Calif., Solano Cnty.*, 480 U.S. 102, 112 (1987) (emphasis in original) (cleaned up). *See also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (“a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction”).

The Court has previously decided whether State courts may exercise *in personam* jurisdiction over a nonresident, nondomiciliary parent of minor children domiciled within the State, in *Kulko v. Super. Ct. of Calif. in and for the City and Cnty. of San Francisco*, 436 U.S. 84 (1978). The Court held “that the exercise of such jurisdiction would violate the Due Process Clause of the Fourteenth Amendment.” 436 U.S. at 86; *see also Griffin v. Griffin*, 327 U.S. 220, 228 (1946).

Dmitry Nikolenko lacked sufficient minimum contacts with the State of Texas to justify the State court actions. At all relevant times, Dmitry intended to return to Russia following his temporary work assignments. Dmitry entered the United States in 2010 on a limited work visa and departed in 2014 to rotate to his next job in Brunei. App. 2. “To hold such temporary visits to a State a basis for the assertion of *in personam* jurisdiction over unrelated actions occurring in the future would make a mockery of the limitations on State jurisdiction imposed by the Fourteenth Amendment.” *Kulko*, 436 U.S. at 93. If the Texas Family Code enables this result, then that law is unconstitutional.

Dmitry did not return after 2014 to the United States, and he discovered that he could not return lawfully, after expiration of his work visa. App. 7. He would need a new personal visa to lawfully reenter the United States. App. 7. Luiza and the children were present in Texas through no fault of Dmitry’s, but only because Luiza had secretly and without lawful permission reentered the United States using her expired and invalid visa. App. 4.

Dmitry submitted to the Texas courts the absence of ties between him and the United States or Texas. While the court rejected his demurrer to personal jurisdiction, the district court nonetheless relied on the same facts, showing no ties, to declare Dmitry as a risk of international child abduction. App. 70-72.

The Texas Court of Appeals held that Luiza's affidavit in support of the Texas R. Civ. P. 106 motion for substituted service did not comply with Texas Rule 106. App. 40. On that basis, the Texas Court of Appeals vacated the temporary orders and arrearage judgments. App. 4. But the same Court of Appeals upheld the general personal jurisdiction over Dmitry nonetheless. App. 16-19.

Dmitry opposed personal jurisdiction by special appearance, timely raising these arguments in both the trial court and the Texas Court of Appeals. App. 5, 13. The Texas courts ruled against Dmitry in error and violated Fourteenth Amendment due process. The Texas Family Code and the Texas courts' "application of the minimum-contacts test in this case represents an unwarranted extension of *International Shoe* and would, if sustained, sanction a result that is neither fair, just, nor reasonable." *Kulko*, 436 U.S. at 92; *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 887 (2011) ("Due Process protects petitioner's right to be subject only to lawful authority . . . and [this] exercise of jurisdiction would violate due process.").

3. **The Texas court denied Dmitry Nikolenko due process under the Fourteenth Amendment, when the Texas court refused a continuance to allow Dmitry time to obtain lawful permission to travel and attend court in the United States, promised Dmitry an option of remote teleconference, then unfairly reneged and denied Dmitry permission to attend remotely by teleconference, undermining Dmitry's defense of this unauthorized court proceeding.**

The “Court’s decisions concerning access to judicial processes . . . reflect both equal protection and due process concerns.” *M.L.B.*, 529 U.S. at 120. Constitutional due process requires a meaningful opportunity to defend the action by personal attendance in court. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). “[D]ue process requires at a minimum that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the process must be given meaningful opportunity to be heard.” *Id.*; *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

The Texas court deprived Dmitry of this essential element of due process in multiple ways. At the very least, it was entirely wrong for the Texas court to proceed without Dmitry in the courtroom, despite Dmitry’s sincere and diligent efforts to obtain lawful permission to enter the United States and come to the Texas court. There is a “root requirement that an

individual be given an opportunity for a hearing before he is deprived of any significant property interest.” *Boddie*, 401 U.S. at 379.

The Texas court dismissed and ignored the legitimate reasons that impaired Dmitry’s ability to timely obtain a visa for the United States. The Texas court wrongly assessed the reasons and difficulty for Dmitry’s delay and failure to obtain a visa, and unfairly prejudged and disadvantaged Dmitry in that respect.

The Texas court further wronged Dmitry in offering a remote teleconference alternative to personal attendance in court. The Texas court volunteered the idea of a teleconference option; then appeared to forget it had offered the alternative; then the Texas court seemed to revive the idea of teleconferencing; and finally, the Texas court ruled that its suggestion had been conditional upon Dmitry’s “needing” to attend by teleconference and arbitrarily “found” that Dmitry did not “need” to use teleconferencing. App. 10-11.

The Texas court prejudged Dmitry, biasing his outcome in the proceedings, and denied Dmitry any opportunity to attend and assist in his own defense. The

State’s refusal to admit [this litigant] to its courts . . . must be regarded as the equivalent of denying [him] an opportunity to be heard upon the[] claimed right to a dissolution of the[] marriage[], and in the absence of a sufficient countervailing justification for the State’s action, a denial of due process.

Boddie, 401 U.S. at 380-81. By either granting time to obtain a lawful visa or providing alternative means of remote attendance, the Texas court could have assured Dmitry due process, without harm to the resolution of the case.

“The State’s obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due.” *Boddie*, 401 U.S. at 380 (“a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant.”).

4. The Texas court denied equal protection of the laws to Dmitry Nikolenko, violating the Fourteenth Amendment, when the Texas court granted alien Luiza Nikolenko access to the courts and a favorable judicial settlement but thwarted alien Dmitry Nikolenko’s efforts to attend and meaningfully defend his case.

The Fourteenth Amendment mandates the State government treat similarly situated individuals subject to that State’s jurisdiction, equally in the enforcement of State laws and provision of benefits. U.S. CONST. amend. XIV, § 1. The “concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental actions questioned or challenged.” *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

As set forth above, the Texas courts lacked subject matter jurisdiction for the dissolved marriage. The Texas courts lacked personal jurisdiction over Dmitry Nikolenko. Notwithstanding that lack of jurisdiction, in subjecting Dmitry to the jurisdiction of the Texas courts, those courts denied Dmitry the equal protection of the laws guaranteed him by the Fourteenth Amendment.

The Texas state court denied equal protection of the laws to Dmitry Nikolenko, barring him from access to the State judicial process, which access the Texas Family Code and the Texas courts in contrast facilitated to Luiza Nikolenko. State court procedures “must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.” *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969) (per curiam).

From the outset of the Texas court proceedings, Luiza and Dmitry Nikolenko were similarly situated: aliens without lawful permission to enter or remain in the United States absent a properly issued visa. App. 2, 4. Luiza unlawfully returned in 2017 to the United States and Texas using her L-2 dependent visa, which was invalid unless she accompanied Dmitry who had been issued the predicate L-1 work visa for 2010-2014. Dmitry obeyed the laws of the United States by seeking a new and valid visa to attend court in Texas. App. 7, 9, 12.

The United States maintains consular presence in only three cities in the Russian Federation:

Moscow Embassy, plus Vladivostok and Yekaterinburg. www.ru.usembassy.gov.³ Dmitry was required to travel to a consular office in person to apply for and be interviewed for a visa. From Maykop to Moscow and to Yekaterinburg, respectively, the approximate driving travel distance to each is 878 miles and 1,617 miles. Vladivostok is approximately 6,095 miles from Maykop. *See Brief of Appellant, supra*, at 5 (discussion with district court of distances).

Dmitry could not ask his employer to obtain a visa for Dmitry that was not for work purposes. App. 12. Dmitry had difficulty scheduling interviews with American consular officers as relations between the United States and Russia worsened. Dmitry's defense counsel tried unsuccessfully to explain this to the Texas court. App. 7-9.

In arbitrarily denying Dmitry Nikolenko the necessary time and indulgence to permit lawfully obtaining a visa and travel to the United States for in-person court attendance, while affording Luiza Nikolenko unfettered and easy access to the Texas state court system, the State of Texas and its court denied equal protection of the laws to Dmitry Nikolenko. The Texas statutes, as applied by the Texas courts to this end, unconstitutionally rewarded the alien lawbreaker to punish the law-compliant alien spouse who cannot

³ U.S. Embassy in Russia has suspended all non-diplomatic consular activity. www.ru.usembassy.gov/visas/ (last visited Jan. 3, 2024).

lawfully enter the United States. This violated the Fourteenth Amendment's equal protection guarantees.

C. The Court's precedent and international judicial comity call for reversal of the Texas courts.

The operations of the Texas court and its denial of international comity with respect to the prior judicial ruling of the Russian court threaten to expose the United States and its citizens to unfair retaliation by other nations. The Court has long held that

when there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citations or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal. . . .

Hilton v. Guyot, 159 U.S. at 202-03.

International comity calls for the courts of the United States as well as the State courts to respect and

abide by the valid and prior rulings of foreign courts of competent jurisdiction in matters of applying their own laws to their own citizens. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1986) (“a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections to another state when the exercise of such jurisdiction is unreasonable.”).

The Texas courts’ disregard and refusal to honor the Russian court’s divorce decree has not only offensive effect to the domestic jurisdiction of another sovereign, in the individual case of Dmitry Nikolenko it would if adopted label Dmitry (or his wife Svetlana) a bigamist⁴ under Russian family law and threaten the status of their younger minor children. *See* SK RF art. 14. This too violates Due Process, by harming Dmitry and Svetlana’s reputational liberty interests. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (reputational stigma is liberty interest protected by Due Process).

The Russian judicial system saw fit in its own competence to adjudicate its own laws, to dissolve the marriage of Dmitry and Luiza and to bless the remarriage of Dmitry to Svetlana.

These are matters of legitimate concern to the State of the domicile. They entitle the

⁴ Cf. *Williams v. N. Carolina*, 325 U.S. 226 (Refusal of North Carolina to recognize jurisdiction of Nevada to divorce parties exposed both to criminal prosecution for bigamy in North Carolina.).

State of the domicile to bring in the absent spouse through constructive service. In no other way could the State of the domicile have and maintain effective control of the marital status of its domiciliaries.

Estin, 334 U.S. at 547, The rulings of the Texas courts disrupt this status and create unnecessary contention.

The prevailing rule in international comity is reciprocity. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 147 (8th ed. 1866) (“The general comity, utility, and convenience of nations have, however, established a usage among most civilized States, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution.”); *id.* § 149 (“The same jurisprudence prevails in the United States of America, in respect to the judgments and decrees rendered by the tribunals of a State foreign to the Union.”); *see Guyot*, 159 U.S. at 214; *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) (“where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations”).

Failure to respect the valid rulings of foreign courts in matters where they possessed proper jurisdiction in their own nations, can justify those foreign nations in retaliating against the United States and its citizens. *Guyot*, 159 U.S. at 191, 213; *id.* at 228 (“international law is founded upon mutuality and reciprocity”); *Bradstreet v. Neptune Ins. Co.*, 3 F. Cas. 1184, 1187 (C.C.D. Mass. 1839) (No. 1,793) (“If a civilized nation seeks to have the sentences of its own courts held

of any validity elsewhere, they ought to have a just regard to the rights and usages of other nations, and the principles of public and national law in the administration of justice.”) (Story, J.); *see also* WHEATON, *supra*, § 79.

The actions of the State of Texas and its courts in this matter have transgressed international judicial comity and call for the Court to redress the situation in the best interest of the United States.

D. This case is an excellent vehicle for the Court to review these issues.

Dmitry Nikolenko raised his federal constitutional claims at each stage of the litigation and preserved those claims for the Court’s review. App. 13, 19-20, 113. Each State trial and appeals court considered and denied those federal law claims. App. 6-19, 20, 113. This case is in an optimal posture for the Court to review the issues presented. The factual record is complete and not in dispute. Rather, the issues here on appeal are the application of federal and international law to those facts, which Dmitry contends the Texas Supreme Court and its subordinate courts have wrongly decided. SUP. CT. R. 10(c).

CONCLUSION

The Court should grant the petition and issue a writ of certiorari.

Respectfully submitted,

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