No. 21-35210

In The
United States Court of Appeals for the Ninth Circuit

SETH BASIL COLCHESTER,
Petitioner-Appellee,

v.

JEWEL LAZARO,
Respondent-Appellant.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:20-cv-01571-JCC
Hon. John C. Coughenour

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Jewel Lazaro presented compelling evidence below that her former partner, Seth Colchester, abused both her and their daughter S.L.C. Even without more, that evidence should have given the district court pause before it granted Mr. Colchester's petition to return S.L.C. to his care in Spain under the Hague Convention. The Convention—along with its implementing legislation, the International Child Abduction Remedies Act—recognizes an affirmative defense to petitions for return when the responding parent proves that the child faces a grave risk of exposure to harm. *See Monasky v. Taglieri*, 140 S. Ct. 719, 729 (2020); *see also* 22 U.S.C. § 9003(e)(2)(a).

The district court's repeated abuses of discretion prevented Ms. Lazaro from sustaining her burden of proof. First, the district court improperly prohibited evidence showing that Mr. Colchester traffics drugs for a living. Second the court barred a thorough evaluation of S.L.C. by a psychologist. The district court also issued an order unsupported by the findings that the Federal Rules require and relied on decisions of other courts to which it should not have given weight. It then inappropriately restricted Ms. Lazaro's custody rights. To cap off

these errors, the district court awarded Mr. Colchester $115,000 in expenses, even though Ms. Lazaro had less than $1,000 in her bank account and a yearly income that totals less than a fifth of the overall fee award.

Mr. Colchester's Answering Brief cannot rehabilitate the district court's errors. His arguments, often unmoored from case law and at odds with the record, return more than once to his preferred theme—irrelevant to the issues below—that Ms. Lazaro wrongfully abducted S.L.C. The parties have a long history of proceedings in which Mr. Colchester has prevailed and Ms. Lazaro's repeated attempts to escape his violence, including that directed at her daughter, have put her conduct in conflict with the rulings of other courts.

But faulting Ms. Lazaro for her predicament as a domestic violence victim on the run can go only so far. The grave risk defense applies, after all, only when a petitioner like Mr. Colchester has proven a wrongful removal—a necessary element for a petition under the Convention. In other words, *every* parent who raises a successful grave risk challenge has wrongfully absconded with a child. The defense's existence requires courts to look beyond that conduct and ask whether

the child faces serious dangers of physical or psychological harm if returned.

Because the answer here is yes, Ms. Lazaro should have prevailed below. And she would have but for the district court's missteps. This Court should reverse so the parties can have a fair trial to decide an issue critical to both—and most importantly to S.L.C.

ARGUMENT

A. The district court abused its discretion in excluding evidence that Mr. Colchester is a drug trafficker—evidence at the core of the grave risk inquiry.

Living with a drug trafficker endangers a child, and Mr. Colchester nowhere suggests otherwise. Thus, the district court's determination that whether Mr. Colchester makes his living through drug trafficking is of "tangential relevance" was error. *See* 1-ER-32. And given the centrality of the evidence to Ms. Lazaro's claims, that error was prejudicial. *See Tritchler v. Cty. of Lake*, 358 F.3d 1150, 1155 (9th Cir. 2004) (describing standard for reversal for excluding evidence).

1. Mr. Colchester overlooks the importance of the drug trafficking evidence.

First, the Answering Brief—in a section unburdened by citation—attacks a strawman: "that a district court is required to consider

allegations of drug trafficking in all cases where a party makes them." Answering Br. at 33. This Court would come up empty searching for any such claim in Ms. Lazaro's papers. But the district court did abuse its discretion in *this* case, on *these* facts. In deciding whether S.L.C. faces exposure to grave risk, it should have admitted the evidence of her father's criminality. As the amicus briefs establish, no one, particularly a judge with the safety of the child in his hands, should disallow relevant evidence about the father's actions that would, if true, support a finding that the child faces a grave risk of harm.

Yet the district court blocked precisely that kind of evidence, which could have carried Ms. Lazaro's burden. Contrary to Mr. Colchester's assertions, Ms. Lazaro never "concede[d]" that the evidence of Mr. Colchester's crimes is not alone enough to prove grave risk. *Cf.* Answering Br. at 33. She observed instead that, together with the evidence of Mr. Colchester's abuse, the drug trafficking evidence would have met her burden, and so excluding it was prejudicial error. *See* Opening Br. at 24–25. This contention aligns with the reasoning of other courts.

When allegations of drug dealing surface in Convention cases, courts consider the evidence. *See* Opening Br. at 25–26. Those authorities cohere with the low threshold for relevance under Federal Rule of Evidence 401—having a "tendency to a make a fact" material to the case "more or less probable." They also track the common-sense intuition that a young child faces serious risks from living in the sole care of a career criminal.

Unwilling to argue otherwise—and rightly so—Mr. Colchester downplays the drug trafficking evidence as "frivolous" and "unsupported." Answering Br. at 31. Those are curious descriptions for one proffered witness's firsthand knowledge of Mr. Colchester's drug-growing operations, including seeing thousands of marijuana plants and grow lights, along with Ms. Lazaro and another witness's direct knowledge of Mr. Colchester's plants, grow lights, and concern about law enforcement scrutiny. 2-ER-244–47.

As for excluding Ms. Lazaro's expert, Mr. Colchester clings to grounds the district court never adopted and that courts do not countenance. Nothing in the record suggests that the district court ruled on the proffered expert's qualifications and neither the district

court nor Mr. Colchester made any showing that the expert's analysis was wrong. Mr. Colchester's caricature of the expert's sources of data "goes only to the weight of his testimony, not to admissibility …." *Chroma Lighting v. GTE Prod. Corp.*, 111 F.3d 137, at *2 n.4 (9th Cir. 1997) (unpublished); *cf.* Answering Br. at 34. In any event, rules on the reliability of expert opinion are "largely irrelevant in the context of a bench trial." *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 852 (6th Cir. 2004). Here, evidence that Mr. Colchester's legitimate income cannot sustain his expenses, *see* 5-ER-950–61, goes straight to both his credibility and the substance of whether his income is illegitimate. The district court's ruling on this score thus defies common sense and lacks a basis in law.

The district court could not consider whether Ms. Lazaro's proffered evidence was "flimsy," as Mr. Colchester asserts, because it flat-out barred the testimony. Mr. Colchester offers no authority supporting that exclusion.

2. Mr. Colchester misapprehends the scope of the district court's improper restrictions on Ms. Lazaro.

Next, Mr. Colchester does not contest the authorities giving Ms. Lazaro the right to rebut evidence when he opens the door. *Compare* Opening Br. at 30 (citing *Gillette v. Delmore*, 979 F.2d 1342, 1345–46 (9th Cir. 1992); *United States v. Whitman*, 771 F.2d 1348, 1351 (9th Cir. 1985)) *with* Answering Br. at 31–32. He argues instead that just allowing Ms. Lazaro to ask questions about Mr. Colchester's tax returns and business records was enough to satisfy that right. He is wrong. Mere foundational cross-examination—cut off when Mr. Colchester was asked directly whether he illegally sold drugs—simply sets the stage for rebuttal evidence in the form of other testimony.

The district court repeatedly interrupted Ms. Lazaro's cross-examination to prohibit pointed inquiries into his possible crimes and punctuated these errors with its mistaken conclusion that the court was not going to be "trying a drug case." *See, e.g.*, 3-ER-400, 402, 408. Mr. Colchester offers no legal authority for his contention that this limited examination was enough for a fair chance to rebut

Mr. Colchester's testimony. Nor can he. Mr. Colchester's denying his renting space in a warehouse and claiming that his long-ago use of a facility was only for "cultural events" just reinforces the need for a chance to rebut that testimony. *Cf.* Answering Br. at 32. Ms. Lazaro was prepared to offer a witness who would have undermined these claims. 2-ER-244–46. Nothing supports the district court's conclusion that percipient witness evidence of Mr. Colchester's marijuana-growing operations was only tangentially relevant to assessing S.L.C.'s risk. This is even more so given the other evidence of drug trafficking that the district court rejected out of hand.[1]

3. The district court's exclusion did not meet the standard under Federal Rule of Evidence 403.

Last, the district court's belatedly stated basis for excluding the proffered evidence cannot sustain the decision. Excluding evidence under Rule 403 is inappropriate in a bench trial. Even if it were

[1] Contrary to Mr. Colchester's suggestion, *see* Answering Br. at 32 n.13, his having been the target of police investigation in Spain for drug manufacturing hardly inspires confidence in the legitimacy of his businesses.

otherwise, the district court's rationale conflicts with its other evidentiary rulings and finds no support in the record.

To start, Mr. Colchester erroneously asserts that Ms. Lazaro's authorities on the inapplicability of Rule 403 in bench trials address only "parties claiming that the court abused its discretion by *refusing* to exclude evidence." Answering Br. at 35. His assertion ignores the Fourth Circuit's decision in *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994), which faulted the district court for excluding evidence and held that the exclusion "was not harmless error since a party was prevented from fully developing evidence relevant to a material issue." So too here.[2]

But whether Rule 403 applies at all does not alter the outcome. Showing that Mr. Colchester is an illegal drug trafficker was central to Ms. Lazaro's trial strategy. Both parties' trial briefs bore out this understanding. *See* 5-ER-987, 988–90; 5-ER-1013–14, 1019–20. The

[2] This Court relied on *Schultz* in stating that "Rule 403 is inapplicable to bench trials" and nowhere hinted that its statement turned on the distinction Mr. Colchester offers—that it dealt with a claim that evidence was wrongly admitted. *United States v. Preston*, 706 F.3d 1106, 1117 (9th Cir. 2013), *as amended* (Feb. 27, 2013), *vacated on other grounds on reh'g en banc,* 751 F.3d 1008 (9th Cir. 2014).

district court was therefore wrong to see no "relevance of this inquiry other than … trying to show that [Mr. Colchester] has undisclosed sources of income …." 1-ER-21.

The district court's ostensible concern over putting Mr. Colchester on trial doesn't make sense of its treatment of Mr. Colchester—or of Ms. Lazaro—on other issues. Through her abuse allegations, Ms. Lazaro put Mr. Colchester's potential crimes of domestic violence at issue. Evidence of other criminal conduct risking S.L.C.'s physical and psychological safety is no different.[3] The district court also lacked any hesitation to put Ms. Lazaro on trial, despite her own risk of criminal liability, and even though the wrongfulness of her removing S.L.C. from Spain was undisputed at trial. The district court let Mr. Colchester try to develop a child abduction case against her. *See* 4-ER-579–80; 6-ER-1087. And the court's explanation that evidence about Ms. Lazaro's wrongful removal of S.L.C. went to her credibility applies equally to

[3] Testimony in civil trials often implicates a party's criminal liability—that alone is no reason to preclude inquiries that are core to the dispute. And no Fifth Amendment right against self-incrimination arises out of purely foreign criminal exposure. *See United States v. Balsys*, 524 U.S. 666, 673 (1998).

evidence that Mr. Colchester's traffics drugs and launders money. *See* 4-ER-694.

Mr. Colchester fails to respond to Ms. Lazaro's observation that any concern over "delay" lacked support. *See* Opening Br. at 29 (citing 3-ER-423; 4-ER-648–49, 775–76). But besides the extra time that the district court's broad exclusions created, a court abuses its discretion by excluding critical evidence merely to save marginal time. *See* Fed. R. Evid. 403 (allowing exclusion only when waste of time or other prejudice "substantially outweigh[s]" the probative value).

The district court barred Ms. Lazaro from putting on affirmative evidence of Mr. Colchester's crimes without a sensible reason. Because that evidence goes to the heart of whether S.L.C. faces exposure to a grave risk, the error was prejudicial.

B. The district court abused its discretion by denying Ms. Lazaro's requests for discovery and an evaluation of S.L.C.

1. Denying Ms. Lazaro's request for targeted discovery was both improper and prejudicial.

Ms. Lazaro proposed a narrow discovery plan aimed at documents in Mr. Colchester's exclusive possession supporting the drug trafficking allegations. *See* 6-ER-1080 n.7 (identifying tax returns, CBD and

medical marijuana licensing information, business records Mr. Colchester must maintain under Spanish law, and vendor agreements as categories of discovery).[4] There was no reason for the district court to deny Ms. Lazaro's request for discovery—and the district court gave none.

To begin, Mr. Colchester claims that Convention cases "are routinely resolved without discovery," but cites just two examples. *See* Answering Br. at 38–39. He says nothing about the half-dozen contrary examples in the Opening Brief. *See* Opening Br. at 35–36. Nor does he identify any decision by or within this circuit denying discovery altogether. He instead ducks the question by observing that "district courts" (plural) "in the Ninth Circuit" have cited one of his proffered authorities in noting their "substantial discretion" to determine procedures in Convention cases. Answering Br. at 39 (citing *Garcia v. Duarte Reynosa*, 2020 WL 777247, at *1 & n.1 (W.D. Wash. Feb. 18, 2020), and its reliance on *West v. Dobrev*, 735 F.3d 921, 929 (10th Cir. 2013)). But in fact, *Garcia* is the only court in this circuit to cite *West* for

[4] Mr. Colchester calls these discovery requests "extensive"—a description belied by even casual familiarity with the discovery typical of federal civil cases. *See* Answering Br. at 15.

any purpose, and it did so to support its liberal admission of telephonic testimony. And the *Garcia* court itself allowed the parties to take discovery. *See Garcia v. Duarte Reynosa*, 2020 WL 363404, at *2 (W.D. Wash. Jan. 22, 2020).

Ms. Lazaro's grave risk defense raised a distinctive theory requiring access to information held solely by Mr. Colchester. This contrasts with allegations of abuse common in other grave risk cases in which both parties may have equal access to evidence.

Next, Mr. Colchester does not dispute that this Court "must be able to ascertain how the district court exercised its discretion" to review that exercise. *Traxler v. Multnomah Cty.*, 596 F.3d 1007, 1015 (9th Cir. 2010). He instead suggests that the district court gave a reason for denying discovery simply by asking whether the Spanish courts had addressed the same issues. *See* Answering Br. at 40–41 (citing 6-ER-1070–71). But asking a question is not ruling on an issue, and nothing about the district court's questions spoke to what Mr. Colchester calls "the duplicitous nature of Ms. Lazaro's requests." Answering Br. at 40.

Even if this were the basis for the district court's decision, Mr. Colchester points to no evidence hinting that Ms. Lazaro had a chance to take discovery from Mr. Colchester about his drug trafficking activities in *any* prior proceeding, much less the proceeding in Spain the district court asked about. *See* 5-ER-817–43; *see also* 5-ER-781–89, 883–945; 3-SER-421–25.[5] No logical connection exists between orders that neither discussed a right to discovery nor involved any exchange of discovery on the one hand and the district court's unreasoned decision to prohibit it on the other. *See Chang v. United States*, 327 F.3d 911, 925 (9th Cir. 2003) (holding that the district court abused its discretion by ruling "in an irrational manner"); *Or. Nat. Res. Council v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995) ("The district court abuses its discretion when its decision is based on an erroneous conclusion of law or when the record contains no evidence on which it rationally could have based that decision." (internal quotations and brackets omitted)).

Mr. Colchester last contends that Ms. Lazaro "waived" her request for discovery and for an evaluation of S.L.C. through "delay." Answering

[5] All U.S. proceedings between the parties resolved without discovery, and none but those below involved live testimony. *See* 5-ER-781–89; 3-SER-421–25.

Br. at 27, 40 & n.18, 43 & n.20. The record, however, shows otherwise. Just three days after Ms. Lazaro accepted service and removed this case to the district court, the district court issued a case management schedule requiring the parties to submit a status report—including the Rule 26(f) discovery plan—more than three months later. *See* 6-ER-1144; Fed. R. Civ. P. 26(f). That order set the contours for how and when the case would proceed. Then, Mr. Colchester waylaid the dispute by filing a meritless dispositive motion only three days after Ms. Lazaro filed her Answer. *See* 6-ER-1145, 1148. In denying that motion, the district court again confirmed the schedule:

> If either party wishes to expedite the case management deadlines previously provided in the Court's entry or suggest an alternative means of resolving their dispute, they may so move, either on a contested or stipulated basis. But absent such a motion, the parties should anticipate that this matter will proceed in due course.

6-ER-1088–89 (citations omitted). Only then did Mr. Colchester first propose an expedited schedule, providing a concrete proposal and discovery plan *after* Ms. Lazaro requested it several times and sent her own proposal. 6-ER-1075–77. When the parties could not agree, Ms. Lazaro filed a brief supporting her position and argued the issue at a status conference. 6-ER-1051–84. She finally repeated those

arguments in her trial brief and expressly identified the denial of discovery as a basis for her appeal. 5-ER-1039–40; 6-ER-1139.

To sum up, Ms. Lazaro (1) briefed her request for discovery after the parties could not agree, (2) advocated for her position in a hearing, (3) reserved her objection to the district court's ruling in her trial brief, and (4) flagged it again in her notice of appeal. So Mr. Colchester's "waiver" argument lacks merit.

2. The district court should have allowed an evaluation of S.L.C.

Psychological evaluations are expected in Convention cases raising the grave risk defense. Denying Ms. Lazaro's request for such an evaluation geared toward the Convention's standards on grave risk was an abuse of discretion that prejudiced Ms. Lazaro. Mr. Colchester's assertions to the contrary misread the record and rest on little authority.

Starting with the law, Mr. Colchester never addresses any of Ms. Lazaro's authorities approving psychological evaluations in grave risk cases. *Compare* Opening Br. at 37–39 *with* Answering Br. at 41–44; *see also* Brief of *Amici Curiae* Sanctuary for Families et al. at 4–20; Brief of *Amici Curiae* Nat'l Ass'n of Social Workers et al. at 18–21. And

despite claiming that "many courts have expressly opted not to [allow an evaluation], despite a parent requesting such an examination," he identifies just one. Answering Br. at 44. There, the district court expressed frustration with the respondent's reluctance to allow the court to interview the children and the refusal (on privilege grounds) by a psychologist identified by the respondent to testify. *See West*, 735 F.3d at 931–32.

Here, by contrast, Ms. Lazaro asked the district court to interview S.L.C. And Ms. Lazaro's expert, Alicia Romero-Fernandez, willingly testified and (as Mr. Colchester acknowledges) both her own report and her testimony called for a more thorough evaluation. The evidence at trial included audio recordings of S.L.C. saying that Mr. Colchester hit her and of Mr. Colchester screaming at S.L.C., and S.L.C.'s statements to a healthcare provider in Washington and to Ms. Romero that she had suffered abuse. 3-ER-368, 379–81, 493; 4-ER-721–36; 5-ER-860–65. This evidence reflects exactly the type of dispute that cries out for expert evaluation. *See Khan v. Fatima*, 680 F.3d 781, 785–88 (7th Cir. 2012) (reasoning that failure to adjourn the hearing to have the child examined by a psychologist was error).

Turning next to the record, Mr. Colchester relies on the same baseless accusations of delay discussed above. The facts do not support these claims. But one other aspect of his contention merits a response. Mr. Colchester scolds Ms. Lazaro for not following up with Ms. Romero for more evaluation while she had S.L.C. in her care in the United States. Answering Br. at 42–43. He overlooks that Ms. Romero has no license to practice psychology in Washington or anywhere in this country. *See* 4-ER-719; Wash. Rev. Code §§ 18.83.010–18.83.220 (outlining licensure requirements for psychologists in Washington). She conducted her preliminary evaluation through an interpreter. 4-ER-721. And her own testimony shows that she did not evaluate S.L.C. in the context of any Convention proceeding (none existed) or with an eye toward the Convention's standards. She instead assessed S.L.C.'s safety in an "emergency situation" right after Ms. Lazaro fled Mr. Colchester's abuse.[6] *See* 4-ER-720–22, 725–28. Mr. Colchester chides Ms. Lazaro, in

[6] Mr. Colchester asserts incorrectly that Ms. Romero "acknowledged that she had offered [her] opinions without observing the appropriate standards of care" or in violation of any "professional standards." Answering Br. at 22. Despite his efforts on cross-examination, Ms. Romero explained repeatedly that her assessment and preliminary conclusions conformed to professional standards. *See* 4-ER-736–39. As

essence, for not asking a professional unlicensed in the jurisdiction to evaluate a child from across an ocean for the purpose of expert testimony in a matter for which Ms. Lazaro had neither accepted service nor secured counsel. No lawyer would have prescribed such a course, and any district court would have looked askance at one who did.

What Ms. Lazaro needs and what justice demands is a chance for an expert retained for the Convention case and instructed on its standards to thoroughly evaluate S.L.C. Ms. Romero's preliminary conclusions, while helpful, were an inadequate substitute for what courts regularly authorize in similar circumstances. Mr. Colchester offers no response to Ms. Lazaro's argument on prejudice—the district court's comments on the brevity of Ms. Romero's examination track Ms. Lazaro's own stated reasons for seeking an expert to testify in proceedings in the United States.

The Court should reverse and remand with instructions allowing Ms. Lazaro to take discovery and secure a complete evaluation of S.L.C.

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trial courts across this circuit instruct, "[q]uestions and objections by lawyers are not evidence." Ninth Circuit Jury Instructions Comm., *Manual of Model Civil Jury Instructions* § 1.10 (2017 ed.).

C. The district court's order fell short of Federal Rule of Civil Procedure 52(a)'s requirements.

Rule 52(a) required the district court to "find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a)(1). Those findings must be "explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision." *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1090–91 (9th Cir. 2002) (vacating judgment and remanding for district court to make clear findings). The district court's failure to live up to these requirements also warrants remand.

Mr. Colchester fails to distinguish Ms. Lazaro's authorities, relying instead on the unremarkable proposition that a district court need not address "each and every fact presented at trial" and cobbling together an argument from the standard for clear error review. Answering Br. at 44–46. But Ms. Lazaro has not asked this Court to remand for findings on every fact, and objects only to the way the district court made its findings—in an order that does not give this Court the chance for meaningful review. *See Khan*, 680 F.3d at 785 (holding that the Rule 52(a) requirement "is at its most exacting" in cases of inconsistent testimony and remanding a Convention case

because of a failure to adequately address the facts); *In re Application of Adan*, 437 F.3d 381, 396–98 (3d Cir. 2006) (reversing district court for abusing discretion in the manner it considered evidence in a Convention case involving grave risk).

The district court did not have to address every fact, but it should have addressed at least some going to the most significant dispute. Yet the order nowhere mentions the testimony about Mr. Colchester's abuse, or the audio recording proving his threat to S.L.C., or his inconsistent explanations of that recording, or the expert testimony, or the medical records. None of it. 1-ER-6–15. The district court did not even make credibility findings about any witness, including the parties. The thin judgment focused almost exclusively on Ms. Lazaro's undisputed wrongful removal and the findings of other courts. This violates Rule 52(a).

If this Court has any doubt about the inadequacy of the order below, it need only look to the Statement of the Case in Mr. Colchester's Answering Brief. There, Mr. Colchester plucks contested evidence from the record and asserts as fact claims which the district court never decided. He contends, for instance, that Ms. Lazaro "lied to the local

Spanish police" about the circumstances under which she fled Mr. Colchester. Answering Br. at 9. But he cites as support a letter written months later by different officers than those with whom Ms. Lazaro spoke. *See* 5-ER-848–51. And Ms. Lazaro denied doing any such thing. 4-ER-565-67. The district court did not resolve this dispute. So too with Mr. Colchester's unsupported assertions discussed above that Ms. Romero violated professional standards in her evaluation. And the same with the claims that Ms. Lazaro "offered inconsistent and contradictory testimony, unsupported by any credible or reliable evidence" and that her testimony was "consistently vague and contradicted by her own prior statements or evidence in the record." Answering Br. at 18–19. The district court made no such findings.

While it need not have discussed all this evidence, it should have at least addressed the core evidence of abuse and explained why it was unavailing. Failing to do so violated Rule 52(a)'s mandate.

D. The district court's reliance on the conclusions of other courts was an abuse of discretion.

The district court also erred by relying so heavily on the decisions of other courts facing different evidence, legal issues, and procedural postures. Mr. Colchester responds first by asserting that it never

happened, and then by misinterpreting the implications of the district court's order. Neither response can undo the district court's error.

First, any uncertainty over what weight the district court gave these decisions and whether it extended comity to a Spanish determination falls on Mr. Colchester. After all, he drafted those sections of the district court's order. *See* 1-ER-14. In the paragraphs adopted by the district court as its own, the reasoning proceeds straight from describing the decisions in Spain and in state court to announcing—with no more analysis—that Ms. Lazaro's evidence on grave risk "is neither clear nor convincing …." 1-ER-14–15 (¶¶ 10, 13); *see also* 1-ER-7 (adopting paragraphs one through ten and thirteen of Mr. Colchester's proposed findings). And just three days after submitting these proposed findings, Mr. Colchester argued that the Spanish determination was "entitled to comity by this Court." *Compare* 1-ER-11–16 *with* 3-ER-259. He made the same argument the day before the district court issued its order: "[I]n addition to giving comity to that order, we think it's appropriate for this Court to separately make its own finding that Ms. Lazaro has not met her burden …." 4-ER-753.

It seems Mr. Colchester got his wish: the district court extended comity to the Spanish order, but its own "separate" finding contained no analysis.

That was error. The January 2021 Spanish custody order whose language animates so much of Mr. Colchester's briefing and trial presentation misapplied the Convention and cannot support comity under this Court's decision in *Asvesta v. Petroutsas*, 580 F.3d 1000, 1011–20 (9th Cir. 2009) (reversing district court for abusing its discretion in extending comity to a Convention decision by a foreign court when misapplication of the Convention and considerations of fairness weighed against comity). As Ms. Lazaro explained in her principal brief, the Spanish court repeatedly based its ruling on the best interests of the child and turned on an evidentiary record riddled with interpretation errors. *See* Opening Br. at 45–47.

Mr. Colchester's response is unconvincing. He does not dispute that interpretation errors occurred, but waves them away by noting that Ms. Lazaro did not object to them in Spain—essentially ignoring that it was these errors that hindered her ability to vindicate her rights. *See* Answering Br. at 50. Nor does it help things that the Spanish judge

apparently understood English—if anything, that makes it worse. *See id.* If true, that means that the judge, knowing full well that Ms. Lazaro had answered the court's questions with precision, baselessly admonished her for "rambling." *See* 4-ER-635–37. And the Spanish court's finding that Ms. Lazaro was "incoherent" hinged on its apparent inability to believe that a child was cleaning dishes and its reliance on the explanation Mr. Colchester first offered—but abandoned in this case—for shouting at S.L.C. *See* 5-ER-827; *see also* 3-ER-368–70; 5-ER-1002 (shifting explanation from an interrupted phone call—which the court credited in Spain—to being blocked while carrying laundry—as Mr. Colchester testified below and asserts here). Ms. Lazaro's testimony about S.L.C.'s abuse, which the Spanish court found so difficult to follow, was among the things the interpreter in Spain flubbed. *See* 5-ER-827, 915–16. The district court abused its discretion in giving a proceeding littered with procedural unfairness so much weight.

The same is true of the state court decisions. First, Mr. Colchester nowhere disputes that neither state court heard live testimony or considered the same evidence offered below.

And his argument that the state courts decided the abuse allegations on the merits sidesteps his own briefing in state court. That briefing confirmed at least three times that the lack of evidence of domestic violence *in Washington*—rather than in Spain—determined the outcome, and that the court could not exercise jurisdiction over the child because Spain is her "home country" under the statute at issue. 6-ER-1099–1104. Mr. Colchester has never addressed whether his own arguments may have inadvertently led the first state court astray.

The second state court decision is no more helpful. That order makes plain that it was simply following the earlier decision as res judicata and that no acts of violence occurred in Washington *after* the first state court decision to justify exercising jurisdiction. *See* 5-ER-787–88. Nothing in it addresses the merits of Ms. Lazaro's abuse allegations stemming from Mr. Colchester's actions in Spain.[7]

[7] Mr. Colchester seems at last to have abandoned the evidence-free claim he inserted into his proposed findings that the second state court found Ms. Lazaro's assertions "not credible." *Compare* 1-ER-14 *with* Answering Br. at 53 (noting that "one state court [found] Ms. Lazaro not to be credible"). But the district court's adopting this unsupported assertion without comment casts doubt on the care with which it assessed all the evidence.

The district court was similarly wrong to give these decisions weight in considering different evidence to decide a separate legal question.

E. The district court's purported ameliorative measures were improper.

The district court abused its discretion in restricting Ms. Lazaro's rights under applicable Spanish custody orders to daily calls with S.L.C. and a week of unsupervised visitation each month. *See* 1-ER-10 (limiting Ms. Lazaro to "electronic communications" and two days of supervised visitation per month); 5-ER-799–800 (Spanish custody order providing for broader visitation). These interventions squeezed Ms. Lazaro's rights in an unprecedented way—by finding no grave risk of harm yet intruding on ongoing custody proceedings to a respondent's detriment.

Courts deciding grave risk also consider whether any reasonable ameliorative measures can facilitate a child's safe return to her country of habitual residence. *See Gaudin v. Remis*, 415 F.3d 1028, 1035–36 (9th Cir. 2005). In defending the district court's order, Mr. Colchester fails to provide even a single example of a court restricting *the respondent*'s custody rights. That failure is telling.

Mr. Colchester's argument—that the district court's measures undermining Ms. Lazaro's access to, and relationship with, S.L.C. were appropriate "until the Spanish courts could hear this matter"—fails. Answering Br. at 54. Indeed, it conflicts with his own narrative: the parties were already in proceedings before Spanish courts in parallel with those below. Mr. Colchester does not deny this—he trumpets it. *See, e.g.*, Answering Br. at 14–15. But the Spanish courts have already considered visitation and decided that Ms. Lazaro should have daily calls and unsupervised visits with S.L.C. The district court should not have disturbed that arrangement without a basis in precedent.

To be sure, Ms. Lazaro contends that, because of the flawed evidentiary and discovery rulings, the district court wrongly concluded that she had not proven a grave risk. But having decided as it did and having found that Spain is S.L.C.'s habitual residence, the district court was not free to convert a Convention case into a custody battle.

So either the purported ameliorative measures were a dead letter from the start (because of the pending proceedings in Spain to which the district court said its order was subject) or they improperly intruded on those courts' authority, with no support in other Convention cases.

F. The district court abused its discretion in awarding expenses defying equitable principles.

Ignoring the substance of Ms. Lazaro's argument and basic principles of equity, Mr. Colchester asks this Court to affirm the award of $115,000 in expenses against someone with no hope of ever paying it.[8] In doing so, Mr. Colchester never cites—much less distinguishes—the holdings of other circuits that courts should consider a respondent's ability to pay and the effect an award will have on her capacity to care for her child. *Compare Whallon v. Lynn*, 256 F.3d 138, 140 (1st Cir. 2004); *Rydder v. Rydder*, 49 F.3d 369, 373–74 (8th Cir. 1995), *with* Answering Br. at 54–56. And he flips the facts of the only authority he invokes. Nor does Mr. Colchester have anything to say about the Second Circuit's warning that awarding expenses against a victim of domestic violence is an abuse of discretion without countervailing equities. *See Souratgar v. Lee Jen Fair*, 818 F.3d 72, 80–82 (2d Cir. 2016).

His argument turns on this Court's decision in *Cuellar v. Joyce*, 603 F.3d 1142 (9th Cir. 2010), claiming that the court rejected a fee

[8] Mr. Colchester cites the prior codification of the Act at 42 U.S.C. § 11607(b)(3). Answering Br. at 54. The correct authority on expenses under the Act is at 22 U.S.C. § 9007(b)(3).

challenge "simply based on one party's inability to pay those fees or because a party had *pro bono* counsel." Answering Br. at 55. This reading is wrong.

Cuellar said nothing about a respondent's ability to pay an award of expenses. Instead, it was the *petitioning parent* who "live[d] in poverty" and depended on pro bono counsel. *Cuellar*, 603 F.3d at 1143. *Cuellar* explained that, but for the efforts of the pro bono lawyers, the respondent's abduction attempt "most likely would have succeeded" and that awarding attorneys' fees would "encourage other lawyers to advance legal services to impecunious clients in the expectation that they will be compensated if successful." *Id.*

Nothing of the sort happened here. In fact, Ms. Lazaro—not Mr. Colchester—has had to rely on pro bono counsel, and her inability to pay the district court's award is beyond serious dispute. *See* Opening Br. at 53; 2-ER-43–44.

Putting Ms. Lazaro in debt for life[9] will help neither Mr. Colchester nor S.L.C. Doing so will also overburden a victim of

[9] *See In re Weed*, 479 B.R. 533, 536–39, 544 (Bankr. D. Minn. 2012) (holding that awards under the Act are not dischargeable in

domestic violence and compromise her ability to care for her child—both of which other courts have concluded are improper. And so this Court should reverse the award.

G. Because this Court did not order S.L.C.'s return, the Act does not authorize it to award Mr. Colchester fees on appeal.

Finally, Mr. Colchester—seemingly unsatisfied with an uncollectable $115,000 award—now asks for more. In two sentences, again relying on *Cuellar*, Mr. Colchester contends that this Court "has held that an award of fees and costs on appeal is appropriate under the Convention and ICARA." Answering Br. at 56. Not so here.

The Act authorizes the court "ordering the return of a child" to award expenses. 22 U.S.C. § 9007(b)(3); *see also Hollis v. O'Driscoll*, 739 F.3d 108, 113 (2d Cir. 2014) (explaining that, after an affirmance of an order of return on appeal, the district court should determine any fees appropriate in the first instance).

Indeed, *West v. Dobrev*—a decision Mr. Colchester cites—declined a petitioner's request for fees for defending the respondent's appeal. 735

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bankruptcy); *see also In re Coe*, 2017 WL 5054312, at *3 (Bankr. E.D. Va. Nov. 2, 2017) (same).

F.3d at 931 n.9. Like Mr. Colchester, the petitioner there failed to explain whether or how the appellate court was one "ordering the return of a child." *See id.*

Cuellar is not to the contrary. There, this Court—not the trial court—ordered the child's return after reversing the district court. *See Cuellar*, 603 F.3d at 1143; *Cuellar v. Joyce*, 596 F.3d 505, 512 (9th Cir. 2010).

Nor would an award of more expenses by this Court or the district court conform with the equitable principles discussed above and in the Opening Brief. Ms. Lazaro cannot afford to pay more. And she should not have to pay for an appeal aimed at securing her the fair trial she should have gotten from the start. She thus asks this Court to deny Mr. Colchester's request.

CONCLUSION

For these reasons and those in her principal brief, Ms. Lazaro asks the Court to reverse the judgment below, remand with instructions to allow discovery and a psychological evaluation of the child, and award Ms. Lazaro her costs on appeal. The Court should also deny Mr. Colchester's request for more fees.

Date: June 28, 2021

Respectfully submitted,

s/Aaron P. Brecher

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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