No. 21-825

# 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*

## RESPONDENT'S RESPONSE TO PETITIONER'S MOTION TO SCHEDULE PARALLEL ORAL ARGUMENT AND BRIEFING WITH GOLAN v. SAADA OR, IN THE ALTERNATIVE, TO DEFER CONSIDERATION OF PETITION UNTIL CONCLUSION OF GOLAN v. SAADA

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## INTRODUCTION

Petitioner Shon abducted her and Respondent Radu's minor children from Germany more than two years ago. Radu has not so much as spoken with his children since November 2019, although the district court has now twice granted his petition under the Hague Convention on the Civil Aspects of International Child Abduction and ordered their immediate return to Germany.

The Hague Convention requires return of a child to his or her country of habitual residence unless there is a grave risk that the return would expose the child to physical or psychological harm. *Hague Convention*, Art. 13(b). The Ninth Circuit below ruled that "the facts here do seem to be a borderline case whether" a finding of grave risk "is warranted," but remanded for the district court to consider whether its proposed conditions on the children's return to Germany (*i.e.*, that they remain temporarily in Shon's custody) would mitigate any such risk pending a German court's final custody ruling. *Radu v. Shon*, 11 F.4th 1080, 1089 (9th Cir. 2021). Shon petitioned this Court for review of this decision but did not request the Ninth Circuit stay its mandate. The district court has since reassumed jurisdiction, conducted a further evidentiary hearing, and issued a new superseding order directing the children to return to Germany in Shon's custody. App. 44-55. Shon has not appealed the order.

This case is not ripe for the Court's review, and the Court should therefore deny both the request to schedule argument with *Golan v. Saada*, No. 20-1034, and to hold the petition.

## I. THE COURT SHOULD DENY THE REQUEST TO SCHEDULE PARALLEL ARGUMENTS OR HOLD THE PETITION BECAUSE THIS CASE IS NOT RIPE FOR REVIEW

The Court should not schedule argument or hold the petition because the case is not ripe. As discussed, Shon failed to stay the mandate of the Ninth Circuit; that court remanded to the district court, which conducted a further evidentiary hearing and issued a new superseding decision; and Shon has not yet appealed that new decision.

1. "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam). The Court's usual practice in such circumstances is to deny the petition outright, not schedule it for argument or hold it pending further developments in the lower courts. *See Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J., statement respecting denial of certiorari) ("The Court of Appeals remanded the case to the District Court to fashion an appropriate remedy . . . . Because no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take, I agree with the Court's decision to deny the petitions for certiorari."); *Va.*

*Mil. Inst. v. U.S.*, 508 U.S. 946 (1993) (Scalia, J., statement respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

2. Shon has submitted the new district court decision in a supplemental appendix, suggesting that the Court will simply consider the questions presented in the petition based on whatever record exists in the lower courts as of that time. App. 44-55. But the Court does not typically review district court orders without the benefit of intermediate appellate review. *See* Stephen M. Shapiro et al., Supreme Court Practice § 2.4 (11th ed. 2019) (quoting *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers)). And Shon has not even attempted to argue for such review directly or to comply with the Court's procedural requirements. This relief is available only where the petitioner has noticed an appeal to the regional circuit court. *See id*. (citing *Gay v. Ruff*, 292 U.S. 25, 30 (1934)), and Shon has not done so. Moreover, immediate review is available "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." U.S. Sup. Ct. R. 11. Shon has not argued such a circumstance exists here, and it does not. The only timing imperative is the Hague Convention instruction "to 'use the most expeditious procedures available' to return the child to her habitual residence." *Monasky v. Taglieri*, 140 S. Ct. 719, 724 (2020) (citing Art. 2, Treaty

Doc., at 7; Art. 11, *id*., at 9). But Shon has not sought to expedite any of the lower court proceedings in this case, and this Court assumes "that the Court of Appeals will proceed expeditiously" where there is such an imperative. Stephen M. Shapiro et al., Supreme Court Practice § 4.20 (11th ed. 2019).

3. For similar reasons, the Court should not hold the petition pending the outcome of the *Golan* matter. This case is not properly before the Court—there is a new district court judgment and ongoing proceedings in the lower courts. The Court should instead simply deny the petition.

## II. GOLAN IS A SUPERIOR VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED

Shon's petition seeks review of two questions. The first is identical to *Golan*: after finding that return to the country of habitual residence would expose a child to grave risk, is a district court required to consider ameliorative measures to effectuate return while mitigating that risk, or must it simply deny return altogether? Pet. at i. *Golan* is a sufficient vehicle for the Court to address that question, and, given the incomplete record in this case, a superior one.

The second question is: assuming the district court must consider ameliorative measures, which party (if any) bears the burden of proof to establish the adequacy of such measures? *Id.* Shon rests the argument for consolidation on the addition of this question. But this case is no longer a proper vehicle to present

it. This Court seldom grants review where the question presented would have no effect on "the ultimate outcome of the case." Stephen M. Shapiro et al., Supreme Court Practice §4.4(F) (11th ed. 2019). That is the situation here. Before the Ninth Circuit, Shon argued that Radu as the Hague Convention petitioner must prove the adequacy of the conditions imposed on return, and that Radu had failed to meet this burden. *Radu*, 11 F.4th at 1089. But on remand, the district court conducted a full evidentiary hearing concerning its proposed conditions for return. There is thus no longer any arguable failure of proof, and the assignment of an evidentiary burden to one party or another would have no effect on the ultimate outcome. Moreover, to the extent the Court rules in *Golan* that the district court must consider ameliorative measures, it may also give guidance as to the appropriate proof structure.

## CONCLUSION

For the foregoing reasons, the Court should deny the motion.

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