**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

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction requires a court to return an abducted child to his state of habitual residence unless it finds that an exception applies; such exceptions include a finding under Article 13(b) that return would pose a grave risk of physical or psychological harm to the child. The questions presented are:

(1) Whether, upon a finding of grave risk, a district court must consider ameliorative measures to facilitate the safe return of the child to his state of habitual residence, or is merely permitted in its discretion to do so; and

(2) Whether, upon a finding of grave risk, a Hague Convention petitioner bears an evidentiary burden to prove that the district court's proposed measures are sufficient to ameliorate the risk.

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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 and ordered their immediate return to Germany.

This case is a poor vehicle to consider the questions presented, and instead typifies the purposeful delays that have plagued litigation in this area and undermined the effectiveness of the Convention. Shon originally sought review of the Ninth Circuit's decision vacating and remanding the district court's original order, which directed the children to return to Germany in her custody pending a final custody ruling by a German court. Since the Ninth Circuit decision, however, the district court has reassumed jurisdiction, conducted a further evidentiary hearing, and issued a new judgment now on appeal before the Ninth Circuit.

Direct review of a district court's judgment while an appeal is pending before a regional Circuit is uncommon in and of itself. But here, Shon also asks the Court to review issues that will not affect the ultimate outcome of the case. The first question presented asks whether, after a district court finds that a Hague Convention respondent has sustained an Article 13(b) defense, it must still consider ordering a child's return to her home country

by imposing conditions to protect her safety, or if instead the district court has discretion to deny return outright without conducting that inquiry. *Golan v. Saada*, the case in which the Court has already granted review of that question, is a sufficient and superior vehicle to consider it. Here, there is nothing in the record to indicate that the remedy that the district court ordered turned on this question. The district court found (and the Ninth Circuit agreed) that Shon had presented only a "borderline" Article 13(b) defense. And on remand, the district court expressed doubt that it had applied the law properly in sustaining that defense. Rather than consider whether return posed a grave risk of psychological harm to the children during the brief period before the German court rules on custody, the district court had considered the psychological harm that might result *over the long term* if it returned the children to Germany *in the sole custody of Radu*. Nothing indicates that the district court ordered return to Germany only because the law compelled it to consider ameliorative measures, or that the court would reverse itself and deny return to Germany outright if it had the discretion to forego consideration of ameliorative measures altogether.

The second question presented asks whether the Hague Convention petitioner should bear an evidentiary burden to prove that the proposed con-

ditions for return of the child are sufficient to ameliorate the Article 13(b) risk found by the district court. The answer to that question similarly will not affect the outcome in this case. After the Ninth Circuit remanded, the district court conducted a further evidentiary hearing on the question of whether its proposed conditions on return would be effective. There is now no arguable failure of proof on that question, regardless of which party (if any) bears the burden.

The Court should deny the petition.

## STATEMENT OF THE CASE

### Relevant Facts

Radu and Shon married in 2011 in the United States. Pet. App. 20.[1] Their older son, O.S.R., was born in the United States in 2013 and their younger child, M.S.R., was born in Germany in 2016. *Id.* The family lived in Germany from 2016 to 2019. *Id.* Shon conceded that when she removed the children to the United States, Germany was the children's country of habitual residence, and that Shon and Radu shared joint custody there. *Id.* at 21-22. On June 10, 2019, Shon and the children flew to Tucson, Arizona, *id.* at 20, for a purportedly temporary visit with the children's maternal grandparents. C.A. E.R. 268. Shon and the children had made a similar trip in 2017 that lasted two months. *Id.* at 268-269. When Shon and the children left Germany, they did not bring the children's toys, clothing, or other possessions. *Id.* at 269. Instead, they brought luggage for a brief trip overseas. *Id.* at 295-96.

During the summer of 2019, Shon revealed a plan to keep the children in the United States. She

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[1] References to "Pet. App." are to the Appendix included with Shon's Petition. References to "C.A. E.R." are to the ER pages of the Excerpts of Record filed in the Ninth Circuit (Case No. 20-17022, Dkt. 15), and references to "C.A. Supp. E.R." are to the SER pages of the Supplemental Excerpts of Record filed in the Ninth Circuit (Case No. 20-17022, Dkt. 53).

wrote to Radu and informed him that "[a]t the moment I've decided to stay here [in Arizona]." *Id.* at 272. That August, Shon revealed to Radu that she had enrolled the children in school in Tucson and that she intended to remain there with the children. *Id.* Radu did not consent. *Id.* Since this abduction, Shon has prevented Radu from speaking to his children on the phone, and Radu has seen only two grainy pictures of them. *Id.* at 72.

Radu made numerous attempts to secure the children's safe return to Germany, including reporting the abduction to the Tucson Police Department, and contacting the FBI Field Office in Tucson, the U.S. State Department Overseas Abduction of Children Prevention Division, and the U.S. Consulate in Frankfurt, Germany. C.A. E.R. 275-76; C.A. Supp. E.R. 34-44. Radu also filed a Request for Return with the German Central Authority. C.A. Supp. E.R. 36-44.

When these efforts proved unsuccessful, Radu petitioned the district court for the return of the children to Germany under the Hague Convention and the International Child Abduction Remedies Act ("ICARA"), arguing that Shon had wrongfully removed and retained the children in the United States. C.A. E.R. 367-73.

**The Hague Convention**

The Hague Convention, Article 1 sets forth its objectives: "a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." The Convention thus prioritizes the prompt return of wrongfully removed children to their state of habitual residence.

The Convention rests on three related concepts: (1) removal or abduction of a child from his or her home country is wrongful, (2) such removal or abduction harms the child, and (3) the child's home country is in the best position to rule on the merits of a custody dispute. *See* Jeremy D. Morley, *The Hague Abduction Convention* 10-11, ABA (2d ed. 2016). Accordingly, "[t]he Hague Convention seeks to deter parents from abducting their children across national borders by limiting the main incentive for international abduction—the forum shopping of custody disputes." *Cuellar v. Joyce*, 596 F.3d 505, 508 (9th Cir. 2010) (citing *Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir. 2001)). The Convention's primary goal is thus the return of the child. *See Abbott v. Abbott*, 560 U.S. 1, 9 (2010) ("The Convention's central operating feature is the return remedy"); *Baxter v. Baxter*, 423 F.3d 363, 367 (3d Cir. 2005) (Convention procedures are designed "to

restore the status quo prior to any wrongful removal or retention . . .").

The Convention's objectives are premised on international comity: "[t]he careful and thorough fulfillment of our treaty obligations stands not only to protect children abducted to the United States, but also to protect American children abducted to other nations—whose courts, under the legal regime created by this treaty, are expected to offer reciprocal protection." *Blondin v. Dubois*, 189 F.3d 240, 242 (2d Cir. 1999). These objectives are realized only if judges display faithfulness to this principle: "[t]he Convention requires judges to be brave enough to implement its terms even in the face of concerns that a return order might not be in the child's best interests." *See* Jeremy D. Morley, *The Hague Abduction Convention* 2.

There are currently 89 states that are contracting parties to the Hague Convention. Hague Convention, HCCH Members, https://www.hcch.net/en/states/hcch-members. But the Convention is not in force as among all of them, as it provides that a country's adoption of the Convention will have effect only as to contracting parties that formally accept that country as a new member. Hague Convention, Art. 38. The United States has implemented its obligations under the Convention through ICARA. Under ICARA, the U.S. State Department accepts a country as an eligible partner only if it is satisfied that the country

can adequately protect returned children. *Id*. The State Department reviews each new signatory's domestic legal and administrative systems to determine both whether it will cooperate with the United States to ensure the prompt return of abducted American children and whether it will observe a U.S. court's order on interim remedies. *See* Jeremy D. Morley, *The Hague Abduction Convention* 2. For example, The United States did not accept Belarus's accession to the Convention because the "basic principles of Belarusian legislation in regard to family relations and child protection have not substantially changed since the mid-1960's." S. Comm. Prt. No. 106-76, Hague Convention on International Child Abduction: Applicable Law and Institutional Framework Within Certain Convention Countries, 106th Cong., at 21 (2d Sess. Oct. 2000), https://www.govinfo.gov/content/pkg/CPRT-106SPRT70663/html/CPRT-106SPRT70663.htm. Congress also observed that the Belarusian judiciary was unlikely to respect a U.S. court's order, as it "continues to reject foreign decisions and international legal acts in favor of traditional domestic laws." *Id*. at 25. Likewise, the United States delayed accepting Pakistan's accession to the Convention until just last year, when the State Department was satisfied that Pakistan would act to return abducted American children.

By contrast, the State Department has recognized Germany since its accession in 1990. *See*

U.S. Dep't of State, U.S. Hague Convention Treaty Partners, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/hague-abduction-country-list.html; *see also* Hague Convention, Status Table, https://www.hcch.net/en/instruments/conventions/status-table/?cid=24.

**The Grave Risk Defense and the Use of Ameliorative Measures**

Article 13(b) of the Convention provides an exception to the court's obligation to return an abducted child to his state of habitual residence. It provides that "the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that . . . (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Hague Convention, Art. 13(b).

Courts and academics alike warn that overuse of the grave risk exception would swallow the treaty entirely. "[A] systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration." Elisa Pérez-Vera, Explanatory Report: Hague Conference on

Private International Law, in Acts and Documents of the Fourteenth Session (1980), 426-76 (1982), ¶ 34, https://www.hcch.net/en/publications-and-studies/details4/?pid=2779; *Blondin*, 189 F.3d at 246. The State Department has similarly instructed that the grave risk exception "was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests." Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494 (1984).

Even if a court finds that return would pose a grave risk of harm, Article 13(b) allows the court to order a child's return pursuant to an interim remedy or undertaking. "An undertaking is a voluntary promise, commitment or assurance given by a natural person—in general, the left-behind parent—to a court to do, or not to do, certain things. Courts in certain jurisdictions will accept, or even require, undertakings from the left-behind parent in relation to the return of a child." HCCH Permanent Bureau, *Revised draft Guide to Good Practice on Article 13(1)(b) of the 1980 Convention* (Mar. 2019), at 8, https://assets.hcch.net/docs/1e6f828a-4120-47b7-83ac-a11852f77128.pdf. The Ninth Circuit requires a district court that finds the grave risk defense applies to at least consider undertakings that would allow it to order a safe return. *Gaudin v. Remis*, 415 F.3d 1028, 1037 (9th Cir. 2005).

**Procedural History**

The district conducted its first evidentiary hearings on July 29, 2020 and August 26-27, 2020. Pet. App. 19-20. Shon raised two defenses to the children's return: that the children had already permanently settled in Arizona (the "well-settled" defense of Article 12), and that return posed a grave risk of harm to the children (the "grave risk" defense of Article 13). *Id.* at 22-23. The court decided through a motion *in limine* that it would hear evidence only "as to the substantial harm issue, not the well-established [defense]." C.A. E.R. 91.

The parties presented conflicting testimony as to the alleged risks of harm from return. Shon called several witnesses who testified to the effect that Radu shouted at her or the children on several occasions. Shon testified, for example, that at times, when angered, Radu would "slam on the table," "clench[] his fists," "point his fingers," and that he would speak "rhythmic or really forceful." *Id.* at 184. Shon also testified that Radu had yelled at O.S.R. after Shon had tripped over a stool that O.S.R. had left out, and for crying during a meal. *Id.* at 184-85, 191. Shon testified she did not recall if Radu had ever become physical with O.S.R., though later changed her testimony to state that Radu "slapped" O.S.R. one time. *Id.* at 180, 193. The couple's landlord in Germany testified that she heard yelling from time to time, though she was

never present in the apartment to witness it directly. *Id.* at 132-33. Shon's therapist, Mikels-Romero, testified that she met with O.S.R. four times. *Id.* at 151. She rejected counsel's attempt to classify O.S.R. as suffering from "post-traumatic stress disorder," and instead testified that O.S.R. has had "very brief" dissociative episodes. *Id.* Mikels-Romero testified that O.S.R. said Radu had "yelled and said mean words and mean things, such as 'stupid,'" and had yelled at M.S.R but also that O.S.R. told her that his father "was nice [and] would play with him." *Id.* at 152, 154. None of the witnesses testified that they had ever reported any incident to the police, child protective services, or any other authority. Pet. App. 25; C.A. E.R. 102, 130, 161, 236-37.

For his part, Radu admitted that he may have used words like "stupid" "in the heat of passion . . . a couple of times," but that he did not do it with any intention to "put them down." C.A. E.R. 63. He denied the accusations of more severe conduct. *Id.* at 60-63. And with respect to outbursts, Radu also testified "I do regret it, looking in perspective right now. Maybe I should have used a different tone [of] voice or a different type of—better approach in managing my children." *Id.* at 63.

Radu also testified that he is affectionate with his children. *Id.* "I think I have been a good parent and a loving parent." *Id.* "They're my children. I love them. Especially I love to play with them in

the house, and go outside to the dinosaur park . . . ." *Id.* at 64. Radu further testified, "I wasn't like a total ice block type parent. That couldn't be further from the truth." *Id.* Radu testified that at times he "overreacted to things," but that he had "learned a lot and [is] still learning." *Id.* Radu testified that "[t]he children would never be in any kind of emotional risk if they were to return to Germany." *Id.* at 65. "As a matter of fact," he said, "I miss them a lot. I haven't seen them in 14 months . . . ." *Id.*

Radu's counsel argued that even if the district court did find that a grave risk of harm existed, an appropriate remedy would be for the court to "order the children to be returned [to Germany] with Mr. Radu not to assume physical custody of the children." *Id.* at 41, 45. Radu likewise testified that he would obey any restrictions the court placed on him. *Id.* at 66.

Radu also testified to the feasibility of the children's return. He testified that there were individuals residing in Germany whom the children could live with if Shon were unwilling to travel, including Shon's best friend, Andrea Zwilling, as well as some of Shon's American friends residing in Germany. *Id.* at 66-67. Radu represented to the court that he would personally pay for the children's airfare to return. The record also reflects Shon's access to substantial financial resources for reestablishing the children's residence in Germany. Shon

testified to facts showing that her parents had routinely provided financial assistance in the past at her request, including: allowing Shon, Radu, and O.S.R. to live in their South Lake Tahoe home for three years (*id.* at 101), paying for flights from Germany to Arizona (*id.* at 207-08), and renting a second apartment in Shon and Radu's apartment building in Germany for three weeks after the birth of M.S.R. to help with childcare (*id.* at 174-75). Shon testified that she had friends in Germany (*id.* at 196, 198, 215) and that she had been a member of the board of directors of Mom2Mom KMC, a breastfeeding support group serving the U.S. military base (*id.* at 183). Shon did not put on contrary evidence at the hearing that she lacked financial means to return the children to Germany. Shon raised this issue only as a reason to deny Radu's motion for attorney fees. C.A. Supp. E.R. 30.

On September 16, 2020, the district court granted Radu's petition and ordered that Shon return the children to Germany. Pet. App. 26-27. The court found that "[t]he evidence [was] insufficient to show that [the children] would be at grave risk of physical harm if returned to Germany." *Id.* at 25. There was "no evidence that Radu hit either of the minor children in a manner that required medical attention, nor [was] there any evidence that Shon or anyone else sought a protective order or filed any police reports concerning Radu's behav-

ior toward the children." *Id.* To mitigate any psychological risk to the children, however, the court ordered that "O.S.R. and M.S.R. be returned to Germany in the custody of Shon until a custody determination can be made by a German court of competent jurisdiction." *Id.* at 26. The court also offered to conduct a hearing on the logistics of the children's return. *Id.*

Shon appealed to the Ninth Circuit requesting review of one issue: "Did the lower court err in ordering the 'alternative remedy' of returning the children to Germany in the custody of the Mother, rather than denying the petition for return?" The Ninth Circuit held to the effect that the district court was not required to deny return; rather, the "question is simply whether any reasonable remedy can be forged that will permit the children to be returned to their home jurisdiction for a custody determination while avoiding the 'grave risk of psychological harm' . . . ." *Id.* at 9. The Ninth Circuit then set forth several factors a district court should consider in evaluating the adequacy of any ameliorative measures. *Id.* at 9-10.

Shon also argued that the Hague Convention petitioner should bear the burden of proving the adequacy of any proposed ameliorative measures. The Ninth Circuit declined to assign a burden of proof because "Congress is capable of assigning burdens of proof and has already done so under ICARA," and the Ninth Circuit "need not add judicial

constraints absent from ICARA or the Convention." *Id.* at 14-15 (citing 22 U.S.C. § 9003(e)(2)).

Applying its holdings to the facts here, the Ninth Circuit repeated the district court's observation that "the facts here do seem to be a borderline case whether an Article 13(b) finding is warranted." *Id.* Nevertheless, the court vacated the judgment because in its view the district court had not conducted adequate fact finding to determine whether the ameliorative measure ordered "has a high likelihood of performance through supportive reinforcements." *Id.*

Shon filed her petition for certiorari but did not move to stay the mandate. On remand, the district court conducted a further evidentiary hearing, which included testimony from both parents. The district court also contacted the U.S. State Department to discuss German child custody procedures and evaluate whether the German courts would recognize the district court order. The State Department contacted the German Central Authority who directed the court to Section 155 of the Act on Proceedings in Family Matters and Matters of Non-Contentious Jurisdiction, which states that "proceedings based upon endangerment of the best interests of the child, shall have priority" and "shall be handled in an expedited manner." *Id.* at 49. The German representative informed the State Department that youth welfare services are capable of monitoring and ensuring the welfare of children

"and can conduct home visits, apply to a court for restriction of custody rights of parents and transfer to a guardian, and, in urgent matters, take a child into custody before applying to the court." *Id.* at 49-50.

The district court made several findings regarding each party's ability to carry out its order. First, the district court found that "Shon's testimony concerning her limited financial means was not entirely credible, given Shon's employment, lifestyle, and ability to obtain financial support as needed to fund her lifestyle." *Id.* at 53. The record showed, for example, that Shon's parents are both retired and provide such support when asked, including paying for plane tickets, attorneys, and a $420,000 house for Shon and the children. The court further found that if Shon is unable to pay for airfare or rent in Germany, "Radu has committed to paying for the airfare of O.S.R. and M.S.R., as well as rent for a separate residence for Shon and the children until a custody determination can be made in Germany." *Id.* at 53-54.

The district court also "question[ed] why Shon has not attempted to ascertain whether any criminal proceedings are pending against her in Germany if she is concerned about that possibility—particularly since she hired a German lawyer for other purposes during the course of these proceedings." *Id.* at 54. Based on its findings, the district

court once again ordered the children's return to Germany in Shon's care.

The district court issued its new, superseding order after Shon petitioned for certiorari. *Id.* at 44-55. Two weeks later, Shon noticed a second appeal at the Ninth Circuit.

Shon's second appeal again asks the Ninth Circuit to review the adequacy of the ordered undertaking. Shon repeats her argument that the district court should not be required to consider return subject to ameliorative measures, but merely permitted to do so. Shon also repeats the argument that the Hague Convention petitioner should bear a burden to prove the adequacy of such measures. Because the district court has now developed the evidentiary record showing that its order will be effective, Shon suggests that Radu as the Hague Convention petitioner should bear the burden of proof on a long list of highly fact-bound and case-specific questions, some of which would require proving a negative. These include the arguments that Radu must prove to a certainty that:

- No criminal charges or investigations are pending against Shon anywhere in Germany;
- Shon's parents would travel to Germany to help with childcare;
- Shon's parents would continue to provide financial support;

- German child protection agencies would "ensure the wellbeing of the children";
- A German court will make a custody determination within six months.

The Ninth Circuit agreed to expedite briefing for the appeal based on Radu's unopposed request. But Shon later moved to hold the appeal in abeyance after briefing is complete, until this Court decides *Golan*.

**The Case's Relation to *Golan v. Saada***

The first question presented in Shon's petition is identical to that presented in *Golan*: Whether a district court must consider ameliorative measures to facilitate the return of the child to the state of habitual residence after a finding of grave risk under the Hague Convention.

In *Saada v. Golan*, the parties share one child, B.A.S., and previously lived together in Milan for the first two years of B.A.S.'s life. 833 F. App'x 829, 831 (2d. Cir. 2020). In July 2018, Golan traveled with B.A.S. to the United States for a wedding, where the two have remained since that time. *Id*. Saada's and Golan's relationship "was abusive almost from its inception." *Id*. The district court found that "Saada would yell, slap, hit, and push Golan," and that Saada would "call her names and pull her hair." *Id*. The district court further found that Saada "once threw a glass bottle at [Golan] and also threatened to kill her." *Id*. The court

found that the abuse occurred in B.A.S.'s presence. *Id*.

The district court found that B.A.S. faced a grave risk of harm if returned to Italy, because of the "severe effects" of Saada's abuse on B.A.S.'s psychological health. *Id*. The district court also determined that ameliorative measures could address that risk. *Id*. The court ordered Saada to stay away from Golan in Italy, to visit B.A.S. only with Golan's consent, and to pay Golan $30,000 to cover living expenses upon her return. *Id*.

The Second Circuit vacated and remanded because, in its view, ameliorative measures "must be either enforceable by the district court or supported by other sufficient guarantees of performance." *Id*. On remand, the district court communicated with Italian authorities and determined that the Italian courts could issue a protective order requiring Saada to stay away from Golan and to attend therapy. *Id*. The district court ordered the parties to obtain such a protective order and the parties complied. *Id*. at 832.

Golan again appealed the district court's order. The Second Circuit held that the "district court correctly concluded that there existed sufficiently guaranteed ameliorative measures that would remedy the grave risk of harm to B.A.S. upon his return to Italy" and that the district court had "properly granted Saada's petition." *Id*. at 834.

## REASONS FOR DENYING THE PETITION

### I. THIS CASE DOES NOT HAVE A FINAL JUDGMENT AND IS THEREFORE NOT READY FOR REVIEW.

Shon seeks review of the Ninth Circuit's decision in her first appeal, which vacated and remanded the case for further proceedings. But she did not move to stay the mandate, and the Ninth Circuit remanded to the district court, which then conducted a further evidentiary hearing and issued a new, superseding decision. Shon has noticed a second appeal and recently filed her opening brief. The Ninth Circuit is therefore yet to enter a final judgment.

Certiorari before judgment is "an extremely rare occurrence." *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers). The Court's usual practice in such circumstances is to deny the petition outright. *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.").

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 to this standard at all, let alone that this case is of "imperative public importance." And indeed, that circumstance does not exist here, particularly because the Court has already decided to hear the *Golan* case. The Court should therefore deny the petition and allow Shon's second appeal to proceed in the normal course.

## II. THIS CASE IS A POOR VEHICLE TO CONSIDER THE QUESTIONS PRESENTED AND IT WILL NOT AID THE COURT'S CONSIDERATION OF THE ISSUE PRESENTED IN *GOLAN*.

The Court may grant certiorari before judgment where it is desirable to review the questions presented simultaneously with another case before the Court. Stephen M. Shapiro et al., Supreme Court Practice § 2.4 (11th ed. 2019). The Court does so primarily where it is helpful to consider complicated questions in a "wider range of circumstances." *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 260 (2003) (race in university admissions); *U.S. v.*

*Booker*, 543 U.S. 220, 229 (2005) (sentencing guidelines); *Brown v. Bd. of Educ. of Topeka*, 344 U.S. 1, 3 (1952) (segregation in schools).[2]

This case will not aid the Court's consideration of the question presented in *Golan*. That question is purely legal, requiring the Court to examine whether the Hague Convention and ICARA require the district court to consider ameliorative measures, or merely permit it to do so. *Golan* is a sufficient vehicle for the Court to address that question because it turns on interpretation of the governing legal texts and not on variations in the fact patterns that arise in Hague Convention cases.

Moreover, to the extent that the Court disagrees, *Golan* still provides the superior vehicle, and this case does not add meaningfully to it. The facts in *Golan* provide a classic case of abuse giving rise to an Article 13(b) "grave risk" finding and court-ordered conditions on return. *See Saada*, 833 F. App'x at 831. Here, by contrast, the district court and Ninth Circuit found this to be "a borderline case" for an Article 13(b) defense. Pet. App. 14, 52. The district court on remand expressed doubts

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[2] The Court may also grant immediate review when the parties request that it hear two cases together. But neither party from *Golan* has asked the Court to hear this case. And Shon has withdrawn her request that the Court hear this case with *Golan*. Letter from Stephen J. Cullen, Counsel for Petitioner, to Scott S. Harris, Clerk of Supreme Court of the United States (Jan. 24, 2022).

about its original ruling, though it was not free to revisit it since Radu, through his district court counsel, elected not to cross-appeal. This predicate question about whether the Article 13(b) finding was even appropriate provides an irregular context in which to review the question presented, one that is not part of the "wider range of circumstances" that would be useful to consider because it is unlikely to recur in a future case. *Gratz*, 539 U.S. at 260.

The second question is also not adequately presented by this case. Given the further evidentiary hearing conducted by the district court, there is no arguable failure of proof on the issue of whether its conditions on return ameliorate the Article 13(b) risk—and therefore assigning a burden of proof to one party or another is of no consequence to the outcome here.[3]

Shon's new arguments at the Ninth Circuit on this issue illustrate the point. She contends that Radu should have borne the burden to prove the absence of criminal proceedings against Shon in all

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[3] The Ninth Circuit's ruling was also correct. It "decline[d] to allocate a burden of proof on the reasonableness of an alternative remedy." Pet. App. 14-15. It did so because "Congress is capable of assigning burdens of proof and has already done so under ICARA . . . . [T]he reasonableness of the remedy originates with the district court having authority to request any information from the parties. The district court is in the best position to assess a parent's willingness to respect court orders and craft the alternative remedy accordingly." *Id.*

of Germany, (*Radu v. Shon*, No. 22-15063, Dkt. 13-1 at *35-37 (9th Cir. Feb. 14, 2022)) while she herself made no attempt "to contact any German authorities to determine whether there is an arrest warrant or any proceedings against her." Pet. App. 47. Shon contends that there is no evidentiary basis to support the district court's conclusion that her parents would travel to Germany to assist with care, (*Radu*, No. 22-15063, Dkt. 13-1 at *33), when the record showed that the parents are both retired and provide support when asked, including paying for a $420,000 house for Shon and the children. Pet. App. 47. Shon suggests that the district court provided no means to enforce Radu's offers to pay for airfare and housing in Germany (*Radu*, No. 22-15063, Dkt. 13-1 at *38), but the district court expressly offered to conduct a hearing concerning those logistics, (Pet. App. 54), and Shon simply refused that offer in favor of taking a new appeal. These are all case-specific and fact-bound questions that the Court typically does not review at all, let alone while a regional Circuit appeal is still pending.

Shon's Ninth Circuit appeal also seeks review of several potentially dispositive issues wholly unrelated to the questions presented. At the Ninth Circuit Shon argues that the district court violated her Constitutional rights by engaging in ex parte communications with the U.S. State Department. Shon has requested that the Ninth Circuit order a

new evidentiary hearing "before a judge who has not been exposed to ex parte communications."[4,]

## III. THE OUTCOME OF THIS CASE WILL NOT BE AFFECTED BY THE RESOLUTION OF EITHER QUESTION PRESENTED.

The 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). The first question presented asks whether a court is *required* to consider ameliorative measures before denying a child's return to his state of habitual residence.

Neither Golan nor Shon has asked this Court to hold that once a court finds an Article 13(b) defense has merit, the Convention *prohibits* ordering the return of children to their country of habitual residence. In other words, even if this Court announces that a district court may deny return without considering ameliorative measures, a district court will still have the discretion to consider ordering return with such measures. Again, here

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[4] To the extent the Court wishes to consider the second question presented, it can do so in connection with *Golan*. U.S. Sup. Ct. R. 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.").

both the district court and the Ninth Circuit determined that this is a "borderline" case of "grave risk," and on remand, the district court stated that it had applied an incorrect standard to sustain the defense: "[t]he Court's prior Article 13(b) finding was based on the risk of psychological harm to O.S.R. and M.S.R. if the children were returned to Germany in the sole custody of Radu." Pet. App. 52.

The second question presented will also not affect the outcome of this case. As discussed above, the district court conducted a further evidentiary hearing mooting that issue. The new arguments Shon has presented to the Ninth Circuit on the burden of proof are intensively fact-bound. In essence, Shon's arguments acknowledge that even if this Court were to hold that a Hague Convention petitioner bears the burden to prove adequacy of ameliorative measures, she still cannot prevail unless the Ninth Circuit either adopts her further litany of case-specific proposed evidentiary rules, or finds that the district court engaged in improper ex parte communications. The case thus presents an exceedingly poor vehicle for considering the second question presented.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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