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IN THE SUPREME COURT OF THE UNITED STATES

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JEFFREY LEE CHAFIN, :

Petitioner : No. 11-1347

v. :

LYNNE HALES CHAFIN, :

- - - - - x

Washington, D.C.

Wednesday, December 5, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

MICHAEL E. MANELY, ESQ., Marietta, Georgia; on behalf of Petitioner.

NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

STEPHEN J. CULLEN, ESQ., Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 11-1347, Chafin v. Chafin.

Mr. Manely.

ORAL ARGUMENT OF MICHAEL E. MANELY

ON BEHALF OF THE PETITIONER

MR. MANELY: Mr. Chief Justice, and may it please the Court:

United States courts have the power to effectuate relief in the Hague Convention cases under circumstances presented here in this international treaty.

Sergeant First Class -- First Class Chafin's appeal from the district court's decision is not moot because reversal of the district court's judgment could grant Sergeant Chafin relief in three ways, each sufficient to preclude mootness.

First, a reversal would mean that the United States is the child's habitual residence; second, the district court or court of appeals should order Ms. Chafin to bring the child back to the United States and overturn the monetary award; and, third, it would effectuate relief in the ongoing Alabama case and the Scottish case by, one, letting Alabama courts proceed to

1 determine custody and, two, cause the Scottish court to
2 stay or dismiss its proceeding.

3 JUSTICE GINSBURG: Why would it make any
4 difference? Once the decision, the district court
5 decision is vacated, then the State court can go
6 forward. There is nothing that inhibits it from doing
7 so. There is no Federal court order.

8 So your third point, I think, is --

9 MR. MANELY: Yes, Your Honor. Under the
10 UCCJEA, which is what the State of Alabama would use,
11 there is a home State requirement that the child must be
12 presently -- six months before the action is commenced.

13 Not so much from the district court order,
14 but coming down from the Alabama Supreme Court, but
15 premised upon the original district court order, it was
16 determined that Alabama was not the home State of the
17 child.

18 So it's sort of like the traffic light that
19 we talk about in our brief. It would allow the Alabama
20 courts to say --

21 JUSTICE GINSBURG: Now, I don't understand
22 that. The child is now in Scotland.

23 MR. MANELY: Yes.

24 JUSTICE GINSBURG: So how would these six
25 months be satisfied?

1 MR. MANELY: It would toll because the
2 child, we would argue, is wrongfully in Scotland based
3 upon an errant district court --

4 JUSTICE GINSBURG: But you can argue that on
5 the basis of the vacation of the district court's Hague
6 Convention order. You -- you're not inhibited by
7 anything, as far as I can see, that the Federal court
8 has done. Since it's been vacated, it's as though it
9 never happened.

10 MR. MANELY: Except for the fact that there
11 is an error in the determination of habitual residence.

12 And I understand what you're saying, but
13 the -- the res of the controversy needs to be brought
14 back here. That -- that would be the appropriate remedy
15 here, so that we have not only the habitual court -- or
16 habitual residence determination in the district court
17 because of reversal, but that we have the child brought
18 back here. And then that six --

19 JUSTICE GINSBURG: But you don't have -- you
20 don't have the individual -- the residence -- habitual
21 residence determination because it's been wiped out.

22 MR. MANELY: Yes, Your Honor. I understand.

23 What our argument is, is that there is an
24 ability to grant a remedy here, and that is the reversal
25 of that determination, so that we go back to habitual

1 residence in the United States. That's what avoids
2 mootness in this case. There is a remedy that can be
3 provided here. It is not impossible.

4 JUSTICE SCALIA: Wouldn't the Alabama --

5 JUSTICE SOTOMAYOR: What you're saying is
6 the return of the child essentially back to Alabama.

7 MR. MANELY: Bring the child back. Yes,
8 Your Honor.

9 JUSTICE SOTOMAYOR: And so once the child is
10 back in Alabama, that's the remedy, then the State court
11 would be seized of jurisdiction sufficient then to
12 determine the habitual residence.

13 MR. MANELY: Yes, Your Honor.

14 JUSTICE SOTOMAYOR: Whatever the State --
15 well, presumably the child only comes back if you win.

16 MR. MANELY: Yes.

17 JUSTICE SOTOMAYOR: So presuming you win,
18 the child would come back, and the Alabama courts could
19 then seize the custody determination.

20 MR. MANELY: Right. Proceed under --

21 JUSTICE SCALIA: And the Alabama court would
22 not have jurisdiction if the child had been wrongfully
23 removed?

24 MR. MANELY: The Alabama --

25 JUSTICE SCALIA: Is that what you're saying?

1 MR. MANELY: No. The Alabama court would
2 have jurisdiction under the UCCJEA presently, unless
3 this Court should determine that it is moot when a child
4 is removed from the boundaries of our -- of our nation.
5 The Alabama --

6 JUSTICE SCALIA: Wait, wait, wait. The
7 opinion below has been vacated.

8 MR. MANELY: Yes, sir.

9 JUSTICE SCALIA: So there's -- there's
10 nothing which says that this child -- this child's
11 habitual residence was -- was in the U.K.

12 MR. MANELY: Yes, sir. Yes, Your Honor.

13 JUSTICE SCALIA: That being the case, the
14 only question is will the Alabama court proceed, even --
15 assuming that it finds the child's habitual residence
16 was in Alabama, would it proceed even if the child had
17 been taken out of the jurisdiction, and I understand
18 that it would.

19 MR. MANELY: If there never had been a
20 district court determination in the first place,
21 certainly --

22 JUSTICE SCALIA: There hasn't been. There
23 hasn't been. It's been vacated. It's as though it
24 never happened.

25 MR. MANELY: The posture below is that the

1 Eleventh Circuit vacated the opinion in February; but,
2 as recently as July of this year, the Alabama Supreme
3 Court said, well, since the matter was determined moot,
4 then only the divorce can proceed.

5 What we hope to do is, by going back down to
6 the Eleventh Circuit, obtaining a reversal --

7 JUSTICE SCALIA: Well, that's bad law. I
8 mean -- you mean the Alabama court is bound by a vacated
9 decision of a Federal court? My goodness, I never heard
10 of anything like that.

11 MR. MANELY: Yes, sir. It goes --

12 JUSTICE SOTOMAYOR: Was their reasoning that
13 the child was initially removed properly because there
14 had been an order permitting the mother to go?

15 MR. MANELY: Yes.

16 JUSTICE SOTOMAYOR: So it was a lawful
17 removal at that moment.

18 MR. MANELY: At that moment, yes. And by --

19 JUSTICE SOTOMAYOR: And what they're saying
20 is, since the case is moot, nothing has vacated the
21 order, but it didn't make her action illegal?

22 MR. MANELY: Correct. And by reversing,
23 then we're going back to what was argued to make the
24 case moot in the first place. We can bring the child
25 back, and we'll reverse --

1 JUSTICE GINSBURG: When you say bring the
2 child back, there's an impediment to that because now
3 this court in Scotland has told her don't -- the child
4 stays here. There's an order that the child not be
5 removed from Scotland, and there is also -- doesn't the
6 mother have -- wasn't this mother deported?

7 MR. MANELY: The mother --

8 JUSTICE GINSBURG: So if she -- she -- if
9 she -- the mother comes back into the United States,
10 she's committing a criminal offense.

11 MR. MANELY: Yes, Your Honor. Absent -- and
12 she was present at the trial in the district court. So
13 there are provisions that would allow her to return for
14 that particular reason. And, of course, she can
15 reapply, I think, after something like five years. She
16 was deported because she had overstayed her visa.

17 But --

18 JUSTICE GINSBURG: But what about the order
19 of the court in Scotland?

20 MR. MANELY: The order of the court in
21 Scotland, we would refer to on a State level as being a
22 standing order. And what it does is tell Sergeant First
23 Class Chafin that he can't remove the child. There is
24 no prohibition to the mother. There is no sense that
25 Scotland has assumed authority over this child, should

1 become a ward of the country.

2 It's more that since the mother has filed a
3 custody action there, it's a, Dad, you can't remove the
4 child from Scotland.

5 JUSTICE SOTOMAYOR: It's a stand-still order
6 there.

7 MR. MANELY: Yes.

8 JUSTICE GINSBURG: How long has the child
9 been -- now since the return pursuant to the Federal
10 court's order, how long has the child been residing in
11 Scotland?

12 MR. MANELY: October 13th of last year, I
13 believe, so approximately 14 months now.

14 JUSTICE ALITO: What if the Alabama courts
15 were to conduct a custody proceeding? Since the child
16 has now been in Scotland for over a year, would they
17 consider the child's habitual residence to be Scotland?

18 MR. MANELY: The Alabama courts --

19 JUSTICE ALITO: And if they did that,
20 wouldn't they defer to the Scottish courts for custody
21 determination?

22 MR. MANELY: No, Your Honor, I don't think
23 so.

24 Again, applying UCCJEA, which all of the
25 States have but for one, they are to look at Hague

1 orders in the same way that they would apply UCCJEA, and
2 there is a tolling provision. If a child has been
3 wrongfully removed from that jurisdiction, then the
4 child is still presumed to have retained a home State
5 status with Alabama.

6 JUSTICE SOTOMAYOR: Counsel, there is a
7 judgment against your client, isn't there, for \$94,000
8 or so?

9 MR. MANELY: Yes, Your Honor.

10 JUSTICE SOTOMAYOR: Could you break down
11 that figure?

12 MR. MANELY: The lion's share of it is
13 attorney's fees, but, also, within the Hague, there is a
14 mandatory provision for costs; not just costs of court,
15 but the costs of mother's flying over here from
16 Scotland, staying here for approximately a week and a
17 rental car.

18 So while that isn't the predominant share of
19 the \$94,000, it was a substantial portion of that.

20 JUSTICE SOTOMAYOR: So --

21 JUSTICE KENNEDY: So have the State
22 proceedings been dismissed? Or are they in suspense?

23 MR. MANELY: Neither, Your Honor. Where
24 they are is the trial level court is waiting to grant a
25 divorce, but that is kind of effectively held up by the

1 parties in hoping that we can use Alabama Rule of Civil
2 Procedure 60(b)(5); that if we get a reversal from the
3 Eleventh Circuit saying habitual residence is the United
4 States, we can reopen the custody matter.

5 JUSTICE KENNEDY: So it would be your
6 position that the Alabama courts still have jurisdiction
7 over the child and the mother?

8 MR. MANELY: Certainly, if the Eleventh
9 Circuit reverses, yes, sir. Yes, Your Honor.

10 JUSTICE SOTOMAYOR: Counsel, that cost that
11 you have to pay for the mother, even though the case was
12 mooted, that judgment is still outstanding for the
13 moneys you have to pay?

14 MR. MANELY: It still is, Your Honor.

15 JUSTICE SOTOMAYOR: If you win on this
16 appeal, is that wiped out?

17 MR. MANELY: We believe that it is.

18 The energy of our case is thrust into having
19 habitual residence determination reversed and bringing
20 the child back; but, we think that when -- the provision
21 of ICARA that allows for the costs, the travel costs and
22 the attorney's fees to be awarded, is also obliterated.
23 So that is also --

24 JUSTICE GINSBURG: Is that done in a
25 separate judgment? The --

1 MR. MANELY: It's a separate order, same
2 case.

3 JUSTICE GINSBURG: And is there any problem
4 about the time to appeal from that having run?

5 MR. MANELY: We don't think so, but, again,
6 that's not the thrust of our case. I understand the
7 government's argument, and we certainly agree with that.
8 Our energy all along has been spent exclusively on
9 reversing habitual residence determination.

10 JUSTICE GINSBURG: But as far as mootness is
11 concerned, if you have not appealed from that order and
12 the time has run from your appeal, you can't rely on
13 that to avoid mootness.

14 MR. MANELY: Your Honor, I believe I
15 understand your question, and I -- and I think you're
16 correct. If we're talking about a determination that
17 the United States loses power over children when they're
18 removed from our borders, then the rest kind of falls in
19 line.

20 JUSTICE SOTOMAYOR: Counsel, what's -- what
21 happens --

22 JUSTICE SCALIA: I don't understand your
23 answer.

24 MR. MANELY: I'm sorry.

25 JUSTICE SCALIA: What is your -- I don't

1 understand that answer. Are you -- are you saying
2 that -- that your failure to appeal that in a timely
3 fashion makes it impossible for the Court of Appeals to
4 obliterate that award?

5 MR. MANELY: No, sir. And it may be --

6 JUSTICE SCALIA: Well, that's -- that's what
7 I thought the question was.

8 MR. MANELY: I apologize. And it may be
9 just the -- the tunnel vision that we have in this case.

10 We're solely focused on reversing the
11 district court order on habitual residence and returning
12 the child. The rest is --

13 JUSTICE SCALIA: Well, then -- then, retain
14 your tunnel vision. And don't say that the case remains
15 non-moot simply because of this other issue. The other
16 issue is either in the case or out of the case. Now, is
17 it part of your case?

18 MR. MANELY: We agree with the government's
19 position that it keeps this case alive, and it is not
20 moot. But I certainly understand the issue,
21 particularly since our focus on the case is otherwise.

22 JUSTICE ALITO: Well, if you -- if you could
23 take an appeal and got a reversal of the decision -- of
24 the order removing the child to -- allowing the child to
25 be removed to Scotland, wouldn't that undermine the --

1 the judgment for costs? I don't understand why that
2 would be a separate order, why that would be something
3 that has to be appealed separately. Why wouldn't that
4 be included with the final order in the case?

5 MR. MANELY: Yes, Your Honor. I agree. And
6 the -- allowing the child to leave was the linchpin that
7 allowed the costs. Removing that impediment also
8 removes the costs.

9 JUSTICE SCALIA: Well, I mean, that's
10 lovely, but -- so you are saying that you don't have to
11 appeal that separately; is that what you're saying?

12 MR. MANELY: I'm saying I trust that that is
13 the resolution of this; but, again, our focus is on the
14 child, not costs.

15 JUSTICE SCALIA: But you've got to answer my
16 question.

17 MR. MANELY: Yeah.

18 JUSTICE SCALIA: Do you have to appeal that
19 separately or not? If -- if the way you answered
20 Justice Alito's question was -- was the way you did, you
21 are saying that it's unnecessary to appeal that monetary
22 aspect of the judgment separately, that it goes -- it
23 goes with the rest of it. Is that -- is that your
24 position?

25 MR. MANELY: Your Honor, I think that it is

1 correct that if the -- the basis for the award is
2 removed, then the award is removed; but, if the basis
3 for the award remains, then it would be difficult to
4 assert that there is some reason to appeal that award.

5 I don't think there is any great answer.

6 JUSTICE SCALIA: I think you're saying it
7 doesn't have to be appealed separately.

8 MR. MANELY: Yes. Yes, Your Honor.

9 JUSTICE SOTOMAYOR: Can you tell me what's
10 happening, what is the status? Given the vacated return
11 custody order -- return order, will the Scottish court
12 ever determine habitual residence?

13 MR. MANELY: The Scottish court has no need
14 to determine habitual residence because that was
15 determined by the district court.

16 JUSTICE SOTOMAYOR: But that order has been
17 vacated, so can they revisit that question is really
18 the -- the issue.

19 MR. MANELY: I don't -- they wouldn't
20 revisit within the context of a Hague proceeding unless
21 a Hague proceeding were brought there.

22 Within the context of their own custodial
23 determination, like the Alabama court would in the
24 divorce, there is a determination of -- of jurisdiction
25 over the child.

1 JUSTICE SCALIA: But you could bring a Hague
2 proceeding there, right?

3 MR. MANELY: We could bring a Hague
4 proceeding there.

5 JUSTICE SCALIA: You could say, you know,
6 there having been no decision in the United States, we
7 want you to decide what habitual residence is, and we
8 think it's in the United States. You could do that.

9 MR. MANELY: We could do that. The problem
10 with that is that we're talking about different points
11 in time.

12 For our Hague -- actually, his mother's
13 Hague proceeding, she's the one that filed it -- for the
14 mother's Hague proceeding, the time period that we're
15 looking at was February of 2010 until the child left in
16 October of 2011. That is the time frame we'd really
17 like to stay with. That's an important time frame.

18 If we go to Scotland, we're talking about a
19 different time frame. It's a different animal.

20 CHIEF JUSTICE ROBERTS: I thought you said
21 that that time period was tolled, the period that she
22 was in Scotland would be tolled.

23 MR. MANELY: From a United States
24 perspective, more specifically an Alabama perspective,
25 yes. Yes, Your Honor.

1 JUSTICE GINSBURG: But in Scotland, it's --
2 it would be a custody proceeding. Forget about the
3 Hague. The child is there. The mother is bringing a
4 custody proceeding. And the question for that court is
5 where is the child's habitual residence now?

6 JUSTICE SOTOMAYOR: And at the Hague, it's
7 what was it then.

8 MR. MANELY: Yes. Yes.

9 And -- and the Scottish court -- our -- our
10 briefs are filled with the citations of authority, but
11 the Scottish court -- there is no reason to believe that
12 the Scottish court wouldn't honor what the United States
13 court has said about habitual residence, the case
14 brought by the mother in the Federal district court in
15 Alabama. So that if that was the linchpin to allow --

16 JUSTICE GINSBURG: But that was only for
17 determining the Hague Convention; and, if the Hague
18 Convention is out of it, then there is a custody
19 proceeding.

20 The idea of the Hague Convention is just to
21 get the case to a forum that's an appropriate forum to
22 decide the custody question, right?

23 MR. MANELY: Yes. Custody is the second and
24 crucial element of the Hague Convention as well.

25 If -- if there are no further questions, I'd

1 like to reserve the balance of my time.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Ms. Saharsky.

4 ORAL ARGUMENT OF NICOLE A. SAHARSKY,

5 FOR UNITED STATES, AS AMICUS CURIAE,

6 SUPPORTING PETITIONER

7 MS. SAHARSKY: Mr. Chief Justice, and may it
8 please the Court:

9 Put simply, this case is not moot because an
10 appellate decision on the merits would matter. What the
11 Court has been discussing today is there are various
12 ways in which the appellate decision might matter.
13 There are ways that there would be a judgment that the
14 father either did or did not wrongfully retain the
15 child.

16 Part of the wrongful retention determination
17 is the 900 -- or the \$94,000 in money damages. There is
18 a question of whether the child might remain in the UK
19 or be brought back to the U.S. And then there's the
20 question of which courts are going to decide custody,
21 Alabama or Scottish courts.

22 And we don't need to know precisely, and
23 this Court doesn't need to figure out all of the
24 different details of Alabama State law or of custody law
25 under the Scottish proceedings. All the Court needs to

1 decide is that the appellate court's decision would make
2 a difference here. And it's -- it's just not the case
3 that you could say it's moot because it doesn't make a
4 difference.

5 JUSTICE SCALIA: But we don't know it'll
6 make a difference without answering those questions.

7 MS. SAHARSKY: Well, I'm glad --

8 JUSTICE SCALIA: I mean, you want us to --
9 to say it may make a difference, and that's enough,
10 right?

11 MS. SAHARSKY: Well, this Court has said
12 that as long as there's any possibility of effectual
13 relief, that the case is not moot. So --

14 JUSTICE SCALIA: Well, you should put it
15 that way, then. It doesn't -- you don't know that it
16 makes a difference, but you don't have to know, right?

17 MS. SAHARSKY: That's what I would say is
18 that you don't have to know.

19 But just, if there is nothing else but a
20 declaratory judgment that the father either did or did
21 not wrongfully retain the child in the U.S., that is a
22 piece of paper in the world that has consequences to
23 these parties. It has consequences in terms of the
24 money judgment that's been entered, and it has
25 consequences in terms of where custody will be

1 determined.

2 The whole point of bringing a Hague
3 Convention case is to get the child in the place of
4 habitual residence, so that those courts, under their
5 own law, can decide custody.

6 JUSTICE GINSBURG: Ms. Saharsky, not to -- I
7 mean, the whole object of the Hague Convention is to
8 stop this shuttling the child back and forth. But,
9 because of this unfortunate situation we have where the
10 district judge wouldn't give a stay, you're -- what
11 you're -- what you're urging is exactly what this
12 Convention was meant to stop.

13 This child has been in Scotland for 14
14 months. Now, you say bring it back to the United
15 States, and we start over.

16 The whole object of the return procedure is
17 so that you get the child to a place that's a proper
18 place to determine custody; isn't that right?

19 MS. SAHARSKY: Yes. We share your concerns
20 about not wanting the child to be shuttled back and
21 forth. And we think that the way to accommodate those
22 concerns are by stays in appropriate cases, where the
23 four factor test that -- with respect to a likelihood of
24 success on the merits and a balancing of the equities is
25 met; and, that when stays are put in place pending

1 appellate proceedings, that those proceedings be
2 expedited, the decisions made quickly.

3 JUSTICE KENNEDY: And would you go further
4 and say that if a stay is not in place, that that still
5 does not deprive the Court of Appeals of jurisdiction to
6 resolve the case on the merits?

7 MS. SAHARSKY: Yes. That's what we would
8 say, that the case is not moot. The Court of Appeals
9 should be able to go forward with the case.

10 But if the case for a stay has not been made
11 by the losing party, then the child should be returned
12 to the country of habitual residence because a
13 determination has been made that that's the country
14 where the child should be, and there's not a good
15 argument that the other side has put forth for a stay.

16 JUSTICE GINSBURG: You agree that the
17 ideal -- the ideal procedure would be, and I quite
18 agree, that you have a very fast track stay pending
19 appeal and an expedited appeal. But there is no rule
20 that -- that requires that, so how -- how could that
21 sensible procedure be put in place?

22 MS. SAHARSKY: Well, we think that just
23 under the normal court appellate rules, that that
24 effectively is what happens using the American stay
25 standard for a four factor test; not that there would be

1 a stay in every case, but, when the showing, the
2 appropriate four factor showing is made for a stay, that
3 then a stay would be appropriate, and an expedited
4 appeal would be appropriate.

5 But you can't ---

6 JUSTICE SCALIA: Well, that's lovely, but
7 there wasn't a stay here. So what do you do when that
8 procedure hasn't been followed? That's the issue that
9 we're presented with.

10 MS. SAHARSKY: That's exactly right.

11 JUSTICE SCALIA: And do we even know that a
12 stay would have been appropriate here?

13 MS. SAHARSKY: Well, the district court
14 denied a stay, and petitioner did not go to the court of
15 appeals, so we don't know --

16 JUSTICE SCALIA: So presumably a stay would
17 not have been appropriate.

18 MS. SAHARSKY: Well, then, if that's the
19 case, but -- but it -- but this decision actually went
20 to the court of appeals, and the court of appeals
21 reversed on the merits. It would be up to the district
22 court on remand to determine how to fix its prior
23 erroneous decision. And it would use the equitable
24 authority that it has in every case to fix a wrong
25 decision and determine what the right thing is.

1 JUSTICE GINSBURG: But we wouldn't go back
2 to what shouldn't have happened, that is, the district
3 judge applying the four factor test -- or did the
4 district -- there was an application for a stay. It was
5 denied, right?

6 MS. SAHARSKY: Yes. And the district court
7 entered a brief order; so, the district court did not go
8 through the various factors, but presumably that is the
9 standard the district court would have used.

10 JUSTICE SOTOMAYOR: Could I ask a question?
11 Does it matter? Meaning, whether a stay is granted or
12 not, you are, I don't think, taking the position that
13 only if the stay is granted is the court of appeals
14 seized of jurisdiction. You're saying the case is not
15 moot, correct?

16 MS. SAHARSKY: That's exactly right. The
17 mootness question and the stay questions are two
18 separate questions. And you don't want to have to say
19 the person has to get a stay in every single case;
20 otherwise, their case becomes moot. They lose their
21 appeal.

22 JUSTICE SOTOMAYOR: All right. Now, under
23 the Convention, if the child -- if it goes back to the
24 district court now to fashion a remedy, it could order
25 return, it could decide under the Convention that

1 bringing the child back after 14 months presents a great
2 risk to the child under the Convention and not order the
3 return, correct?

4 MS. SAHARSKY: We don't think the Convention
5 addresses that; but, the district court could make that
6 determination using its equitable discretion.

7 JUSTICE SOTOMAYOR: So we just don't know
8 what the court's going to do, but some form of relief is
9 possible. That's why you used the word "possible."

10 MS. SAHARSKY: That is exactly -- that is
11 exactly our position. We don't know what the courts
12 would do. We're glad to discuss the possibilities with
13 the Court; but, the standard is the possibility of
14 relief, it doesn't need to --

15 JUSTICE SOTOMAYOR: But they have the power,
16 if they choose it, but they don't have to choose it;
17 that's the bottom line, correct?

18 MS. SAHARSKY: That's exactly right. The
19 position of the other side is that there is absolutely
20 nothing that the courts can do in these circumstances
21 once the child leaves.

22 And we just think that the Convention
23 doesn't say that. It doesn't mandate that. It's a
24 question of U.S. mootness law. And this Court has said
25 as long as there's --

1 JUSTICE SOTOMAYOR: Are you aware of -- I
2 happen to be because I know this area very well -- the
3 English courts have an amici filed with us yesterday,
4 and they are sort of sensibly keeping track of what
5 we're doing and trying to adjust their proceedings
6 accordingly and in the manner they think is most helpful
7 to us. Whether it is or not, I can't comment on.

8 Is this common in the custody area? Is
9 there discussions between courts about what they're
10 doing and the why of it?

11 MS. SAHARSKY: Well, in the Convention,
12 there is kind of two aspects of this. One is in child
13 custody proceedings, under the UCCJEA, and one is in the
14 context of the Convention.

15 The UCCJEA, which deals with competing
16 States and potentially competing countries' custody
17 determinations, has specific provisions that address
18 cooperation and communication. They are, like, Section
19 110, 111, and 112 --

20 JUSTICE SOTOMAYOR: And it's required.
21 There is a whole system set up now, right?

22 MS. SAHARSKY: There is a whole system for
23 that.

24 In the Convention, that type of comity and
25 cooperation typically occurs through the Central

1 Authorities. Each country has a Central Authority that
2 communicates with each other. So, for example, if the
3 UK's Central Authority would like something to be
4 brought to the U.S. Court's attention, it might enlist
5 the help of the U.S. Central Authority in, for example,
6 getting the parties to --

7 JUSTICE SCALIA: Counsel, all that's very
8 nice. What does that have to do with this case? I
9 don't understand that.

10 MS. SAHARSKY: Well, the question is just
11 what -- what might happen in this case in terms of if
12 there would be competing court orders or whether the
13 courts would -- what the courts would do in response to
14 each other.

15 And I think the point, at least, that I was
16 getting from Justice Sotomayor's question is that there
17 is a measure of cooperation here, so that the Court need
18 not be particularly concerned about parallel proceedings
19 or competing proceedings in other countries.

20 The way that, for example, this case has
21 played out is that while the Hague Convention dispute
22 has been litigated in Federal court, the Alabama custody
23 court has appropriately stayed its hand, as it's
24 required to do under Article 16 of --

25 CHIEF JUSTICE ROBERTS: Counsel, do you

1 agree with your -- with the Petitioner, just reading a
2 sentence from its brief, that "mootness requires that
3 relief be impossible"? Do you think that's the right
4 standard?

5 MS. SAHARSKY: Well, we -- we think that the
6 Court essentially said that in Knox, that it said --
7 that asked whether there is a possibility of relief, if
8 the question is one of literal impossibility, we don't
9 think that the Court needs to ask --

10 CHIEF JUSTICE ROBERTS: What this Court --
11 Court has always said, if it's an Article 3 inquiry
12 under standing, and it said that it's not supported by
13 injury that is speculative or conjectural.

14 It seems to me when you start talking about,
15 well, the Scottish court might do this or the Alabama
16 courts might do this, that -- that sounds pretty
17 speculative and conjectural.

18 MS. SAHARSKY: Well, I think the Court has
19 made those comments more in the context of the standing
20 inquiry at the beginning of a case, as opposed to the
21 mootness inquiry after a case has gone on for a while,
22 and the burdens there are different.

23 At the standing -- at the beginning of a
24 case in the standing inquiry, the party coming into
25 court really had the burden of showing that this case --

1 that there's something to be adjudicated in court.

2 As the case continues, it's the party who
3 doesn't want the case to be in court anymore to show
4 that there's nothing the Court can do; that even though
5 the Court has put those resources --

6 JUSTICE SCALIA: Well, the burden is
7 different, but I don't agree that the standard changes.
8 It's just who has to prove it, one side or the other.
9 But I --

10 MS. SAHARSKY: Right. And our position with
11 respect to the standard is simply from language taken
12 from this Court's decision, going back to Mills, but
13 also repeated in Church of Scientology and Knox, is
14 there any effectual relief, whatever; is it possible to
15 grant relief? Relief can be partial, it doesn't need to
16 be complete. That's things that the Court has said.

17 You know, we don't interpret that to be a,
18 you know, literal impossibility standard. We just
19 understand that to be asking the question, is there
20 something the courts can do, even if it's not
21 complete --

22 CHIEF JUSTICE ROBERTS: So do you think
23 it's -- I mean, I know you've got a laundry list of
24 things, but, as I understand it, you think it's enough
25 that if the Court issues an opinion, the Scottish court

1 might do something as a result of that?

2 MS. SAHARSKY: Well, I think that the Court
3 issuing an opinion has effects in America, regardless of
4 what happens in Scotland, because you have a declaratory
5 judgment that sets out the rights of the parties.

6 CHIEF JUSTICE ROBERTS: I thought one of the
7 arguments, maybe it was the Petitioner's and not yours,
8 was that one reason it wasn't moot is because the
9 Scottish courts might look at the case differently.

10 MS. SAHARSKY: Well, that's -- I think it's
11 a set of interrelated reasons. I mean, they're really
12 all connected because -- can I finish the sentence? --
13 you have a judgment in the United States about the
14 rights of the parties. It affects the money judgment.
15 It affects what might happen with custody. I mean, it's
16 all part and parcel of the same dispute.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Cullen.

20 ORAL ARGUMENT OF STEPHEN J. CULLEN

21 ON BEHALF OF THE RESPONDENT

22 MR. CULLEN: Mr. Chief Justice, and may it
23 please the Court:

24 Mr. Chief Justice, the effect that any
25 appeal court could give would be zero in the Scottish

1 court, nothing. There is nothing a court can do in this
2 judicial process --

3 JUSTICE SOTOMAYOR: Why can't they order the
4 mother to come back with the child? Because the
5 Scottish court stops her? There is competing orders all
6 the time.

7 MR. CULLEN: Which -- well, they can't,
8 first. The answer to that is no, they cannot.

9 JUSTICE SOTOMAYOR: Why not? She was here.
10 She submitted to the Court's jurisdiction. Doesn't
11 her -- jurisdiction over her now continue until the end
12 of the case?

13 MR. CULLEN: Well, the case did end because
14 there is one remedy, and one remedy only, in this
15 treaty, and that is return.

16 JUSTICE SOTOMAYOR: That doesn't matter.
17 The question is, isn't she seized -- doesn't the Court
18 have jurisdiction over her until the case ends? The
19 case doesn't end until there has been an appeal and a
20 judgment and the judgment affirmed or reversed. That
21 hasn't happened.

22 MR. CULLEN: No. That's not correct. I
23 can't agree with that because then we're ignoring
24 Article 3 and the constitutional doctrine of mootness,
25 because that's where the constitutional doctrine comes

1 into central --

2 JUSTICE SOTOMAYOR: You are suggesting that
3 the Convention deprives a party, after the remedy's been
4 ordered and effected, of the right to appeal; not
5 because of mootness, but because the Convention takes
6 away a fundamental right to appeal?

7 MR. CULLEN: No. The Convention says you
8 must exercise the most expeditious remedies available
9 because --

10 JUSTICE SOTOMAYOR: You're not going to
11 suggest all those countries that permit appeals
12 explicitly and stop removals until appeals are finished,
13 that those -- that those those treaty -- contracting
14 treaty parties are breaching the Convention, are you?

15 MR. CULLEN: No. They're not. There are 88
16 countries, and this is a very, very good convention. It
17 works. It works for the countries, Justice Sotomayor,
18 that do immediate enforcement, and it works for the
19 countries that don't do immediate enforcement pending an
20 appeal.

21 But the question presented here is what a
22 court could do in this country once the sheriff court in
23 the Hamlet of Airdrie is seized with jurisdiction.
24 Because what this treaty has done is has taken
25 jurisdiction from the United States and said, Scotland,

1 you now have jurisdiction.

2 CHIEF JUSTICE ROBERTS: One thing -- one
3 thing the Court can do is give him back \$94,000.

4 MR. CULLEN: No, it cannot. It cannot. I
5 was very --

6 CHIEF JUSTICE ROBERTS: He has no -- his
7 ability to challenge the propriety of the order that he
8 pay \$94,000 is gone?

9 MR. CULLEN: It's gone in this case,
10 Mr. Chief Justice, because in the Joint Appendix, pages
11 16 and 17, you'll see -- I believe it's docket entry 52
12 on page 16, an appeal was taken off those fees.

13 If you go on, I believe it's page 17 of the
14 Joint Appendix, docket entry 57, you'll see that the
15 Petitioner voluntarily dismissed his appeal of the fees.
16 So having taken an appeal of the fees and having
17 dismissed, there is nothing left for any appeal court
18 now to do with respect to fees.

19 JUSTICE KENNEDY: Well, except he might have
20 assumed that the issue of fees would still be alive if
21 the Eleventh Circuit ruled on the merits.

22 MR. CULLEN: Right. So --

23 JUSTICE KENNEDY: And he -- he was just
24 trying to have a single appeal.

25 MR. CULLEN: Right. But the test that the

1 Court would apply in that hypothetical fees
2 determination, is totally different from the test the
3 appeal court would apply in looking at habitual
4 residence. All it would look at is, is it --

5 JUSTICE KENNEDY: Well, appellate courts all
6 the time have issues where they apply different
7 standards to multiple issues in the case.

8 MR. CULLEN: Right. So if we assume that
9 the fees survives -- they can pursue the fees issue.
10 The problem, Justice Kennedy, is that there -- there is
11 no habitual residence to be determined back in time.
12 What this treaty does is it exercises a one-way return.

13 JUSTICE KENNEDY: Well, that of course -- on
14 your premise that's right. On their premise it's wrong,
15 that -- the issue of custody is still alive under their
16 perspective. That's what we are arguing about, so
17 you're just assuming your own premise.

18 MR. CULLEN: Well, the premise, though, is
19 based in the purpose of this treaty, because back in the
20 '70s before this treaty, Justice Kennedy, there was
21 chaos, and in fact the government is suggesting we
22 should go back to possibly competing custody orders
23 between Scotland and Alabama, but --

24 JUSTICE BREYER: I don't think that's --
25 you've won a judgment in lower court that says that the

1 habitual residence of the child is Scotland. So if they
2 appeal, they might win one that says that was wrong, the
3 habitual residence was the United States, but the child
4 is in Scotland.

5 You understand Scottish law better than I,
6 but they are also bound by this treaty. So I would
7 imagine a Scottish court, just as we would do, when they
8 are trying to decide what's the habitual presumptive
9 then, and now what's the habitual residence; they would
10 look at what the United States courts decided.

11 They are not absolutely bound by it. But
12 just as we, in the last case we had, were very
13 interested in what the Chilean courts said. Of course
14 it was relevant to us what the Chilean courts had held
15 was the proper law of Chile in respect to that child.

16 Wouldn't the Scottish courts do the same?
17 Wouldn't it matter to the Scottish courts, after all,
18 that an American court had decided that the residence
19 was not bound? I'd certainly give it -- wouldn't they
20 give it consideration?

21 MR. CULLEN: With -- Justice Breyer, with
22 respect to the lower court's opinion, there is, as
23 Justice Ginsburg said there is no opinion. There is
24 nothing. There's --

25 JUSTICE BREYER: I'm assuming they win. The

1 reason that they want to appeal is they want to win. If
2 I were looking at the case as you present it, I would
3 say, of course you'll win. Don't worry. What are you
4 worried about?

5 But -- but they have a different view. So
6 they think they are going to win. Now, it means nothing
7 if they lose. But if they win on appeal, they then have
8 their order that says that this child's habitual
9 residence was the United States. And my question is
10 where we started, armed with that piece of paper, they
11 walk into the Scottish court and they say, oh, Scottish
12 judge, please read this paper.

13 Of course, he will read it, and I would
14 think that that judge would take it into account in his
15 decision. That's what we do with the foreign -- similar
16 foreign orders of other foreign courts, and I think we
17 should do that and I think the Scottish courts should
18 and will. Now, you tell me where I'm wrong in that.

19 MR. CULLEN: Justice Breyer, the sheriff in
20 Airdrie would say, why are you handing me a finding
21 about what habitual residence was 2 years ago? The
22 child's habitual residence 2 years later is clearly
23 Scotland, and we -- we don't look back in time with
24 respect to that.

25 JUSTICE BREYER: Or -- then argument as to

1 why they shouldn't give in to this hypothetical American
2 judgment. That isn't my question. My question is won't
3 they consider it and give it -- and the Scottish courts,
4 to my knowledge, are not so narrow-minded. I think they
5 would pay attention to what other courts have said.

6 JUSTICE GINSBURG: You're -- I think
7 you're -- you're --

8 JUSTICE BREYER: Am I right or wrong? I
9 want to know if I'm right or wrong.

10 JUSTICE GINSBURG: We -- we have a brief
11 in -- in the case telling us that the question Justice
12 Breyer is posing, would they look at it; they would say
13 it's irrelevant.

14 JUSTICE BREYER: They would?

15 JUSTICE GINSBURG: Because what her habitual
16 residence was then doesn't matter one whit to us. We
17 want to know where she is residing now, and that's the
18 reason why the Scottish court would say it's not
19 relevant to the question before us. Their question is
20 not a treaty question. Their question is custody of
21 this child.

22 MR. CULLEN: Justice Ginsburg, that's
23 correct.

24 Justice Breyer --

25 JUSTICE BREYER: Well, thank you for Justice

1 Ginsburg's answer. She is quite helpful.

2 (Laughter.)

3 JUSTICE SCALIA: I thought he had said the
4 same thing, that the reason --

5 JUSTICE BREYER: I was there, but I didn't
6 understand it as fully, and now, I do.

7 JUSTICE SCALIA: Well, good.

8 (Laughter.)

9 MR. CULLEN: Justice Breyer --

10 JUSTICE KENNEDY: But I am -- I am quite
11 surprised that you would say that prior residence can
12 never bear on present residence. In custody disputes
13 this happens all the time. The child spent 5 years in
14 this country, 4 years in that country; now for the last
15 2 years the child has been in this country -- the
16 previous experience of the child has a tremendous
17 bearing on custody. To say that it's only now,
18 prospective only, after the child has been removed, I
19 just think is wrong as a matter of custody law.

20 MR. CULLEN: Well, with respect to custody
21 law versus Hague law, Justice Kennedy, there -- there is
22 a difference. The relevance of the Hague determination
23 2 years in the past is not, Justice Breyer, helpful, but
24 I agree.

25 JUSTICE BREYER: Unless there is some

1 accommodation here, what worries me is this. If you win
2 this case, it's not going to be better. Maybe for your
3 client it will be, but for others in your position, it's
4 not going to be better.

5 And what's worrying me, to put it on the
6 table so you can respond, is that in similar situations
7 district judges will think this child belongs in
8 England; this child belongs in France; this child
9 belongs in China, wherever they belong; but in the back
10 of their mind will be the possibility that they are
11 wrong, and they know there is a right to appeal.

12 And so instead of being able in these
13 border cases -- borderline cases, instead of being able
14 to send the child back home, they will think, I've got
15 to keep the child here so that the other party has the
16 right to appeal. Now, it seems to me in general that
17 would be bad for the child. It would be -- and it's bad
18 for our system. And it would be better to work out a
19 system that you can send the child back, and then if
20 you're reversed on appeal, it does matter to the other
21 country's courts.

22 MR. CULLEN: But, Justice Breyer, if -- we
23 say, as you know, you can't have conditional returns,
24 but you can have, with respect to stays, there is a
25 panoply of different types of stays. Now, what's

1 happened in the district court in this instance --

2 JUSTICE SOTOMAYOR: Counsel, that -- that
3 actually is not accurate. The Convention is full of
4 conditions for the return: The safety of the child, the
5 support of the parent who is returning -- there is a
6 whole set of conditions that have to be met before the
7 child is returned.

8 MR. CULLEN: Justice --

9 JUSTICE SOTOMAYOR: I happen to think that
10 one could argue that returning back to the court that
11 had -- was making the decision after an appeal is
12 raised, that that's an inherent condition of a return
13 order. But that -- you're arguing against that, but
14 there are plenty of conditions that could be imposed.

15 MR. CULLEN: We don't -- we don't agree with
16 that, Justice Sotomayor. There are affirmative
17 exceptions that can be asserted by a respondent, but
18 there are no conditions; in fact, Article 19 of the
19 treaty, as you know, says you cannot, as a Hague court,
20 step into any sort of custody determinations at all.

21 JUSTICE SOTOMAYOR: No. You can't -- the
22 Court can't order custody issues, but it can set
23 conditions for the nature of the return. It could say
24 the father pays the cost; the father has to pay for
25 certain expenses in the country the child is being sent

1 to; those kinds of conditions can be imposed.

2 MR. CULLEN: Those would be limited
3 undertakings. As you know, Justice Sotomayor, those
4 limited types of undertakings came about because of the
5 13B exception and the 13B exception only, where a judge
6 felt there was some risk in the return but the risk did
7 not rise to the great risk.

8 JUSTICE KAGAN: Mr. Cullen -- Mr. Cullen,
9 it's often true in international litigation that
10 enforcement is very difficult. I mean, take a
11 commercial litigation case where somebody is going after
12 assets and the assets are not in the United States, and
13 somebody looks and says, well, you know, a court can do
14 whatever it wants but nothing is going to happen
15 afterwards.

16 So why is this case any different from, you
17 know, a very frequent problem in international
18 litigation, which is sometimes judgments are difficult
19 to enforce? And if you look at it practically, it may
20 -- may never be enforced, but we don't put courts to the
21 job of saying, oh, well, let's check out the various
22 enforcement options and make predictions about who's
23 going to do what.

24 MR. CULLEN: Justice Kagan, not to state the
25 obvious, but this is different because it's a child.

1 It's a child question, and that has to be a
2 consideration in this treaty.

3 JUSTICE KAGAN: Well, it's different -- that
4 might be -- it's certainly different in terms of the
5 interests at stake, and that might be a very good reason
6 for Congress to step in and try to fix this system so
7 that you don't have children shuttling back and forth.
8 But, you know, at the risk of sounding hard-hearted, in
9 terms of the law, what is different?

10 MR. CULLEN: Well, what is different is --
11 and I need to answer the question -- two Justices have
12 asked me about these stays, and I need to answer that so
13 I can answer your question.

14 The -- the district court was presented with
15 a single request for a stay in this case. The request
16 was we may or may not file an appeal. We haven't filed
17 a notice of appeal, so give us a stay so we can decide
18 what we want to do.

19 What should have happened and what usually
20 happens is you say, give us a stay, but if you're not
21 going to give us a stay, give us a temporary stay. Give
22 us 48 hours to see if we can get a stay from the
23 appellate court.

24 CHIEF JUSTICE ROBERTS: Well, that's not
25 quite fair to say we haven't decided whether we're going

1 to appeal. I mean, the -- the stay motion was made
2 immediately upon the determination of the merits by the
3 district court, and the district court said no.

4 So, I mean, didn't they do everything they
5 could have done to -- to get a stay?

6 MR. CULLEN: No. It was a peculiar
7 halfhearted request for a stay. The stay was we don't
8 even know if we're going to appeal this.

9 CHIEF JUSTICE ROBERTS: Well, that's out of
10 respect to the district judge, who's just issued a
11 ruling on the merits. I mean, saying, you know, we have
12 to consider your -- your ruling; not, you know, we're
13 taking you up right away.

14 MR. CULLEN: Right. And this was a
15 Wednesday. And what should have happened is, at a
16 minimum, a 24-hour or 48-hour request for a temporary
17 stay.

18 And, Mr. Chief Justice, this happens all the
19 time in Hague cases. Hague practitioners ask for stays,
20 and, if a stay is not going to be granted, ask for a
21 temporary stay.

22 The notion presented to this Court that
23 there was some rush to justice here is not what happened
24 on the ground in Alabama. That is not what happened.

25 CHIEF JUSTICE ROBERTS: It seems to me, and

1 I may be taking the opposite position from one of my
2 colleagues, but the -- the best thing is to hold things
3 up briefly, so that the child doesn't go overseas and
4 then have to be brought back, particularly if you have
5 situations where there can be an expeditious appeal.
6 And I think most appellate courts would appreciate
7 the -- the benefit of that.

8 It seems to me, if you -- if you're correct
9 that the decision is moot, it's not going to be a --
10 there is going to be a rush to judgment by the
11 individual that wants to take the child away.

12 MR. CULLEN: No, we don't agree with that,
13 Mr. Chief Justice, because that doesn't take account of
14 the four factors any district court judge is supposed to
15 exercise in her discretion in determining whether a stay
16 should be granted or not.

17 JUSTICE KENNEDY: Well, again, you're just
18 assuming that the district judge is right, but that's
19 the whole issue.

20 And as the Chief Justice indicates, under
21 your position, we give a premium to the very sort of
22 precipitant action that the Hague Convention is designed
23 to avoid.

24 MR. CULLEN: Justice Kennedy, no, what we're
25 doing is we are following the letter and the text of the

1 convention and the implementing legislation in this
2 country.

3 Time and again, this peculiar word
4 "forthwith" is used. It means right now. Time and
5 again, the treaty tells us you must act expeditiously
6 because the idea, Justice Kennedy, is we avoid competing
7 litigation in countries. We must have one country that
8 is deciding this.

9 And it's --

10 JUSTICE SCALIA: So are you arguing that the
11 effect of the statute implementing the treaty, which
12 uses "forthwith" and all of this, is to, in effect,
13 require that unless there is a motion for a stay
14 pending, the decision of the trial court be carried out?

15 MR. CULLEN: Yes, Justice Scalia.

16 JUSTICE SCALIA: You -- you think the -- the
17 mere word "forthwith" in the statute is enough to alter
18 our normal process of appeal.

19 MR. CULLEN: It's the -- as a treaty, it's
20 the supreme law of the land. It says, if you decide to
21 issue a return, the child is to be returned forthwith.
22 And the plain meaning of those words is you must act
23 immediately.

24 JUSTICE BREYER: But I can't -- I don't
25 understand why you want a treaty where the best

1 interests of the child is what's at issue, and you
2 interpret it in a way that the court of one nation with
3 the child where you have parents from both nations pays
4 no attention at all to what courts in other nations are
5 saying.

6 I mean, my experience out of that is Chile,
7 where, of course, we wanted to know what the law of
8 Chile was and how the Chilean domestic relations judge
9 understood the relations between the parents. That was
10 important.

11 And similarly, I think the Scottish judge
12 should want to know the same thing about the courts
13 deciding in the United States. And the same thing is
14 true of the United States judge wanting to know about
15 Scotland and so forth.

16 I don't see how we're going to get harmony,
17 in other words, unless you let appellate processes go
18 forward, too. And -- and I don't know what the treaty
19 drafters would have had in mind if they wanted some
20 other regime.

21 MR. CULLEN: Justice Breyer, it's not that
22 we enter into these communications and agreements with
23 any country.

24 By ratifying this particular treaty and by
25 the United States saying, we are going to ratify it with

1 the United Kingdom or Scotland or Brazil, we are saying
2 much more than there's no comity here. We are saying we
3 trust this other country to do the right thing.

4 And that's, Justice Breyer, why we lodged
5 the Scottish papers, because the Scottish papers should
6 satisfy you that Scotland was very satisfied there was a
7 valid return.

8 JUSTICE BREYER: I trust Scotland to do the
9 right thing. And I think, to help Scotland do the right
10 thing, it would be nice for Scotland to know what
11 American judges have decided. That's all. And the
12 reverse is equally true.

13 MR. CULLEN: But it doesn't matter, Justice
14 Breyer, because there's been a vacatur. There is no
15 underlying decision. The child is back in Scotland, and
16 now one court can proceed.

17 And in fact, by continuing -- Justice
18 Breyer, by continuing the litigation, the effect of that
19 is to undermine the treaty, because the idea behind the
20 treaty, particularly for military families, was to
21 enable mobility. And by having ongoing litigation in
22 the United States, the only thing we can guarantee this
23 Court is this child is not coming to America until the
24 litigation is over. So now we're talking two, three,
25 four years.

1 JUSTICE SOTOMAYOR: Excuse me, can I just --

2 JUSTICE KAGAN: Mr. Cullen, may I ask, I'm
3 trying to figure out what exactly your argument is. So
4 let me give you two options, and you tell me what your
5 argument is, all right?

6 One -- you can tell me it's neither, I
7 suppose. But one is this case is moot because there's
8 no practical way to enforce any relief that's ordered by
9 the Eleventh Circuit. All right. That's what I came in
10 thinking your argument was.

11 The second is, is just no, it's just
12 improper for the Eleventh Circuit to enter any order
13 granting relief.

14 So which is it? Is it the it's improper to
15 enter any order at this point, or is it, you know, you
16 can enter an order, but it's just not going to be
17 enforced, and, therefore, this case is moot?

18 MR. CULLEN: Justice Kagan, I'm going to
19 take your third non-offered offer. And the answer is
20 because the Constitution tells us there is no case. We
21 cannot -- we cannot -- and I see Justice Alito --

22 JUSTICE KAGAN: I don't understand --

23 MR. CULLEN: Because -- because Article 3
24 says we have to be able to grant some effectual relief
25 in the judicial process. And since the Mills case in

1 1895, right up to the Knox case this year, this Court
2 has always said it's effectual relief in this judicial
3 process.

4 So I have to pose the question, Justice --

5 JUSTICE ALITO: Well, then you seem to be
6 saying that if the -- if the law does not permit the
7 issuance of a particular kind of order, and that's what
8 the plaintiff is seeking -- or that's what the appellant
9 is seeking, then the case is moot. Is that your
10 argument? That's a merits question, not a mootness
11 question.

12 MR. CULLEN: It is a mootness question
13 because it goes -- it's not -- it goes to the heart of
14 Constitutional mootness. It goes to the issue of this
15 may be uncomfortable, and this may be inconvenient; but,
16 once we've effected a remedy -- the only remedy, Justice
17 Alito, under this treaty -- and once it's been carried
18 out, and once that child is home in Scotland, no matter
19 what another court does in this judicial process, it can
20 have no effect on the Scottish custody proceeding --

21 JUSTICE GINSBURG: Mr. Cullen, are you
22 saying that the -- under the treaty, there can be no
23 rereturn order? Is that what you're saying? Whether
24 the -- whether the return order was wrong or right,
25 there can be no rereturn?

1 MR. CULLEN: There can be no rereturn.
2 There was a lawful order returning the child to the
3 jurisdiction of Scotland.

4 JUSTICE KAGAN: And there could be no
5 rereturn by the terms of the treaty. So this is an
6 argument that hangs on what the treaty's terms say; is
7 that correct?

8 MR. CULLEN: Well, it is -- it is very
9 textual, which is, of course, what surprised us so much
10 in the government's position in this case. Because as
11 you know, Justice Kagan, the last time the Government
12 presented this position, they said exactly the opposite
13 in Janakakis. Now, they tried to deal with this,
14 Justice Kagan, in this footnote in their brief saying,
15 well, we touched briefly on this point before. They
16 didn't touch briefly on it.

17 They said in absolute terms that nothing in
18 the Convention -- so this is our government talking
19 about the text, and we may give some compelling
20 deference to -- to the government on text, but we don't
21 give any deference to them we say or what the founding
22 fathers meant, but with respect to this Janakakis case,
23 the government, said nothing in the Convention requires
24 courts or other authorities, and this was in Greece, to
25 give binding effect to any judgment --

1 JUSTICE BREYER: It does equate but now
2 you've got me -- I think I'm on the same wavelength, and
3 I think it was back just as well, let me see because
4 Justice Ginsburg, I see the point of her answer now.

5 It's really fact-specific to this case that
6 you're talking about. So it just happens that the child
7 has now been in Britain or in Scotland for 18 months.
8 And so the question of current habitual residence where
9 they have been there for 18 months is a question of
10 what's been happening over these 18 months, and what
11 happened before the 18 months has absolutely nothing to
12 do with it.

13 And the most that the Court of Appeals could
14 say is that it was resident in America 18 months ago and
15 that's no more relevant than saying that the cow jumped
16 over the moon or some other thing. Is has -- is that
17 the point, is that the point? Is that the point.

18 JUSTICE SCALIA: I thought that's what you
19 were saying.

20 JUSTICE BREYER: If that's the point -- yes,
21 that is the point. Okay. If that's the point --

22 MR. CULLEN: I would say it is the point
23 because the Convention says it's the point.

24 JUSTICE BREYER: Well, the Convention
25 doesn't know whether it's 18 months or 6 months or what

1 counts as habitual residence, does it?

2 MR. CULLEN: The Convention says you look to
3 the place where the child was located immediately prior
4 to the --

5 JUSTICE BREYER: That's true but you have to
6 decide whether that's the habitual residence, and it
7 seems to me that you're adding a factual thing, that
8 what happened in 18 months earlier has nothing to do
9 with whether the child is now an habitual resident of
10 Scotland.

11 And what I want to know, and I'm not going
12 to find this in the treaty, I don't think, because it's
13 not going to say whether it's 11 months or 12, but I
14 want to know what source I look to, to show that you're
15 right and that what happened 18 months previously has
16 nothing to do with the child's habitual residence as of
17 the place where he has lived for 18 months.

18 MR. CULLEN: Well, habitual residence being
19 fact and law --

20 JUSTICE BREYER: Yes. Fact.

21 MR. CULLEN: Right?

22 JUSTICE BREYER: Yours is fact. I want to
23 know what I look to, to find out that fact.

24 MR. CULLEN: You look to 1895, you look to
25 the Mills decision, and the Mills decision that tells

1 you, under Article 3, a case is moot when the issues
2 presented are no longer live and the parties lack a
3 legally cognizable interest in their -- if the live
4 issue of habitual residence 18 months ago is dead.

5 CHIEF JUSTICE ROBERTS: So everything turns,
6 under your view, on whether or not the district court
7 gives the losing party the 48-hour stay or whether the
8 mother in this case decides to stay in the United States
9 until the U.S. proceedings are done.

10 The incentives if you prevail are for the
11 custodial or the parent with control over the child to
12 leave immediately. Even after a motion has been
13 filed -- if a motion for a stay has been filed, that's
14 not a stay. Get on the first plane out and then you're
15 home free. That seems to me to be a very unfortunate
16 result.

17 MR. CULLEN: Mr. Chief Justice, we don't
18 agree, and here's why. We don't agree because initially
19 the district court judge did not order the instantaneous
20 departure of this child. She only did that after
21 considering the motion to stay. It was not --

22 CHIEF JUSTICE ROBERTS: No, no. I know.
23 But the point is that the other side says that the
24 decision was wrong.

25 MR. CULLEN: And it's -- right.

1 CHIEF JUSTICE ROBERTS: And, you know,
2 most -- not most, but many district judges don't like to
3 immediately say after they have issued a decision, well,
4 there is a good likelihood that I'm wrong, and
5 therefore, I'll issue a stay.

6 (Laughter.)

7 CHIEF JUSTICE ROBERTS: So there has to be
8 at least a period before somebody can go up to the Court
9 of Appeals and get a stay, and if you're right, what's
10 happening during that 48 hours or 24 hours is that the
11 parent with control of the child is trying to find the
12 first flight out and once she does, it's all over.

13 MR. CULLEN: It is all over once -- once the
14 doors close on that plane and that child arrives back in
15 Scotland, unless the plane turns round and comes back
16 again, it is all over.

17 JUSTICE ALITO: Well, if I understand your
18 answer to Justice Kagan, your argument is dependent on
19 the proposition that under the Convention that once the
20 child has left this country, a U.S. court no longer has
21 any power to order the child to come back; is that
22 right?

23 MR. CULLEN: Yes, Justice Alito.

24 JUSTICE ALITO: And I don't see where that
25 was decided either by the court in this case or in the

1 Beckier case that the Eleventh Circuit panel here cited.
2 There is no discussion in either of those opinions of
3 the -- how the Convention -- what the Convention says on
4 this question.

5 MR. CULLEN: Well, the Beckier case goes to
6 Mills and relies on Church of Scientology and Mills --

7 JUSTICE ALITO: No, no. This is not a --
8 this is not a question about our general standard of
9 mootness. This is a question of the meaning of the
10 Convention. As I understood your argument to Justice
11 Kagan, your position is dependent on a particular
12 interpretation of the Convention. And I don't see any
13 discussion of that interpretive issue in either of those
14 opinions.

15 MR. CULLEN: Well, this is the -- this is
16 what makes constitutional mootness uncomfortable because
17 it's an answer that Justices and judges typically don't
18 want to hear. But it is the answer. The question is
19 there is nothing left to be done. The one remedy has
20 been effected, Justice Alito, and what -- what brings
21 all this into sharp contrast now is what we lodged last
22 week. The Petitioner, Justice Alito, himself is fully
23 participating in the Scottish proceedings.

24 JUSTICE ALITO: If the Convention said
25 explicitly that a court in this country or whatever

1 other sending countries involved could order the child
2 back, this case would not be moot; is that correct?

3 MR. CULLEN: Yes.

4 JUSTICE ALITO: And you -- but you say that
5 the Convention, in effect, says exactly the opposite;
6 once the child leaves, there can't be an order requiring
7 their return.

8 MR. CULLEN: Right. And there would be a
9 problem, Justice Alito, if we didn't have the motion to
10 stay concept, if we didn't have all of the alternatives
11 for district courts to enter different types of motions
12 to stay. What -- what at least will happen from the
13 Chafin case, I'm sure, will be everyone will know that
14 you need to ask for a motion to stay, everyone will know
15 you need to ask for different types of motions to
16 stay --

17 JUSTICE SOTOMAYOR: But asking is not
18 enough.

19 MR. CULLEN: Well, ask --

20 JUSTICE SOTOMAYOR: Because the mother can
21 get on the plane the moment she hears that someone's
22 asked.

23 MR. CULLEN: The mother can get on the plane
24 when she is allowed to get on the plane, and in this
25 particular case, probably because she had to come in

1 under humanitarian parole, there was considerable
2 urgency in this case. And it was a very young child,
3 and the Scottish court was ready to beseize the
4 jurisdiction.

5 Why would Judge Johnson not do what the
6 treaty was telling her to do? Get the child back to
7 Scotland. I found habitual residence in Scotland, and
8 let's let Scotland move forward.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Manely, you have four minutes remaining.

11 REBUTTAL ARGUMENT OF MICHAEL E. MANELY

12 ON BEHALF OF THE PETITIONER

13 MR. MANELY: Thank you, Your Honor.

14 With that, I'd like to touch on four points:

15 First of all, these courts have inherent
16 authority to order the child be brought back. It is a
17 way of reversing the wrong decision of the district
18 court. When we are talking about the object of the
19 Convention, it is in part rapid return, but that is kind
20 of putting the cart before the horse. The critical
21 issue is where is the appropriate habitual residence of
22 the child, and that is the place that then needs to make
23 the custodial decision.

24 JUSTICE BREYER: Well, what he says is that
25 after 18 months in Scotland, the Scottish court will

1 decide where is the habitual residence of the child. We
2 are now in August of year 2. And what happened before
3 January of year one is now totally irrelevant. So even
4 if the American courts decided prior to January of year
5 1 the correct habitual residence was Alabama, when the
6 Scottish courts decide what is his habitual residence as
7 of 18 months later, they won't pay any attention at all
8 to that American decision because it is not relevant.

9 That, I take it, to be his argument, which
10 depends on the long-time, 18 months. So what is your
11 response?

12 MR. MANELY: I think that may well be his
13 argument. I disagree with it entirely. As was pointed
14 out earlier, courts are quite used to having children
15 have to transfer from one place to another. The closest
16 case on point I can think of --

17 JUSTICE GINSBURG: But that was the purpose
18 of the Convention was to cut that out. That's the whole
19 reason for the Convention, that they wanted to stop the
20 shuttling of children.

21 Do you -- are you aware of re-return?
22 Your -- your thesis is that the -- that now the Court of
23 Appeals could tell the district judge, you were wrong.
24 And then the father armed with that can go and get a
25 re-return order from the Scottish court under the

1 Convention. Have there been instances under the
2 Convention, was this question of re-return -- is
3 re-return authorized assuming that there was a valid
4 return order, at least valid when it was entered and
5 when the child was returned --

6 MR. MANELY: Your Honor --

7 JUSTICE GINSBURG: What is the incidence of
8 re-return under the Hague Convention?

9 MR. MANELY: There no cases because we don't
10 run into this problem, quite frankly. And -- and
11 re-return is a catch phrase that was created here.
12 Bringing the child back would be a part of the court's
13 inherent authority, part of the district court or the
14 Court of Appeals' inherent authority, and it's the basis
15 upon which Scotland has the child in the first place.

16 JUSTICE SOTOMAYOR: Isn't there a Spanish
17 case?

18 MR. MANELY: I'm sorry?

19 JUSTICE SOTOMAYOR: Isn't there a Spanish
20 case?

21 MR. MANELY: There is a Scottish custody
22 case pending --

23 JUSTICE SOTOMAYOR: Not a Scottish; Spain, a
24 case from Spain.

25 MR. MANELY: A Spain -- a Spanish case, yes,

1 Your Honor, there is.

2 JUSTICE SOTOMAYOR: Where the child was, in
3 fact, returned when --

4 MR. MANELY: The child was sent to Poland
5 based upon the trial court's decision in that case, and
6 the child returned from Poland based upon the supreme
7 court of Spain's decision in that case.

8 So there is a confusion between --

9 JUSTICE GINSBURG: Was the child returned,
10 or was it just a decision that the appeal could not be
11 avoided? Was the child returned by Poland?

12 MR. MANELY: Well, I don't know ultimately
13 if the child was returned from Poland, so much as the
14 supreme court --

15 JUSTICE GINSBURG: That's -- see, that's the
16 whole problem is that you -- you're going to have rival
17 decrees of two countries, which is what -- exactly what
18 the convention was meant to avoid.

19 MR. MANELY: Except that we never have.

20 I mean, this is a fairly young convention,
21 we haven't had it that long, but we never have had that
22 problem before.

23 It's been easy enough -- *Ohlander v. Larson*
24 out of the Tenth Circuit is a great case to look at for
25 where the United States has been very giving in sending

1 children back. We have not had this problem before.

2 JUSTICE SOTOMAYOR: Counsel, there is an
3 amici brief here that says that the Scottish courts will
4 not pay attention to the habitual residence of a child
5 at the time of the removal.

6 The amici brief that was filed with us
7 yesterday, if I'm reading it correctly, suggests that
8 the court believes that hasn't been settled in English
9 law; is that correct?

10 MR. MANELY: That's my reading of it as
11 well, Your Honor.

12 JUSTICE SOTOMAYOR: That that -- so that
13 proposition is not as settled as the amici suggests?

14 MR. MANELY: Correct. I think they are
15 waiting to see what -- what we want to do.

16 So you've got Villamonte v. Marquez, where
17 the issue there is it's not moot because it's possible
18 an extradited person could one day voluntarily return,
19 so it's not moot.

20 But in this case, there is nothing
21 preventing the mother, who filed the case before the
22 district court and is still a party to the case, from
23 voluntarily returning. That enough is -- is enough to
24 survive this --

25 CHIEF JUSTICE ROBERTS: Well, that sounds

1 awfully speculative and conjectural. That doesn't
2 sound -- whether you're analyzing it under standing in
3 the first instance or mootness later, that doesn't sound
4 to be the sort of concrete injury that's required.

5 MR. MANELY: The concrete injury has to do
6 with the habitual residence determination in the
7 district court, which switches if the appellate court
8 reverses and grants habitual residence here and orders
9 the child be brought back. That is the concrete
10 interest.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 The case is submitted.

13 (Whereupon, at 11:03 a.m., the case in the
14 above-entitled matter was submitted.)

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