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1 P R O C E E D I N G S

2 (10:01 a.m.)

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

5 Mr. Manely.

6 ORAL ARGUMENT OF MICHAEL E. MANELY

7 ON BEHALF OF THE PETITIONER

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

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

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

19 First, a reversal would mean that the United
20 States is the child's habitual residence. Second, the
21 district court or court of appeals should order
22 Ms. Chafin to bring the child back to the United States
23 and overturn the monetary award. And, third, it would
24 effectuate relief in the ongoing Alabama case and the
25 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 -- once the decision -- the district
5 court 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. So your third
8 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. So it's sort of like the traffic light that we
18 talk about in our brief. It would allow the Alabama
19 courts to say --

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

22 MR. MANELY: Yes.

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

25 MR. MANELY: It would toll because the

1 child, we would argue, is wrongfully in Scotland based
2 upon an errant district court --

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

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

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

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

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

22 What our argument is, is that there is an
23 ability to grant a remedy here, and that is the reversal
24 of that determination, so that we go back to habitual
25 residence in the United States. That's what avoids

1 mootness in this case. There is a remedy that can be
2 provided here. It is not impossible.

3 JUSTICE ALITO: Wouldn't the Alabama --

4 JUSTICE SOTOMAYOR: What you're saying is
5 the return of the child, essentially, back to Alabama?

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

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

12 MR. MANELY: Yes, Your Honor.

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

15 MR. MANELY: Yes.

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

19 MR. MANELY: Right. Proceed under --

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

23 MR. MANELY: The Alabama --

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

25 MR. MANELY: No, the Alabama court would

1 have jurisdiction under the UCCJEA presently, unless
2 this Court should determine that it is moot when a child
3 is removed from the boundaries of our -- of our nation.
4 The Alabama --

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

7 MR. MANELY: Yes, sir.

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

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

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

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

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

24 MR. MANELY: The posture below is that the
25 Eleventh Circuit vacated the opinion in February; but,

1 as recently as July of this year, the Alabama Supreme
2 Court said, well, since the matter was determined moot,
3 then only the divorce can proceed.

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

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

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

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

14 MR. MANELY: Yes.

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

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

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

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

25 JUSTICE GINSBURG: When you say, "bring the

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

6 MR. MANELY: The mother --

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

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

16 But --

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

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

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

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

6 MR. MANELY: Yes.

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

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

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

17 MR. MANELY: The Alabama courts --

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

21 MR. MANELY: No, Your Honor, I don't think
22 so. Again, applying UCCJEA, which all of the States
23 have, but for one, they are to look at Hague orders in
24 the same way that they would apply UCCJEA, and there is
25 a tolling provision. If a child has been wrongfully

1 removed from that jurisdiction, then the child is still
2 presumed to have retained a home State status with
3 Alabama.

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

7 MR. MANELY: Yes, Your Honor.

8 JUSTICE SOTOMAYOR: Could you break down
9 that figure?

10 MR. MANELY: The lion's share of it is
11 attorneys' fees, but, also, within the Hague, there is a
12 mandatory provision for costs; not just costs of court,
13 but the costs of mother's flying over here from
14 Scotland, staying here for approximately a week and a
15 rental car. So while that isn't the predominant share
16 of the \$94,000, it was a substantial portion of that.

17 JUSTICE SOTOMAYOR: So --

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

20 MR. MANELY: Neither, Your Honor. Where
21 they are is the trial level court is waiting to grant a
22 divorce, but that is kind of effectively held up by the
23 parties, in hoping that we can use Alabama Rule of Civil
24 Procedure 60(b)(5); that, if we get a reversal from the
25 Eleventh Circuit saying habitual residence is the United

1 States, we can reopen the custody matter.

2 JUSTICE KENNEDY: So it would be your
3 position that the Alabama courts still have jurisdiction
4 over the child and the mother?

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

7 JUSTICE SOTOMAYOR: Counsel, that cost that
8 you have to pay for the mother, even though the case was
9 mooted, that judgment is still outstanding for the
10 monies you have to pay?

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

12 JUSTICE SOTOMAYOR: If you win on this
13 appeal, is that wiped out?

14 MR. MANELY: We believe that it is. The
15 energy of our case is thrust into having habitual
16 residence determination reversed and bringing the child
17 back; but we think that when -- the provision of ICARA
18 that allows for the costs, the travel costs and the
19 attorneys' fees to be awarded, is also obliterated. So
20 that is also --

21 JUSTICE GINSBURG: Is that done in a
22 separate judgment? The --

23 MR. MANELY: It's a separate order, same
24 case.

25 JUSTICE GINSBURG: And is there any problem

1 about the time to appeal from that having run?

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

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

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

17 JUSTICE SOTOMAYOR: Counsel, what's -- what
18 happens --

19 JUSTICE SCALIA: I don't understand your
20 answer.

21 MR. MANELY: I'm sorry.

22 JUSTICE SCALIA: What is your -- I don't
23 understand that answer. Are you -- are you saying
24 that -- that your failure to appeal that in a timely
25 fashion makes it impossible for the Court of Appeals to

1 obliterate that award?

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

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

5 MR. MANELY: I apologize. And it may be
6 just the -- the tunnel vision that we have in this case.
7 We're solely focused on reversing the district court
8 order on habitual residence and returning the child.
9 The rest is --

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

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

19 JUSTICE ALITO: Well, if you -- if you could
20 take an appeal and got a reversal of the decision -- of
21 the order removing the child to -- allowing the child to
22 be removed to Scotland, wouldn't that undermine the --
23 the judgment for costs? I don't understand why that
24 would be a separate order -- why that would be something
25 that has to be appealed separately. Why wouldn't that

1 be included with the final order in the case?

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

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

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

12 JUSTICE SCALIA: But you've got to answer my
13 question.

14 MR. MANELY: Yes.

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

22 MR. MANELY: Your Honor, I think that it is
23 correct that if the -- the basis for the award is
24 removed, then the award is removed; but, if the basis
25 for the award remains, then it would be difficult to

1 assert that there is some reason to appeal that award.

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

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

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

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

10 MR. MANELY: The Scottish court has no need
11 to determine habitual residence because that was
12 determined by the -- by the district court.

13 JUSTICE SOTOMAYOR: But that order has been
14 vacated, so can they revisit that question is really
15 the -- the issue.

16 MR. MANELY: I don't -- they wouldn't
17 revisit within the context of a Hague proceeding, unless
18 a Hague proceeding were brought there. Within the
19 context of their own custodial determination, like the
20 Alabama court would in the divorce, there is a
21 determination of -- of jurisdiction over the child.

22 JUSTICE SCALIA: But you could bring a Hague
23 proceeding there, right?

24 MR. MANELY: We could bring a Hague
25 proceeding there.

1 JUSTICE SCALIA: You could say -- you know,
2 there having been no decision in the United States, we
3 want you to decide what habitual residence is, and we
4 think it's the United States. You could do that.

5 MR. MANELY: We could do that. The problem
6 with that is that we're talking about different points
7 in time.

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

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

16 CHIEF JUSTICE ROBERTS: I thought you said
17 that that time period was tolled -- the period that she
18 was in Scotland would be tolled.

19 MR. MANELY: From a United States
20 perspective, more specifically an Alabama perspective,
21 yes. Yes, Your Honor.

22 JUSTICE GINSBURG: But in Scotland, it's --
23 it would be a custody proceeding. Forget about the
24 Hague. The child is there. The mother is bringing a
25 custody proceeding. And the question for that court is

1 where is the child's habitual residence now?

2 JUSTICE SOTOMAYOR: And at the Hague, it's
3 what was it then.

4 MR. MANELY: Yes. Yes. And -- and the
5 Scottish court -- our -- our briefs are filled with the
6 citations of authority, but the Scottish court -- there
7 is no reason to believe that the Scottish court wouldn't
8 honor what the United States court has said about
9 habitual residence, the case brought by the mother in
10 the Federal district court in Alabama.

11 So that if that was the linchpin to allow --

12 JUSTICE GINSBURG: But that was only for
13 determining the Hague Convention; and, if the Hague
14 Convention is out of it, then there is a custody
15 proceeding. The idea of the Hague Convention is just to
16 get the case to a forum that's an appropriate forum to
17 decide the custody question, right?

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

20 If -- if there are no further questions, I'd
21 like to reserve the balance of my time.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Ms. Saharsky.

24 ORAL ARGUMENT OF NICOLE A. SAHARSKY,
25 FOR UNITED STATES, AS AMICUS CURIAE,

1 SUPPORTING PETITIONER

2 MS. SAHARSKY: Mr. Chief Justice, and may it
3 please the Court:

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

11 Part of the wrongful retention determination
12 is the 900 -- or the \$94,000 in money damages. There is
13 a question of whether the child might remain in the U.K.
14 or be brought back to the U.S. And then there's the
15 question of which courts are going to decide custody,
16 Alabama or Scottish courts.

17 And we don't need to know precisely -- and
18 this Court doesn't need to figure out all of the
19 different details of Alabama State law or of custody law
20 under the Scottish proceedings. All the Court needs to
21 decide is that the appellate court's decision would make
22 a difference here. And it's -- it's just not the case
23 that you could say it's moot because it doesn't make a
24 difference.

25 JUSTICE SCALIA: But we don't know it'll

1 make a difference without answering those questions.

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

3 JUSTICE SCALIA: I mean, you want us to --
4 to say it might make a difference, and that's enough,
5 right?

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

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

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

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

22 The whole point of bringing a Hague
23 Convention case is to get the child in the place of
24 habitual residence, so that those courts, under their
25 own law, can decide custody.

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

8 This child has been in Scotland for 14
9 months. Now, you say bring it back to the United
10 States, and we -- we start over. The whole object of
11 the return procedure is so that you get the child to a
12 place that's a proper place to determine custody; isn't
13 that right?

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

23 JUSTICE KENNEDY: And would you go further
24 and say that, if a stay is not in place, that that still
25 does not deprive the Court of Appeals of jurisdiction to

1 resolve the case on the merits?

2 MS. SAHARSKY: Yes. That's what we would
3 say, that the case is not moot. The court of appeals
4 should be able to go forward with the case.

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

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

17 MS. SAHARSKY: Well, we think that just,
18 under the normal court appellate rules, that that
19 effectively is what happens using the American stay
20 standard for a four factor test, not that there would be
21 a stay in every case, but, when the showing -- the
22 appropriate four factor showing is made for a stay, that
23 then a stay would be appropriate, and an expedited
24 appeal would be appropriate.

25 But you can't ---

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

5 MS. SAHARSKY: That's exactly right.

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

8 MS. SAHARSKY: Well, the district court
9 denied a stay, and Petitioner did not go to the court of
10 appeals, so we don't know --

11 JUSTICE SCALIA: So presumably, a stay would
12 not have been appropriate.

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

21 JUSTICE GINSBURG: But we wouldn't go back
22 to what should have happened, that is, the district
23 judge applying the four factor test -- or did the
24 district -- there was an application for a stay. It was
25 denied, right?

1 MS. SAHARSKY: Yes. And the district court
2 entered a brief order; so the district court did not go
3 through the various factors, but, presumably, that is
4 the standard the district court would have used.

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

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

17 JUSTICE SOTOMAYOR: All right. Now, under
18 the Convention, if the child -- if it goes back to the
19 district court now to fashion a remedy, it could order
20 return, it could decide under the Convention that
21 bringing the child back after 14 months presents a great
22 risk to the child under the Convention and not order the
23 return, correct?

24 MS. SAHARSKY: We don't think the Convention
25 addresses that; but the district court could make that

1 determination using its equitable discretion.

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

5 MS. SAHARSKY: That is exactly -- that is
6 exactly our position. We don't know what the courts
7 would do. We're glad to discuss the possibilities with
8 the Court; but the standard is the possibility of
9 relief, it doesn't need to --

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

13 MS. SAHARSKY: That's exactly right. The
14 position of the other side is that there is absolutely
15 nothing that the courts can do in these circumstances
16 once the child leaves. And we just think that the
17 Convention doesn't say that. It doesn't mandate that.
18 It's a question of U.S. mootness law. And this Court
19 has said, as long as there's --

20 JUSTICE SOTOMAYOR: Are you aware of -- I
21 happen to be because I know this area very well -- the
22 English courts have an amici filed with us yesterday,
23 and they are sort of sensibly keeping track of what
24 we're doing and trying to adjust their proceedings
25 accordingly and in the manner they think is most helpful

1 to us. Whether it is or not, I can't comment on.

2 Is this common in the custody area? Is
3 there discussions between courts about what they're
4 doing and the why of it?

5 MS. SAHARSKY: Well, in the Convention,
6 there is kind of two aspects of this. One is in child
7 custody proceedings, under the UCCJEA, and one is in the
8 context of the Convention.

9 The UCCJEA, which deals with competing
10 States and potentially competing countries' custody
11 determinations, has specific provisions that address
12 cooperation and communication. They are, like, Section
13 110, 111, and 112 --

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

16 MS. SAHARSKY: There is a whole system for
17 that.

18 In the Convention, that type of comity and
19 cooperation typically occurs through the Central
20 Authorities. Each country has a Central Authority that
21 communicates with each other. So, for example, if the
22 U.K.'s Central Authority would like something to be
23 brought to the U.S. courts' attention, it might enlist
24 the help of the U.S. Central Authority in, for example,
25 getting the parties to --

1 JUSTICE SCALIA: Counsel, that's very
2 nice. What does that have to do with this case? I
3 don't understand that.

4 MS. SAHARSKY: Well, the question is just
5 what -- what might happen in this case, in terms of if
6 there would be competing court orders or whether the
7 courts would -- what the courts would do in response to
8 each other.

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

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

19 CHIEF JUSTICE ROBERTS: Counsel, do you
20 agree with your -- with the Petitioner, just reading a
21 sentence from its brief, that "mootness requires that
22 relief be impossible"? Do you think that's the right
23 standard?

24 MS. SAHARSKY: Well, we -- we think that the
25 Court essentially said that in Knox, that it said --

1 that asked whether there is a possibility of relief, if
2 the question is one of literal impossibility, we don't
3 think that the Court needs to ask --

4 CHIEF JUSTICE ROBERTS: What this Court --
5 Court has always said, if it's an Article 3 inquiry
6 under standing, and it said that it's not supported by
7 injury that is speculative or conjectural. It seems to
8 me, when you start talking about, well, the Scottish
9 court might do this or the Alabama courts might do this,
10 that -- that sounds pretty speculative and conjectural.

11 MS. SAHARSKY: Well, I think the Court has
12 made those comments more in the context of the standing
13 inquiry at the beginning of a case, as opposed to the
14 mootness inquiry after a case has gone on for a while,
15 and the burdens there are different.

16 At the standing -- at the beginning of a
17 case in the standing inquiry, the party coming into
18 court really has a burden of showing that this case --
19 that there's something to be adjudicated in court. As
20 the case continues, it's the party who doesn't want the
21 case to be in court anymore to show that there's nothing
22 the court can do; that even though the court has put
23 those resources --

24 JUSTICE SCALIA: Well, the burden is
25 different, but I don't agree that the standard changes.

1 It's just who has to prove it, one side or the other.

2 But I --

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

10 You know, we don't interpret that to be a --
11 you know, literal impossibility standard. We just
12 understand that to be asking the question, is there
13 something the courts can do, even if it's not
14 complete --

15 CHIEF JUSTICE ROBERTS: So do you think
16 it's -- I mean, I know you've got a laundry list of
17 things, but, as I understand it, you think it's enough
18 that, if the Court issues an opinion, the Scottish court
19 might do something as a result of that?

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

24 CHIEF JUSTICE ROBERTS: I thought one of the
25 arguments, maybe it was the Petitioner's and not yours,

1 was that one reason it wasn't moot is because the
2 Scottish courts might look at the case differently.

3 MS. SAHARSKY: Well, that's -- I think it's
4 a set of interrelated reasons. I mean, they're really
5 all connected because -- can I finish the sentence? --
6 you have a judgment in the United States about the
7 rights of the parties. It affects the money judgment.
8 It affects what might happen with custody. I mean, it's
9 all part and parcel of the same dispute.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Cullen.

13 ORAL ARGUMENT OF STEPHEN J. CULLEN

14 ON BEHALF OF THE RESPONDENT

15 MR. CULLEN: Mr. Chief Justice, and may it
16 please the Court:

17 Mr. Chief Justice, the effect that any
18 appeal court could give would be zero in the Scottish
19 court, nothing. There is nothing a court can -- can do
20 in this judicial process --

21 JUSTICE SOTOMAYOR: Why can't they order the
22 mother to come back with the child? Because the
23 Scottish court stops her? There is competing orders all
24 the time.

25 MR. CULLEN: Which -- well, they can't,

1 first. The answer to that is, no, they cannot.

2 JUSTICE SOTOMAYOR: Why not? She was here.
3 She submitted to the court's jurisdiction. Doesn't
4 her -- jurisdiction over her now continue until the end
5 of the case?

6 MR. CULLEN: Well, the case did end because
7 there is one remedy, and one remedy only, in this
8 treaty, and that is return.

9 JUSTICE SOTOMAYOR: That doesn't matter.
10 The question is, isn't she seized -- doesn't the court
11 have jurisdiction over her until the case ends? The
12 case doesn't end until there has been an appeal and a
13 judgment and the judgment affirmed or reversed. That
14 hasn't happened.

15 MR. CULLEN: No, that's not correct. I
16 can't agree with that because then we're ignoring
17 Article 3 and the constitutional doctrine of mootness
18 because that's where the constitutional doctrine comes
19 into central --

20 JUSTICE SOTOMAYOR: You are suggesting that
21 the Convention deprives a party, after the remedy's been
22 ordered and effected, of the right to appeal; not
23 because of mootness, but because the Convention takes
24 away a fundamental right to appeal?

25 MR. CULLEN: No, the Convention says you

1 must exercise the most expeditious remedies available
2 because --

3 JUSTICE SOTOMAYOR: You're not going to
4 suggest all those countries that permit appeals
5 explicitly and stop removals until appeals are finished,
6 that those -- that those those treaty -- contracting
7 treaty parties are breaching the Convention, are you?

8 MR. CULLEN: No, they're not. There are 88
9 countries, and this is a very, very good convention. It
10 works. It works for the countries, Justice Sotomayor,
11 that do immediate enforcement, and it works for the
12 countries that don't do immediate enforcement, pending
13 an appeal.

14 But the -- the question presented here is
15 what a court could do in this country once the sheriff
16 court in the Hamlet of Airdrie is seized with
17 jurisdiction because what this treaty has done is -- has
18 taken jurisdiction from the United States and said,
19 Scotland, you now have jurisdiction.

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

22 MR. CULLEN: No, it cannot. It cannot. I
23 was very --

24 CHIEF JUSTICE ROBERTS: He has no -- his
25 ability to challenge the propriety of the order that he

1 pay \$94,000 is gone?

2 MR. CULLEN: It's gone in this case,
3 Mr. Chief Justice, because, in the Joint Appendix, pages
4 16 and 17, you'll see -- I believe it's docket entry 52,
5 on page 16, an appeal was taken off those fees.

6 If you go on -- I believe it's page 17 of
7 the Joint Appendix, docket entry 57, you'll see that the
8 Petitioner voluntarily dismissed his appeal of the fees.
9 So having taken an appeal of the fees and having
10 dismissed, there is nothing left for any appeal court
11 now to do with respect to fees.

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

15 MR. CULLEN: Right. So --

16 JUSTICE KENNEDY: And he -- he was just
17 trying to have a single appeal.

18 MR. CULLEN: Right. But the test that the
19 Court would apply in -- in that hypothetical fees
20 determination is totally different from the test the
21 appeal court would apply in looking at habitual
22 residence. All it would look at is, is it --

23 JUSTICE KENNEDY: Well, appellate courts all
24 the time have issues where they apply different
25 standards to multiple issues in the case.

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

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

11 MR. CULLEN: Well, the premise, though, is
12 based in the purpose of this treaty because, back in the
13 '70s, before this treaty, Justice Kennedy, there was
14 chaos. And, in fact, the government is suggesting we
15 should go back to possibly competing custody orders
16 between Scotland and Alabama, but --

17 JUSTICE BREYER: I don't think that's --
18 you've won a judgment in lower court that says that the
19 habitual residence of the child is Scotland. So if they
20 appeal, they might win one that says that was wrong, the
21 habitual residence was the United States, but the child
22 is in Scotland.

23 You understand Scottish law better than I,
24 but they are also bound by this treaty. So I would
25 imagine a Scottish court, just as we would do, when they

1 are trying to decide what's the habitual presumptive
2 then, and now, what's the habitual residence, they would
3 look at what the United States courts decided.

4 They are not absolutely bound by it. But
5 just as we, in the last case we had, were very
6 interested in what the Chilean courts said. Of course,
7 it was relevant to us what the Chilean courts had held
8 was the proper law of Chile in respect to that child.

9 Wouldn't the Scottish courts do the same?
10 Wouldn't it matter to a Scottish court, after all,
11 that an American court had decided that the residence
12 was not bound? I'd certainly give it - won't they
13 give it consideration?

14 MR. CULLEN: With -- Justice Breyer, with
15 respect to the lower court's opinion, there is, as
16 Justice Ginsburg said, there is no opinion. There is
17 nothing. There's --

18 JUSTICE BREYER: I'm assuming they win. The
19 reason that they want to appeal is they want to win. If
20 I were looking at the case as you present it, I would
21 say, of course, you'll win, don't worry. What are you
22 worried about?

23 But -- but they have a different view. So
24 they think they are going to win. Now, it means nothing
25 if they lose. But if they win on appeal, they then have

1 their order that says that this child's habitual
2 residence was the United States. And my question is
3 where we started, armed with that piece of paper, they
4 walk into the Scottish court and they say, oh, Scottish
5 judge, please read this paper.

6 Of course, he will read it, and I would
7 think that that judge would take it into account in his
8 decision. That's what we do with the foreign -- similar
9 foreign orders of other foreign courts, and I think we
10 should do that, and I think the Scottish courts should
11 and will. Now, you tell me where I'm wrong in that.

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

18 JUSTICE BREYER: Or -- then argument as to
19 why they shouldn't give in to this hypothetical American
20 judgment. That isn't my question. My question is won't
21 they consider it and give it -- and the Scottish courts,
22 to my knowledge, are not so narrow-minded. I think they
23 would pay attention to what other courts have said.

24 JUSTICE GINSBURG: You're -- I think
25 you're -- you're --

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

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

7 JUSTICE BREYER: They would?

8 JUSTICE GINSBURG: Because what her habitual
9 residence was then doesn't matter one whit to us. We
10 want to know where she is residing now, and that's the
11 reason why the Scottish court would say it's not
12 relevant to the question before us. Their question is
13 not a treaty question. Their question is custody of
14 this child.

15 MR. CULLEN: Justice Ginsburg, that's
16 correct.

17 Justice Breyer --

18 JUSTICE BREYER: Well, thank you for Justice
19 Ginsburg's answer. She is quite helpful.

20 (Laughter.)

21 JUSTICE SCALIA: I thought he had said the
22 same thing, that the reason --

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

25 JUSTICE SCALIA: Well, good.

1 (Laughter.)

2 MR. CULLEN: Justice Breyer --

3 JUSTICE KENNEDY: But I am -- I am quite
4 surprised that you would say that prior residence can
5 never bear on present residence. In custody disputes,
6 this happens all the time. The child spent 5 years in
7 this country, 4 years in that country; now, for the last
8 2 years, the child has been in this country -- the
9 previous experience of the child has a tremendous
10 bearing on custody.

11 To say that it's only now, prospective only,
12 after the child has been removed, I just think is wrong,
13 as a matter of custody law.

14 MR. CULLEN: Well, with respect to custody
15 law versus Hague law, Justice Kennedy, there -- there is
16 a difference. The relevance of the Hague determination
17 2 years in the past is not, Justice Breyer, helpful, but
18 I agree.

19 JUSTICE BREYER: Unless there is some
20 accommodation here, what worries me is this: If you win
21 this case, it's not going to be better. Maybe for your
22 client, it will be, but for others in your position,
23 it's not going to be better.

24 And what's worrying me, to put it on the
25 table, so you can respond, is that, in similar

1 situations, district judges will think this child
2 belongs in England; this child belongs in France; this
3 child belongs in China, wherever they belong. But in
4 the back of their mind will be the possibility that they
5 are wrong, and they know there is a right to appeal.

6 And so instead of being able in these
7 border cases -- borderline cases, instead of being able
8 to send the child back home, they will think, I've got
9 to keep the child here, so that the other party has the
10 right to appeal. Now, it seems to me, in general, that
11 would be bad for the child. It would be -- and it's bad
12 for our system.

13 And it would be better to work out a system
14 that you can send the child back, and then if you're
15 reversed on appeal, it does matter to the other
16 country's courts.

17 MR. CULLEN: But, Justice Breyer, if -- we
18 say, as you know, you can't have conditional returns,
19 but you can have, with respect to stays, there is a
20 panoply of different types of stays. Now, what's
21 happened in the district court in this instance --

22 JUSTICE SOTOMAYOR: Counsel, that -- that
23 actually is not accurate. The Convention is full of
24 conditions for the return, the safety of the child, the
25 support of the parent who is returning -- there is a

1 whole set of conditions that have to be met before the
2 child is returned.

3 MR. CULLEN: Justice --

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

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

17 JUSTICE SOTOMAYOR: No. You can't -- the
18 Court can't order custody issues, but it can set
19 conditions for the nature of the return. It could say
20 the father pays the cost, the father has to pay for
21 certain expenses in the country the child is being sent
22 to. Those kinds of conditions can be imposed.

23 MR. CULLEN: Those would be limited
24 undertakings. As you know, Justice Sotomayor, those
25 limited types of undertakings came about because of the

1 13B exception and the 13B exception only, where a judge
2 felt there was some risk in the return, but the risk did
3 not rise to the great risk.

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

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

20 MR. CULLEN: Justice Kagan, not to state the
21 obvious, but this is different because it's a child.
22 It's a child in question, and that has to be a
23 consideration in this treaty.

24 JUSTICE KAGAN: Well, it's different -- that
25 might be -- it's certainly different in terms of the

1 interests at stake, and that might be a very good reason
2 for Congress to step in and try to fix this system, so
3 that you don't have children shuttling back and forth.
4 But -- you know, at the risk of sounding hard-hearted,
5 in terms of the law, what is different?

6 MR. CULLEN: Well, what is different is --
7 and I need to answer the question -- two Justices have
8 asked me about these stays, and I need to answer that,
9 so I can answer your question.

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

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

20 CHIEF JUSTICE ROBERTS: Well, that's not
21 quite fair to say we -- we haven't decided whether we're
22 going to appeal. I mean, the -- the stay motion was
23 made immediately upon the determination of the merits by
24 the district court, and the district court said no. So,
25 I mean, didn't they do everything they could have done

1 to -- to get a stay?

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

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

10 MR. CULLEN: Right. And this was a
11 Wednesday. And what should have happened is, at a
12 minimum, a 24-hour or 48-hour request for a temporary
13 stay. And, Mr. Chief Justice, this happens all the time
14 in Hague cases. Hague practitioners ask for stays and,
15 if a stay is not going to be granted, ask for a
16 temporary stay.

17 The notion presented to -- to this Court
18 that there was some rush to justice here is not what
19 happened on the ground in Alabama. That is not what
20 happened.

21 CHIEF JUSTICE ROBERTS: It seems to me --
22 and I may be taking the opposite position from one of my
23 colleagues, but the -- the best thing is to hold things
24 up briefly, so that the child doesn't go overseas and
25 then have to be brought back, particularly if you have

1 situations where there can be an expeditious appeal.
2 And I think most appellate courts would appreciate
3 the -- the benefit of that.

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

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

13 JUSTICE KENNEDY: Well, again, you're just
14 assuming that the district judge is right, but that's
15 the whole issue. And as the Chief Justice indicates,
16 under your position, we give a premium to the very sort
17 of precipitant action that the Hague Convention is
18 designed to avoid.

19 MR. CULLEN: Justice Kennedy, no, what we're
20 doing is we are following the letter and the text of the
21 convention and the implementing legislation in this
22 country.

23 Time and again, this peculiar word
24 "forthwith" is used. It means right now. Time and
25 again, the treaty tells us you must act expeditiously

1 because the idea, Justice Kennedy, is we avoid competing
2 litigation in countries. We must have one country that
3 is deciding this. And it's --

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

9 MR. CULLEN: Yes, Justice Scalia.

10 JUSTICE SCALIA: You -- you think the -- the
11 mere word "forthwith" in the statute is enough to alter
12 our normal process of appeal?

13 MR. CULLEN: It's the -- as a treaty, it's
14 the supreme law of the land. It says, if you decide to
15 issue a return, the child is to be returned forthwith.
16 And the plain meaning of those words is you must act
17 immediately.

18 JUSTICE BREYER: But I can't -- I don't
19 understand why you want a treaty where the best
20 interest of the child is what's at issue, and you
21 interpret it in a way that the court of one nation with
22 the child, where you have parents from both nations,
23 pays no attention at all to what courts in other nations
24 are saying.

25 I mean, my experience out of that is Chile,

1 where, of course, we wanted to know what the law of
2 Chile was and how the Chilean domestic relations judge
3 understood the relations between the parents. That was
4 important.

5 And similarly, I think the Scottish judge
6 should want to know the same thing about the courts
7 deciding in the United States. And the same thing is
8 true of the United States judge wanting to know about
9 Scotland and so forth.

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

15 MR. CULLEN: Justice Breyer, it's not that
16 we enter into these communications and agreements with
17 any country.

18 By ratifying this particular treaty and by
19 the United States saying, we are going to ratify it with
20 the United Kingdom or Scotland or Brazil, we are saying
21 much more than there's no comity here. We are saying we
22 trust this other country to do the right thing.

23 And that's, Justice Breyer, why we lodged
24 the Scottish papers because the Scottish papers should
25 satisfy you that Scotland was very satisfied there was a

1 valid return.

2 JUSTICE BREYER: I trust Scotland to do the
3 right thing. And I think, to help Scotland do the right
4 thing, it would be nice for Scotland to know what
5 American judges have decided. That's all. And the
6 reverse is equally true.

7 MR. CULLEN: But the -- but it doesn't
8 matter, Justice Breyer, because there's been a vacatur.
9 There is no underlying decision. The child is back in
10 Scotland, and now, one court can proceed.

11 And in fact, by continuing -- Justice
12 Breyer, by continuing the litigation, the effect of that
13 is to undermine the treaty because the idea behind the
14 treaty, particularly for military families, was to
15 enable mobility.

16 And by having ongoing litigation in the
17 United States, the only thing we can guarantee this
18 Court is this child is not coming to America until the
19 litigation is over. So now, we're talking two, three,
20 four years.

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

22 JUSTICE KAGAN: Mr. Cullen, may I ask -- I'm
23 trying to figure out what exactly your argument is. So
24 let me give you two options, and you tell me what your
25 argument is, all right?

1 One -- you can tell me it's neither, I
2 suppose. But one is this case is moot because there's
3 no practical way to enforce any relief that's ordered by
4 the Eleventh Circuit, all right? That's what I came in
5 thinking your argument was.

6 The second is -- is just no, it's just
7 improper for the Eleventh Circuit to enter any order
8 granting relief.

9 So which is it? Is it that it's improper to
10 enter any order at this point? Or is it -- you know,
11 you can enter an order, but it's just not going to be
12 enforced, and, therefore, this case is moot?

13 MR. CULLEN: Justice Kagan, I'm going to
14 take your third non-offered offer.

15 (Laughter.)

16 MR. CULLEN: And the answer is because the
17 Constitution tells us there is no case. We cannot -- we
18 cannot -- and I see Justice Alito --

19 JUSTICE KAGAN: I don't understand the third
20 option.

21 MR. CULLEN: Because -- because Article 3
22 says we have to be able to grant some effectual relief
23 in the judicial process. And since the Mills case in
24 1895, right up to the Knox case this year, this Court
25 has always said it's effectual relief in this judicial
26 process.

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

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

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

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

23 MR. CULLEN: There can be no rereturn.
24 There was a lawful order returning the child to the
25 jurisdiction of Scotland.

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

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

14 They said, in absolute terms, that nothing
15 in the Convention -- so this is our government talking
16 about the text, and we may give some compelling
17 deference to -- to the government on text, but we don't
18 give any deference to them we say or what the founding
19 fathers meant.

20 But with respect to this Janakakis case, the
21 government said nothing in the Convention requires
22 courts or other authorities -- and this was in Greece --
23 to give binding effect to any judgment --

24 JUSTICE BREYER: It does equate, but now,
25 you've got me -- I think I'm on the same wavelength.

1 MR. CULLEN: Good.

2 (Laughter.)

3 JUSTICE BREYER: And I think it was back
4 just as well, let me see, because Justice Ginsburg -- I
5 see the point of her answer now.

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

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

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

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

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

25 JUSTICE BREYER: Well, the Convention

1 doesn't know whether it's 18 months or 6 months or what
2 counts as habitual residence, does it?

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

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

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

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

21 JUSTICE BREYER: Yes. Fact.

22 MR. CULLEN: Right?

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

25 MR. CULLEN: You look to 1895, you look to

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

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

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

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

24 CHIEF JUSTICE ROBERTS: No, no. I know, but
25 the point is that the other side says that the decision

1 was wrong.

2 MR. CULLEN: And it's --

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

8 (Laughter.)

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

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

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

25 MR. CULLEN: Yes, Justice Alito.

1 JUSTICE ALITO: And I don't see where that
2 was decided, either by the court in this case or in the
3 Beckier case that the Eleventh Circuit panel here cited.
4 There is no discussion in either of those opinions of
5 the -- how the Convention -- what the Convention says on
6 this question.

7 MR. CULLEN: Well, the Beckier case goes
8 back to Mills and relies on Church of Scientology and
9 Mills --

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

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

1 The Petitioner, Justice Alito, himself, is
2 fully participating in the Scottish proceedings.

3 JUSTICE ALITO: If the -- if the Convention
4 said explicitly that a court in this country or whatever
5 other sending countries involved could order the child
6 back, this case would not be moot; is that correct?

7 MR. CULLEN: Yes.

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

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

21 JUSTICE SOTOMAYOR: But asking is not
22 enough.

23 MR. CULLEN: Well, ask --

24 JUSTICE SOTOMAYOR: Because the mother can
25 get on the plane the moment she hears that someone's

1 asked.

2 MR. CULLEN: The mother can get on the plane
3 when she is allowed to get on the plane, and in this
4 particular case, probably because she had to come in
5 under humanitarian parole, there was considerable
6 urgency in this case. And it was a very young child,
7 and the Scottish court was ready to beseize the
8 jurisdiction.

9 Why would Judge Johnson not do what the
10 treaty was telling her to do? Get the child back to
11 Scotland, I found habitual residence in Scotland, and
12 let's let Scotland move forward.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Manely, you have four minutes remaining.

15 REBUTTAL ARGUMENT OF MICHAEL E. MANELY

16 ON BEHALF OF THE PETITIONER

17 MR. MANELY: Thank you, Your Honor.

18 With that, I'd like to touch on four points.
19 First of all, these courts have inherent authority to
20 order the child be brought back. It is a way of
21 reversing the wrong decision of the district court.
22 When we are talking about the object of the Convention,
23 it is, in part, rapid return, but that is kind of
24 putting the cart before the horse.

25 The critical issue is where is the

1 appropriate habitual residence of the child, and that is
2 the place that then needs to make the custodial
3 decision --

4 JUSTICE BREYER: Well, what he says is that,
5 after 18 months in Scotland, the Scottish court will
6 decide where is the habitual residence of the child. We
7 are now in August of year 2, and what happened before
8 January of year 1 is now totally irrelevant. So even if
9 the American courts decided prior to January of year 1
10 the correct habitual residence was Alabama, when the --
11 when the Scottish courts decide what is his habitual
12 residence as of 18 months later, they won't pay any
13 attention at all to that American decision because it is
14 not relevant.

15 That, I take it, to be his argument, which
16 depends on the long time, 18 months. So what is your
17 response?

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

23 JUSTICE GINSBURG: But that was the purpose
24 of the Convention, was to cut that out. That's the
25 whole reason for the Convention, that they wanted to

1 stop the shuttling of children.

2 Do you -- are you aware of rereturn?

3 Your -- your thesis is that the -- that, now, the court
4 of appeals could tell the district judge, you were
5 wrong. And then the father, armed with that, can go and
6 get a rereturn order from the Scottish court under the
7 Convention.

8 Have there been instances under the
9 Convention, was this question of rereturn -- is rereturn
10 authorized, assuming that there was a valid return
11 order, at least valid when it was entered and when the
12 child was returned --

13 MR. MANELY: Your Honor --

14 JUSTICE GINSBURG: What is the incidence of
15 rereturn under the Hague Convention?

16 MR. MANELY: There are no cases because we
17 don't run into this problem, quite frankly. And -- and
18 rereturn is a catch phrase that was created here.
19 Bringing the child back would be a part of the court's
20 inherent authority -- part of the district court or the
21 court of appeals' inherent authority, and it's the basis
22 upon which Scotland has the child in the first place.

23 JUSTICE SOTOMAYOR: Isn't there a Spanish
24 case?

25 MR. MANELY: I'm sorry?

1 JUSTICE SOTOMAYOR: Isn't there a Spanish
2 case?

3 MR. MANELY: There is a Scottish custody
4 case pending --

5 JUSTICE SOTOMAYOR: Not a Scottish, Spain, a
6 case from Spain.

7 MR. MANELY: A Spain -- a Spanish case, yes,
8 Your Honor, there is.

9 JUSTICE SOTOMAYOR: Where the child was, in
10 fact, returned when --

11 MR. MANELY: The child was sent to Poland
12 based upon the trial court's decision in that case, and
13 the child returned from Poland, based upon the Supreme
14 Court of Spain's decision in that case. So there is a
15 confusion between --

16 JUSTICE GINSBURG: Was the child returned?
17 Or was it just a decision that the appeal could not be
18 avoided? Was the child returned by Poland?

19 MR. MANELY: Well, I don't know, ultimately,
20 if the child was returned from Poland, so much as the
21 Supreme Court --

22 JUSTICE GINSBURG: That's -- see, that's the
23 whole problem, is that you -- you're going to have rival
24 decrees of two countries, which is what -- exactly what
25 the Convention was meant to avoid.

1 MR. MANELY: Except that we never have.

2 I mean, this is a fairly young convention.

3 We haven't had it that long. But we never have had that
4 problem before.

5 It's been easy enough -- Ohlander v. Larson
6 out of the Tenth Circuit is a great case to look at, for
7 where the United States has been very giving in sending
8 children back. We have not had this problem before.

9 JUSTICE SOTOMAYOR: Counsel, there is an
10 amici brief here that says that the Scottish courts will
11 not pay attention to the habitual residence of a child
12 at the time of the removal. The amici brief that was
13 filed with us yesterday, if I'm reading it correctly,
14 suggests that the court believes that hasn't been
15 settled in English law; is that correct?

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

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

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

22 So you've got Villamonte v. Marquez, where
23 the issue there is it's not moot because it's possible
24 an extradited person could one day voluntarily return,
25 so it's not moot.

1 But in this case, there is nothing
2 preventing the mother, who filed the case before the
3 district court and is still a party to the case, from
4 voluntarily returning. That enough is -- is enough to
5 survive this --

6 CHIEF JUSTICE ROBERTS: Well, that sounds
7 awfully speculative and conjectural. That doesn't
8 sound -- whether you're analyzing it under standing in
9 the first instance or mootness later, that doesn't sound
10 to be the sort of concrete injury that's required.

11 MR. MANELY: The concrete injury has to do
12 with the habitual residence determination in the
13 district court, which switches if the appellate court
14 reverses and grants habitual residence here and orders
15 the child be brought back. That is the concrete
16 interest.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 The case is submitted.

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

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