1   IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - - - - x

3 MANUEL JOSE LOZANO,   :

4   Petitioner   :   No. 12-820

5   v.   :

6 DIANA LUCIA MONTOYA ALVAREZ   :

7 - - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Wednesday, December 11, 2013

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11   The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:06 a.m.

14 APPEARANCES:

15 SHAWN P. REGAN, ESQ., New York, New York; on behalf of

16   Petitioner.

17 LAUREN A. MOSKOWITZ, ESQ., New York, New York; on behalf

18   of Respondent.

19 ANN O'CONNELL, ESQ., Assistant to the Solicitor

20   General, Department of Justice, Washington, D.C.; for

21   United States, as amicus curiae, supporting

22   Respondent.

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1   C O N T E N T S

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

2   (10:06 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   first this morning in Case 12-820, Lozano v. Alvarez.

5   Mr. Regan.

6   ORAL ARGUMENT OF SHAWN P. REGAN

7   ON BEHALF OF THE PETITIONER

8   MR. REGAN: Thank you, Mr. Chief Justice,

9   and may it please the Court:

10   I represent Manuel Jose Lozano, a father who

11   loves his daughter. Respondent kidnapped that daughter

12   and concealed her from Mr. Lozano, first in the United

13   Kingdom, for nearly eight months; then in France, then

14   in the United States.

15   In Abbott, this Court recognized child

16   abduction to be one of the worst forms of child abuse

17   and that the Convention, therefore, aims to deter and

18   prevent child abduction from occurring in the first

19   instance. Equitable tolling furthers that aim. By

20   contrast, the rule adopted by the Second Circuit

21   provides a playbook for thwarting the Convention --

22   JUSTICE GINSBURG: Mr. -- Mr. Regan, you --

23   you want us to apply equitable tolling in a field,

24   family law, where the interest of the child is always of

25   paramount importance and running all through family law

1   is -- is that concern. And changed circumstances figure

2   very large.

3   So decrees that might be final in another

4   area of law are not because, if circumstances change,

5   then the child custody may change. So it seems to me

6   that this area is hugely unfit for equitable tolling

7   that would leave out consideration of the child's best

8   interests.

9   MR. REGAN: Justice Ginsburg, we believe

10 that equitable tolling does provide, within the context

11 of the Convention, consideration -- the opportunity for

12 courts to consider the interests of the child. And

13 that's most poignantly illustrated by some of the cases

14 in which it has been applied.

15   If I may provide an example, an example in

16 Respondent's brief, Mendez Lynch v. Mendez Lynch, on

17 page 31 of their brief, it's a case in which the Court

18 found equitable tolling is available, and it found

19 equitable tolling applied factually. The Court,

20 however, considered the facts and circumstances of the

21 child's life, including those facts and circumstances

22 that relate to the extent to which the child is settled.

23   But it considered those facts and

24 circumstances within the rubric of the Article 13

25 analysis, and that is consistent with what other courts

1   have done in what I would -- what I would term more

2   natural Article 12 --

3   JUSTICE KENNEDY: Is that equitable

4   discretion, or is that still equitable tolling?

5   Because, as I understand equitable tolling, if it

6   applies and, say, there's a 6-month suspension, the

7   child must go back, so that there's -- so that the --

8   that the weighing that you're talking about just

9   doesn't -- doesn't come into play.

10   MR. REGAN: Thank you, Justice Kennedy. And

11   I think this is important because I think this -- this

12   illustrates how foreign courts have miscomprehended

13   equitable tolling, how it would operate -- how it

14   operates within the context of the convention.

15   Equitable tolling would prevent the

16   abducting parent from taking advantage of the Article

17   12.2 exception, that -- that the child should not be

18   returned because the child is now -- because the parent

19   has met that minimal routine showing of the child is now

20   settled. He's going to school, he or she is -- has some

21   friends, so on and so forth, that they are living a

22   normal life here.

23   What it does not prevent -- and Mendez

24   illustrates this, as do other cases -- it does not

25   prevent the Court from looking at the Article 13

1 considerations. So, for example, as in Mendez and other

2 cases, the Court will still consider if the child -- if

3 the child is of sufficient age and maturity to testify,

4 such that, if this Court should take into account his or

5 her views or objections to return, the Court can do so.

6   JUSTICE GINSBURG: Where is Article 13, so

7 we can look at it?

8   MR. REGAN: I'm sorry, Justice Ginsburg?

9   JUSTICE SCALIA: Where is it in the

10 materials?

11   MR. REGAN: Mendez v. Lynch?

12   JUSTICE SCALIA: Article 13, which you're

13 referring to.

14   MR. REGAN: Oh, Article 13.

15   JUSTICE SCALIA: I'd like to read it.

16   MR. REGAN: I'm sorry. Article 13 is -- it

17 is at -- I'm sorry. It's at 135a of the Petition

18 Appendix. Excuse me. Article 13 is at 136a. Excuse

19 me. 135a is --

20   JUSTICE KENNEDY: And -- and it does

21 provide -- just while people are looking at it, it does

22 provide that, even though there's, in your view,

23 equitable tolling, there are still circumstances in

24 which the child would not go back, if there's a grave --

25 grave risk?

1   MR. REGAN: Grave risk of harm.

2   JUSTICE KENNEDY: Grave risk of harm to the

3   child.

4   MR. REGAN: Or if the court finds that it

5   would be an intolerable situation.

6   JUSTICE KENNEDY: But, again, as Justice

7   Ginsburg questions, it seems to me indicates, there are

8   two different axes here. One is the best interest of

9   the child, and the other is an adequate deterrent so

10   that parents don't abduct. But those axes don't cross

11   very often, if at all.

12   MR. REGAN: I respect, Justice Kennedy, it's

13   difficult to balance them. They're somewhat

14   incommensurate or -- you know, competing considerations

15   or -- but both very important. We think that equitable

16   tolling properly balances them within the structure of

17   the Convention because equitable tolling, again, it --

18   it prevents this Article 12.2 exception, but it doesn't

19   prevent the Article 13 exception.

20   In fact, in many ways, what we're talking

21   about is not inconsistent with what the English court

22   does or did in Cannon. In Cannon, the court said if --

23   where there is concealment and subterfuge, there will be

24   a heightened burden for establishing settlement.

25   Now, in this --

1   JUSTICE KENNEDY: But that still -- but

2   Article 13 still is different from what's in the best

3   interest of the child.

4   MR. REGAN: I think --

5   JUSTICE KENNEDY: Now, it's true that all

6   we're talking about is for the -- during the time in

7   which the hearing takes place, but these hearings take

8   years, and expert witnesses are not available or readily

9   available.

10   MR. REGAN: Well, Justice Kennedy, to your

11 point about timing and essentially provisional return, I

12 do think -- you know, courts -- district courts have

13 shown great adeptness at dealing with those issues.

14 They've entered conditional orders that require the

15 child be returned at a time when the proceeding -- when

16 the testimony is necessary.

17   JUSTICE ALITO: Excuse me. Let me give you

18 this example. Suppose a child is abducted at -- at age

19 one and is concealed for 10 years, and then the location

20 of the child is discovered. The other parent files a

21 petition. So that, if there's equitable tolling, the

22 petition was filed within one year.

23   But during those 10 years, the child has

24 become very well settled in the new country, has learned

25 the language of that country, the customs developed,

1 gone to school, developed relationships, and so forth.

2   Under -- if there is no equitable tolling,

3 but the abduction can be taken into account under the

4 doctrine of equitable discretion, that's -- that's one

5 thing. But the way you read this, the way you read the

6 Convention, the equitable tolling would mean that the

7 petition was filed within a year, and unless one of the

8 conditions in Article 13 was met, for example, a grave

9 risk that the child's return would expose the child to

10 physical or psychological harm or otherwise place the

11 child in an intolerable situation, then there would

12 be -- then the child would have to be removed.

13   So there is that major difference, isn't

14 there, between those two positions?

15   MR. REGAN: There is a significant

16 difference. And we think that that significant

17 difference is warranted and necessary in order to

18 achieve the effect of deterrence because the Second

19 Circuit's rule essentially says to abducting parents, if

20 you abduct your child and you conceal your child for 12

21 months, you will be rewarded.

22   JUSTICE ALITO: Well, that's true. The

23 position of the Respondent and the government would give

24 a great incentive for parents to abduct children and

25 hide them for a period of time. But on the other side,

1   as my example, I think, illustrates, your rule would

2   mean that a child who is very well settled in a

3   particular location would have to be returned to the

4   other country for purposes of the custody determination.

5   So why do you think the Convention should be

6   read one way, rather than the other?

7   MR. REGAN: Justice Alito, I hope to make

8   abundantly clear that our position, equitable tolling,

9   would not mandate that that child be returned. All it

10   does -- but it's significant --

11   JUSTICE ALITO: Well, how would it not?

12   MR. REGAN: It -- it changes the question

13   that the court asks. Absent equitable tolling, the

14   courts -- the question on which -- the question before

15   the court is, is this child settled? And the factors

16   the courts looked at -- the courts have looked at it,

17   and it really -- they're -- you know, "settlement" is

18   not defined in the Convention, and Congress has left it

19   to courts to decide.

20   And courts look at --

21   JUSTICE SCALIA: Well, which of the

22   articles -- which of the provisions in Article 13

23   would -- would prevent the return in the hypothetical

24   that Justice Alito just gave you?

25   MR. REGAN: Courts have looked at -- and

1   I'll say it -- in the decades --

2   JUSTICE SCALIA: I mean, what -- what does

3   Article 13 allow the court to consider? It says, "It's

4   not bound to order the return if the person,

5   institution, or other body having care of the person of

6   the child was not actually exercising the custody rights

7   at the time of removal or retention."

8   Well, you know --

9   MR. REGAN: That's known as acquiescence.

10   JUSTICE SCALIA: That wouldn't have -- or

11   had consent to or -- that wouldn't apply in his

12   hypothetical or in this case.

13   MR. REGAN: It's really B.

14   JUSTICE SCALIA: B, "There is grave risk

15   that his or her return would expose the child to

16   physical or psychological harm." I mean, we have no

17   reason to believe that -- that your client would --

18   would harm the child or -- or that the parent in Justice

19   Alito's hypothetical would harm the child, "or otherwise

20   place the child in an intolerable situation."

21   I don't see how any of those things would --

22   would come to the assistance of the child in -- in

23   Justice Alito's hypothetical.

24   MR. REGAN: If I may explain by way of

25   illustration, in some of the cases, what courts have

1   looked at. And let me give -- Blondin is another

2   example cited in our brief, cited by the Solicitor

3   General, a Second Circuit -- the well-known Second

4   Circuit case. That's a natural Article 12.1 case.

5   Petition is filed before the period of one year expires.

6   The Second Circuit looked at -- or Judge

7   Chin -- then-Judge Chin in the district court, looked at

8   the child's facts and circumstances related to

9   settlement as part of that grave risk analysis. There

10   was expert testimony, as there often is in these cases,

11   that the child was suffering from potential -- from

12   post-traumatic stress disorder.

13   Experts testified that return of the

14   child -- the child should not be returned because it

15   presented a grave risk of harm to the child.

16   JUSTICE SCALIA: Physical or psychological

17   harm.

18   MR. REGAN: That's correct. And there are

19   cases, Mendez v. Lynch and others.

20   JUSTICE SCALIA: It might be now and then,

21   but in the routine case that Justice Alito just gave

22   you, I don't see how there's any -- any reason at all

23   not to yank the child back from wherever he's been for 10

24   years.

25   MR. REGAN: If I may answer in two ways, in

1 the example Justice Alito gave. With a 10-year-old

2 child, it's -- it's very likely that the court would

3 hear from that child. I think the more difficult

4 example is -- let's make that child 7 or 8. But --

5 and -- and there's no evidence these cases have

6 occurred.

7   JUSTICE KENNEDY: Which court? Which court?

8 To use the --

9   MR. REGAN: United States court.

10   JUSTICE SCALIA: Yes, but Article 13 does

11 not say the child -- the child can state -- well, let's

12 see. "The child objects to being returned." I guess

13 you could limit to that. "May also refuse to order the

14 return of the child if it finds that the child objects

15 to being returned."

16   MR. REGAN: That's been universally adopted

17 by the courts hearing testimony.

18   JUSTICE SCALIA: So that's the one

19 exception, yes.

20   MR. REGAN: But -- but the grave risk

21 exception, and courts have applied this, it really -- it

22 really just -- it -- it changes the question, like in

23 Cannon.

24   JUSTICE KENNEDY: But in a sense, what

25 you're saying is that it's not an automatic -- it's not

1   an automatic rule. The more you argue that Section 13

2   is applicable, the more you're watering down the very

3   rigid rule that you want, in order to say that there has

4   to be deterrence.

5   MR. REGAN: I understand that point.

6   However, there is a difference. And so what we're

7   trying to balance here, and I think -- it's not we.

8   What the Convention balances -- what courts applying the

9   Convention have found is the proper balance, is not for

10   courts to say, well, let's try and figure out what the

11   best interests are.

12   In fact, the Convention couldn't be clearer,

13   and Congress couldn't have been clearer that that is not

14   where it -- that's where it least wanted courts wading

15   into those waters.

16   JUSTICE BREYER: The Convention says, in the

17   preamble, that the parties -- that's countries -- are

18   firmly convinced that the interests of the children are

19   of paramount importance in matters relating to their

20   custody. Okay? Paramount importance. So the provision

21   you're talking about, Article 13, says, well, would

22   returning the child lead to physical harm, psychological

23   harm, or otherwise put the child in an intolerable

24   position. So they mean intolerable.

25   So I think this would be a pretty typical

1   case. The husband says he was fine. The wife says, no,

2   he kicked me in the stomach and did a lot of other

3   things. The judge hearing the two sides says I can't

4   say the husband's right.

5   MR. REGAN: Okay.

6   JUSTICE BREYER: So we don't know. Now,

7   your idea is to send the child back to the husband

8   unless the child gets up there and chooses between

9   parents. That's pretty tough on 8- or 9- or 10-year-old

10   children and -- very tough. And you're going to keep --

11   the -- you're going to send it back to the father in

12   this situation, unless the mother can prove it's

13   intolerable, either because of physical -- I mean, my

14   goodness, a physical or psychological, you have all the doctors

15   saying he should stay in New York. A typical problem

16   for a family court judge, really tough.

17   So you have the Convention, which says in

18   the preamble, look to the interests of the child. You

19   have every other country saying, that's what it really

20   means; in other words, they're against you. You have

21   the Department of State, in charge of the treaty, saying

22   that's what it really means and otherwise against you.

23   And so what do you have going for you? That isn't your

24   fault that there isn't too much going for you, but

25   nonetheless, I'd like to know what it is.

1   MR. REGAN: I think we have a lot going for

2   us. You've asked -- I think you've hit, Justice Breyer,

3   on just about every issue that I could possibly want to

4   address today. But -- and -- and let me say, I -- I

5   respect the position of the 8- or 9-year-old child, the

6   difficulty. I was that child before a judge on the --

7   giving that sort of testimony, so I certainly appreciate

8   it.

9   But on this -- this question of best

10   interests, the Convention makes the decided choice if

11   courts -- the Convention defines how courts are to

12   determine that best interest. It doesn't say courts

13   should determine what is in the best interest of the

14   child. It says look at whether the child is settled

15   under Article 12 or, if that's not applicable, you may

16   look at Article 13. Other than that, the presumption is

17   the best interest of the child is for return.

18   You mention that the State Department is

19   against us, which I'm happy to take the opportunity to

20   address here. We don't believe that the State

21   Department's views should be accorded great weight in

22   this situation. Their brief does not speak to the

23   diplomatic consequences of equitable tolling. It

24   doesn't speak to -- it doesn't speak to the idea that

25   equitable tolling will somehow impair our ability to

1   recover children abducted from the United States.

2   JUSTICE GINSBURG: Well, Mr. Regan, aside

3   from the position of the United States, which -- which

4   has changed, you made that point, the determination

5   that's being made at this stage is really one of venue.

6   It's where the main bout will be fought out. And so we

7   don't want that to linger for a long time. We want that

8   decision to be made with dispatch.

9   And as one of the amici brief informs us,

10   many of these what you call kidnappers happen to be

11   badly abused women and if you -- if they had to go under

12   Article 13, then they would have this full-blown, was he

13   really the abuser? Doing it without equitable tolling,

14   that question is reserved for the main -- for the main

15   bout.

16   I suppose if we had a case where the judge

17   isn't certain was the father abuser or not, that judge

18   would feel an obligation to stretch out this venue

19   determination, to see if it's an Article 13 situation.

20   MR. REGAN: I think, Justice Ginsburg, the

21   domestic violence situation, which I am entirely

22   sensitive to and appreciate, illustrates the difficulty

23   of these cases and -- and that courts can't really

24   figure out what's -- who's right or who did what in

25   these circumstances. Most of -- usually all of the

1   evidence is overseas on that issue.

2   What the Convention -- the approach the

3   Convention decides on taking is that, first, there is no

4   self-help remedy certainly for concealment, that -- that

5   nothing excuses concealment of the child. And, in fact,

6   to the extent you said there's a goal and a value of

7   shortening these proceedings, to the extent equitable

8   tolling disincentivizes concealment, it does that.

9   I mean, the opposite rule says, if you

10   conceal, i.e., you extend that period of time during

11   which there's no relationship, you'll be rewarded.

12   It's an enormous incentive.   And our point

13   is there is the proper safety valve. The standard under

14   Article 12.2 is so pedestrian, it is essentially have

15   you failed to be -- aside from abducting your child,

16   since then, have you failed to be a normal parent? Is

17   your child in school? Does he or she go to ballet

18   class? Do you take him or her to church? Do they have

19   friends? All those things were satisfied here. Can you

20   be employed? What's your legal -- what's your

21   immigration status?

22   Now, this case illustrates just how simple

23   and routine that is to achieve. And here, she didn't

24   have a job. She's not here legally. I guess the

25   court found that she had the depth and quantity of

1   friendships that your typical pre-kindergartner has, and

2   that was enough for her to defeat return.

3   The Convention properly balances these

4   things by saying where it presents -- and courts have

5   done this. The district courts are doing this. No one

6   says -- you know, the State, the Solicitor General and

7   our Respondent -- points to a single case where they

8   say, here's equitable tolling and boy -- you know, the

9   court got it wrong.

10   Here was the wrong outcome because they

11   applied equitable tolling as they have been doing for

12   nearly two decades. Courts can do this. But the

13   question, as it is in Cannon, can't be as simple as

14   well, are you -- are you doing fine here in the United

15   States.

16   JUSTICE KAGAN: Mr. Regan, Justice Breyer

17   pointed out that all other countries seem to disagree

18   with you. That's obviously a concern of ours when we

19   interpret a treaty, that all other countries interpret

20   it in a -- in a single way. Do you contest that? Are

21   there any other countries that apply equitable tolling

22   rules?

23   MR. REGAN: We believe that it's neither

24   surprising nor momentous that foreign courts have failed

25   to adopt equitable tolling. It's not surprising because

1   they lacked the presumption that we do. It's not

2   significant for two reasons. One, we think -- as I've

3   alluded to, I think they miscomprehend equitable

4   tolling. The Cannon court calls it "too crude," that it

5   won't allow for an accounting of the child's interest.

6   And as -- as the courts in the United States have been

7   clear, it does.

8   It provides --

9   JUSTICE SCALIA: But they may be wrong. Who

10   cares if they're wrong? The point is a treaty should be

11   interpreted uniformly by all the parties to it. And

12   you're telling me, well, all the rest of them interpret

13   it another way, but they're wrong -- you know, everybody

14   is out of step, but me. That's -- that's just not

15   right.

16   MR. REGAN: Not at all, Justice Scalia. And

17   it was actually -- your question relates to my third

18   point.

19   What those decisions reflect is that the

20   Convention leaves room within Article 12 for the

21   operation of domestic law. Article 12 speaks to

22   commencement of proceedings. You must commence

23   proceedings within one year. It speaks to settlement.

24   The Convention -- it is Congress in ICARA that defines

25   how one commences proceedings. It says you must file in

1   a court that has jurisdiction. That's Section 11603(b)

2   and (f)(3), which are at 117 through 121a of the

3   Petition Appendix.

4   Congress decides that's how you -- how you

5   stop that period, by filing in a court having

6   jurisdiction. Other countries provide nation -- courts

7   of nationwide jurisdiction. Some countries provide that

8   the central authority itself will file the petition for

9   the applicant or will file in its own interest on behalf

10   of the child.

11   JUSTICE SCALIA: None of that is covered by

12   the treaty. Yes, each State may apply its own law with

13   respect to matters not covered by the treaty, but I do

14   not read that to say -- to mean that each State may apply its

15   own law in interpreting the provisions of the treaty and

16   so can create exceptions on the basis of equitable

17   discretion when the treaty has none or because its

18   courts use that in another -- in other contexts or

19   create an exception on the basis of equitable tolling.

20   This is a matter of interpreting the treaty,

21   not of bringing into effect some other principle of --

22   of State law that overrides the treaty. That's how I

23   read that provision.

24   MR. REGAN: Our position is that, if you

25   look at the drafting history here, the drafting history

1 was preliminary draft Article 11 provided for two

2 periods, automatic return, if you will, return subject

3 to the Article 13 and 20 defenses, if you filed within 6

4 months; or for a period -- a discovery rule capped at

5 one year, if you didn't know the whereabouts of the

6 child.

7   Some countries said those periods are too

8 short. Some said they're too long. Some said we don't

9 want to have to deal with this discovery rule issue, we're

10 concerned about the evidentiary burdens. What's

11 important is what the drafters did.

12   They extended that first period to a year,

13 and then, with respect to this discovery rule concept,

14 they said, we're going to give you Article 18, it

15 provides for return at any time; we're going to provide

16 Article 34, which the explanatory report highlights, is

17 meant to provide for invocation of domestic law or

18 rules, particularly where 12.2 is implicated. And it

19 left for countries to define the -- to define key

20 elements of Article 12.2.

21   In doing --

22 JUSTICE SOTOMAYOR: I'm sorry. That's

23 turning legislative history, in my mind, on its head.

24   They considered directly, if you study the

25 SG's brief, a discovery rule that would have codified

1   equitable tolling. And there was lengthy discussion

2   about it and a decision that they wouldn't do that,

3   that, instead, they would expand the period to a year

4   where automatic return was required, and they introduced

5   the best interest of the child after that year, and that

6   that was now a balancing of all interests, the parents'

7   and the child's.

8   And you're right, they had other provisions

9   that would affect the possible return or lack thereof,

10   and they never wanted to stop a court from returning a

11   child if it in its equitable discretion decided it was

12   appropriate. But you're turning that legislative

13   history on its head a little bit.

14   MR. REGAN: Justice Sotomayor, we believe

15   that the State Department's reading of that history --

16   of that drafting history, is oversimplified because

17   there were objections to that period, to that -- to that

18   discovery rule that weren't simply to a discovery rule

19   as a general matter. It was that some countries said,

20   we don't want to have to deal with that. Other

21   countries said, it needs to be longer.

22   And so the choice that was made was a choice

23   to give countries flexibility to determine how they want

24   to calculate that period, when it should be set, and

25   potentially to employ equitable tolling. The

1   jurisdiction convention --

2   JUSTICE SOTOMAYOR: Don't use up your time.

3   MR. REGAN: The jurisdiction convention is

4   consistent with that idea.

5   CHIEF JUSTICE ROBERTS: Thank you, counsel.

6   MR. REGAN: I'd like to reserve my time.

7   Thank you, Mr. Chief Justice.

8   CHIEF JUSTICE ROBERTS: Ms. Moskowitz.

9   ORAL ARGUMENT OF LAUREN A. MOSKOWITZ

10   ON BEHALF OF THE RESPONDENT

11   MS. MOSKOWITZ: Mr. Chief Justice, and may

12   it please the court:

13   To reverse the Second Circuit's holding and

14   to apply equitable tolling to Article 12 would be

15   squarely at odds with the Convention's text, purpose,

16   and drafting history, as well as contrary to the

17   post-ratification understanding and interpretation of

18   every other signatory state to consider the issue.

19   Your Honors, we ended on a note of drafting

20   history, and to return to Justice Sotomayor's question

21   about turning that a bit on its head, I agree. The

22   drafting history specifically shows that the countries

23   considered two periods, one of prompt return, return

24   forthwith within 6 months of the removal; and 6 months

25   from the discovery of the whereabouts of the child, if

1   the child were not known.

2   And what the drafters thought -- some

3   thought the period needed to be longer, but there were

4   countries that wanted it to be shorter. There were

5   countries that were very concerned that the child would

6   become settled in the new environment, such that

7   uprooting that child again, just for purposes of having

8   a custody determination in the -- in the former country

9   of habitual residence would be contrary to that child's

10   interest.

11   So they struck a balance.   They -- they

12   negotiated over -- over several drafts and finally

13   arrived at a single period of one year, but that wasn't

14   going to be a cutoff. Instead of having a statute of

15   limitation -- statute of reposed construct, they said

16   the obligation is going to continue, and it's going to

17   continue until the child turns 16, unless it is

18   demonstrated that the child is now settled in her -- in

19   its new environment.

20   JUSTICE ALITO: But what -- what troubles me

21   about your position is that it undermines the best

22   interests of children in a very powerful way, insofar as

23   it does not deter and, indeed, encourages -- provides a

24   great incentive for parents to abduct their children.

25   And that was the central purpose of the Convention, to

1   prevent harm to children and also to parents, but

2   centrally to children who are abducted.

3   And if you have a rule that says if you can

4   abduct the child and you can hide for a year, which

5   isn't very difficult, then all you have to do is provide

6   some evidence of settlement, and you are going to -- you

7   are going to win, you are going to deter return.

8   Am I wrong to be concerned about that?

9   MS. MOSKOWITZ: Your Honor, your concern is

10 not wrong, but I think it's not founded on what -- what

11 will happen here. I don't think it encourages abduction

12 and concealment because that -- those facts of

13 concealment are going to be taken into account into

14 whether the child, in fact, is settled.

15   JUSTICE ALITO: Well, all right. Perhaps

16 that's the solution to the problem then. I wonder if

17 you would accept that, that there is no equitable

18 tolling, let's assume for the sake of argument, but

19 abduction is a strong factor that weighs against the

20 return, that weighs against the failure to return the

21 child, not just something that can be disposed of in a

22 sentence, which is basically what the district court did

23 here, but a very strong factor that has to be taken into

24 account in the exercise of equitable discretion.

25   Would you disagree with that?

1   MS. MOSKOWITZ: A bit, Your Honor, and

2   it's -- the abduction itself is the -- what triggers the

3   Convention to begin with. Every single case that is

4   heard under the Convention involves a wrongful removal

5   or retention. There will be illegal abduction every

6   time. And the drafters in fact absolutely were trying

7   to address that harm to children.

8   And they -- the paramount interest of the

9   children were designing this Convention, and they did

10   state that there were two --

11   JUSTICE SCALIA: I think they had it in

12   mind, not just the interest of children, but the

13   interest of parents. It's simply not true that, in all

14   cases involving children, the paramount interest of the

15   child governs. That's not the case, or else, we would

16   remove many children from their parents in this country.

17   MS. MOSKOWITZ: Absolutely, Your Honor.

18   JUSTICE SCALIA: Parents have rights.

19   MS. MOSKOWITZ: Absolutely.

20   JUSTICE SCALIA: And that is one of the

21   things that this treaty considers.

22   MS. MOSKOWITZ: Your Honor, it does not

23   consider, ultimately, the custody determination and with

24   which parent the child should live. That is expressly

25   not part of the Convention, and that is what --

1   CHIEF JUSTICE ROBERTS: Well, the --

2   whether or not the child is settled in a particular case

3   is certainly going to be a significant consideration in

4   the custody determination, isn't it?

5   MS. MOSKOWITZ: Yes, Your Honor, I would

6   presume so. But as well as any wrongful acts of either

7   or both parents would be taken into account in a

8   full-blown merits best interest of the child custody

9   determination. What the Convention is trying to address

10 in the instances of where a child is now settled in a

11 new environment after having been at least one year in

12 the new environment is, should the child be uprooted in

13 anticipation of that full-blown hearing.

14   JUSTICE SOTOMAYOR: What's the fairness --

15   CHIEF JUSTICE ROBERTS: The problem is

16 you're each -- you're each using the child as the tool

17 in the objective that you have in representing the

18 parents. On the one side is the allegation of

19 inequitable conduct in concealment. On the other side

20 is the interest in settlement. That's a dispute between the

21 two parents, and the child is being used as -- as -- I

22 don't know what -- you know, a tool in implementing

23 those conflicting considerations.

24   And to the extent that the Convention was

25 designed to deter that kind of kidnapping, it adopted

1 a -- a fairly strict rule. And you're each trying to

2 say, oh, the rule doesn't mean what it means because,

3 don't worry, we'll take those considerations into

4 account in addressing custody; and on the other side,

5 well, don't worry because there's not that much

6 difference between 12 and 13.

7   So how are we supposed to decide between

8 those two conflicting considerations of the parents

9 while maintaining the paramount concern, certainly not

10 the exclusive one, but the significant one, in the

11 interest of the child.

12   MS. MOSKOWITZ: Yes, Your Honor. And just

13 to address the one point that the Petitioner raised of the,

14 don't worry about Article 12 because there's Article 13,

15 those are completely different constructs. In fact,

16 Congress recognized that, when it set a different burden

17 of proof for defenses under Article 13, as opposed to

18 the well settled -- settled analysis under Article 12.

19   CHIEF JUSTICE ROBERTS: But that cuts

20 against you in some respects. You say there is such a

21 big difference, and therefore, it is very important that

22 the kidnapping parent do the best he or she can to

23 conceal the child's presence, so they get beyond 13 and

24 into 12.

25   MS. MOSKOWITZ: No, Your Honor, because if

1   the parent is concealing the child -- for example, if

2   the parent is moving from place to place to evade

3   detection or changing the child's name or not enrolling

4   the child in school to avoid detection --

5   JUSTICE SOTOMAYOR: My gosh, all it takes is

6   moving to Peoria. I mean, I don't mean to denigrate

7   Peoria, but all it takes is moving to a place that has

8   no connection to --

9   JUSTICE SCALIA: Justice Sotomayor is from

10   New York.

11   JUSTICE SOTOMAYOR: Yes, obviously.

12   (Laughter.)

13   JUSTICE SOTOMAYOR: Obviously.

14   CHIEF JUSTICE ROBERTS: Those are us from

15   the Midwest think it's actually easier to hide a child

16   in New York.

17   (Laughter.)

18   MS. MOSKOWITZ: Yes, Your Honor.

19   JUSTICE SOTOMAYOR: I do have a point -- a

20   question though. What sense does this make when -- that

21   a child who -- a suit is filed within the year, but the

22   litigation takes two or the child who -- the filing is a

23   day after the year, and the litigation takes a year and

24   they're both in the same situation. Why should those

25   two children be treated differently? Why should one

1   have the benefit of settled now and the other not have

2   it?

3   MS. MOSKOWITZ: Your Honor, I think --

4   JUSTICE SOTOMAYOR: What sense does it make

5   when, as Justice Alito indicated, part of the central

6   purposes of the Convention is to avoid the kidnapping of

7   children?

8   MS. MOSKOWITZ: Your Honor, absolutely, that

9   is one of the objectives of the Convention, and it

10   exists because that was presumed to be contrary to the

11   interest of children, and I don't dispute that in the

12   majority of the cases, that's true.

13   But the concept that the drafters had to

14   grapple with this issue -- they wanted to deter child

15   abductions, absolutely, but they also recognized that,

16   at some point in time, it wasn't going to be just about

17   children at large.

18   It was going to be about --

19   JUSTICE SOTOMAYOR: So why isn't Article 13

20   enough protection? It has to do with -- and unlike

21   Justice Scalia, I don't think it's psychological or

22   physical harm necessarily by the parent, but by the

23   situation.

24   MS. MOSKOWITZ: Right.

25   JUSTICE SOTOMAYOR: The return. You agree

1 with that?

2 　　　MS. MOSKOWITZ:　　　　Yes, Your Honor.　I do think

3 it -- it should be broader than that.　I think there are

4 courts that -- the Article 13 defense is supposed to be

5 narrow, just like the Article 12.2 settled exception,

6 but the settled exception isn't enough -- excuse me,

7 Article 13 isn't enough because the drafters wanted

8 Article 12, too.

9 　　　They wanted to be able to take into account

10 the situation of the child after this one year.　And why

11 one year and not one year including the hearing, I think

12 it was a balance.　The drafters were concerned both that

13 it was going to be too long and that it was going to be

14 too short.

15 　　　JUSTICE KAGAN:　　　　Ms. Moskowitz, going back to

16 Justice Alito's question.　Could you tell me how you

17 think this works?　You said, in response to Justice

18 Alito, that sometimes concealment can be a factor in

19 determining whether a child is settled.　And I presume

20 you mean if somebody conceals the child by moving the

21 child from place to place, the child would not be

22 settled.

23 　　　Is it also a factor in determining whether a

24 settled child should nonetheless be returned?

25 　　　MS. MOSKOWITZ:　　　　Your Honor, I -- I -- that's

1   the question of whether and to what extent there is

2   discretion to return a child -- a settled child under

3   Article 12. And I think --

4   JUSTICE KAGAN: Or under Article 18.

5   MS. MOSKOWITZ: Your Honor, Article 18 -- my

6   understanding of Article 18 and the government's

7   interpretation of Article 18 is that Article 18 was

8   designed, not as a duty or something arising under the

9   Convention, but a recognition that the Convention is not

10   an exclusive statement and not intended to occupy the

11   space on child abduction and return.

12   JUSTICE SCALIA: I think your answer to

13   Justice Kagan's question has to be no, or else I don't

14   understand what we're doing here.

15   MS. MOSKOWITZ: Your Honor, I struggle with

16   this because I think that there is a reading of the

17   plain language that says no, but it's -- there is a

18   general feeling that there should be some sort of escape

19   hatch --

20   JUSTICE BREYER: Well, what is the answer?

21   I'd like a straight answer in your opinion because

22   Justice Kagan's case, the mother kidnaps the child.

23   They live in a grain elevator -- a nicely refurbished

24   grain elevator, in Peoria for a year. And after the

25   year, a month later. The father finds both of them,

1   goes to a family judge -- a very tough job by the way --

2   and the family judge reads this, and he says, well, I

3   have to admit the child is settled here now in Iowa.

4   All right. It's settled.

5   MS. MOSKOWITZ: Okay.

6   JUSTICE BREYER: But send the child back to

7   London, he's going to be just about as settled. I mean,

8   really, it's not that much difference, but I can't say

9   the child is not settled.

10   The father says this is the most unfair

11   thing I've ever seen. She hides out for a year. The

12   child would be just as well back in London. Almost as

13   well. Who knows? Maybe better. But now, what can the

14   family court do -- judge do? That's the straight

15   question we've been trying to get your answer to that,

16   and it isn't an answer to say -- you could say, if

17   that's the answer, I don't know.

18   MS. MOSKOWITZ: Your Honor, in -- in that

19   question, there's -- there's the question of what can

20   they do under the Convention and what can they do.

21   JUSTICE BREYER: No, what can they do? I

22   just want to know if the family court judge will say

23   please settle this, and the two of them won't.

24   MS. MOSKOWITZ: Yes, Your Honor.

25   JUSTICE BREYER: And so, now, what can the

1   judge do? Is the father simply out of luck or not?

2   MS. MOSKOWITZ: No, Your Honor, because a

3   full-blown merits, best-interest-of-the-child analysis

4   under the -- the custody-type family court proceeding

5   that is envisioned to follow a return petition under the

6   Convention will take all of those facts into account.

7   JUSTICE KAGAN: No, but prior to that.

8   MS. MOSKOWITZ: Prior to.

9   JUSTICE KAGAN: If you could go back to --

10   do you agree with Justice Scalia, that, really, at that

11   point, there's nothing to do? Once the determination

12   has been made that the child is settled, there is no

13   remaining discretion that the judge has?

14   MS. MOSKOWITZ: Your Honor, I think there is

15   some discretion under Article 12 to return the settled

16   child, but it cannot be under a set of facts that were

17   completely within the minds of the drafters when they

18   chose the one-year period.

19   JUSTICE SCALIA: But you say -- I don't

20   understand what you're saying. Give us an example.

21   MS. MOSKOWITZ: Your Honor, it's hard to

22   come up with a specific example, but there can't -- it

23   can't be --

24   JUSTICE SCALIA: You just don't want to say

25   no. It seems to me your case requires you to say no,

 1   and it's no help to me to say, well -- you know, there

 2   may be some exceptions that I can't describe. Tell me

 3   the exceptions if there are any.

 4   MS. MOSKOWITZ: Your Honor, the -- the

 5   exception to whether a child that is found to be settled

 6   after all the facts --

 7   JUSTICE SCALIA: Yes.

 8   MS. MOSKOWITZ: -- of concealment are taken

 9   to -- into account, there -- there should remain some

10   discretion --

11   JUSTICE SCALIA: Under 13, right? Is that

12   the discretion you're talking about?

13   MS. MOSKOWITZ: No, Your Honor. It's the

14   discretion under Article 12, but it's in the same vein

15   of there is discretion under Article 13 and 20, as well.

16   The way that the language is written in Article 13, for

17   example, states that the State is not bound -- I'm on

18   136a of the Petition Appendix -- that the State is not

19   bound to order the return if it is established.

20   So it -- it's not saying that the return

21   must be denied if these defenses are established.

22   There's slightly different language in Article 12, which

23   I think is a reflection of the different drafting --

24   JUSTICE ALITO: Well, you -- you're

25   confusing me. Let's say I'm the judge who has to decide

1 this. The one-year period has just past, and I have

2 evidence that this child who is now two years old has

3 some friends, goes to play with the friends, goes to the

4 park, has become accustomed to some American customs,

5 knows the neighborhood.

6   So the child is settled to that degree.   And

7 you say even if there's been very elaborate -- a very

8 elaborate effort of concealment, no proffered

9 justification for the abduction, no indication that

10 there would be any serious harm if the child were sent

11 back to the U.K., you say that's just too bad. That's

12 your answer?

13   MS. MOSKOWITZ: No, Your Honor. I think

14 some of the factors you pointed out, for example, that

15 there would be no serious harm if the child were

16 returned, not necessarily physical harm or intolerable

17 situation under Article 13, but there -- Article 12

18 settlement does take into account roots. It's not

19 routine, it's not --

20   JUSTICE BREYER: But can you give me any

21 authority? I read that exactly in Article 12, but

22 you've now given me a different impression. What

23 Article 12 says is that, if it's less than a year, the

24 child is returned forthwith. If it's more than a year,

25 the child shall be returned forthwith, unless -- unless

1 it is demonstrated the child is now settled in its new

2 environment.

3   It doesn't say you don't return it if the

4 child is now well settled in the environment. It just

5 says you don't have to return it forthwith.

6   MS. MOSKOWITZ: Yes, Your Honor.

7   JUSTICE BREYER: So I would have thought

8 that that would have opened room for discretionary

9 factors, but you have not given me a case that said that

10 that's so. You have not given me anybody who said that

11 what I thought was the natural reading and which you'd

12 like to be the natural reading, you've not given any

13 support for the proposition that it is the natural

14 reading.

15   JUSTICE SCALIA: And I -- I assumed from

16 your brief that that was not the reading you were giving

17 it. And that is not the reading it has to be given,

18 frankly. I read it the other way, "shall order the

19 return unless it is demonstrated that the child is now

20 settled."

21   I assume that to mean in which case you

22 shall not order the return. Isn't that the way you've

23 been reading it?

24   MS. MOSKOWITZ: No, Your Honor. We do in

25 our --

1   JUSTICE SCALIA: Oh, it is not. Okay.

2 Well, then, gee, we don't have a lot to argue about here.

3   JUSTICE KAGAN: Well, if that's the case, if

4 you're reading it that way -- I mean, I was reading it

5 Justice Scalia's way, too.

6   JUSTICE SCALIA: Of course.

7   JUSTICE KAGAN: The first clause says,

8 "shall" and the second clause says, "shall not." But

9 there is an alternate reading where the first clause

10 says, "shall," and the second clause essentially says,

11 "may or may not at your discretion." But, boy, that

12 would open up a big discretionary hole if you read it

13 that way, wouldn't it?

14   MS. MOSKOWITZ: No, Your Honor. It

15 shouldn't be read that broadly. It's certainly -- and

16 the House of Lords in England, in In re: M, did find

17 that there was a residual discretion after finding a

18 child was settled.

19   JUSTICE BREYER: So I should read that case

20 because the language says, "Unless it is demonstrated

21 the child is now settled, you return it forthwith,

22 unless it is demonstrated the child is well settled."

23 Well, now, it's demonstrated well settled. Does that

24 mean I cannot return it? Or does it mean I don't have

25 to return it?

1   MS. MOSKOWITZ: Your Honor, I --

2   JUSTICE BREYER: And I say -- or you say I

3 read that case in the House of Lords, and I will

4 discover it means you don't have to return it.

5   MS. MOSKOWITZ: That's the way the House of

6 Lords interpreted it.

7   JUSTICE SOTOMAYOR: And they relied on

8 Article 18, didn't they?

9   MS. MOSKOWITZ: No, Your Honor. They found

10 the discretion within Article 12.

11   JUSTICE SCALIA: Ms. Moskowitz, what do you

12 do about Article 13 in that case, which begins,

13 "notwithstanding the provisions of" Article -- "of the

14 preceding Article 12, the judicial or administrative

15 authority requesting is not bound to order the return of

16 the child if the person" -- blah, blah, blah.

17   That says to me that, under 12, you are

18 bound, and you're telling me, well, you're really not

19 bound under 12. You have discretion anyway.

20   MS. MOSKOWITZ: Your Honor --

21   JUSTICE SCALIA: I, frankly, didn't

22 understand that that was your argument in this case, and

23 it -- it puts the whole case in a quite different light.

24   MS. MOSKOWITZ: Article 12, you are

25 absolutely bound to return the child, unless you meet

1   one of these exceptions within the one year, forthwith

2   return. Prompt -- prompt return is the idea of the

3   first clause of Article 12. Article --

4   JUSTICE SOTOMAYOR: That's the one year.

5   MS. MOSKOWITZ: Correct. And under Article

6   12.2, that's saying the child -- the court shall --

7   shall also order the return after this 1-year period,

8   unless it is demonstrated. And the question is what

9   happens if it's demonstrated, and that's do you have to

10   return still, or can you -- or do you have to keep the

11   child here? And I think what the -- generally, the

12   courts have found -- and it's not unanimous

13   internationally; it's not.

14   Hong Kong says --

15   JUSTICE KENNEDY: In many cases, this would

16   be an example. The cost of experts to testify about the

17   child's adoption or adaption or settlement in New York

18   would be very substantial. The experts who had examined

19   the child, the experts who knew about the school, the

20   school's officials themselves, would all have to go to

21   England to testify. Is that a factor that the courts

22   consider, or is that not -- not relevant?

23   MS. MOSKOWITZ: Your Honor, I think those

24   facts are exactly why the settled exception exists. It

25   recognizes that the -- the reason to get the child

1   immediately back under the --

2   JUSTICE KENNEDY: In other words,

3   "settlement" is a code word for saying ease of producing

4   witnesses?

5   MS. MOSKOWITZ: No, Your Honor, it's not,

6   but it certainly is a recognition that the -- the

7   justification for return and prompt return is in part to

8   return to the status quo ante of where child was for

9   purposes of having a custody determination.

10   JUSTICE GINSBURG: May I -- may I ask you, I

11   think your brief -- I may not be remembering it

12   correctly, but I think you -- you said no equitable

13   tolling, and everybody in all the other countries agree

14   on that, but there is equitable discretion. I think

15   that you -- and the question is, is there this equitable

16   discretion notion?

17   MS. MOSKOWITZ: Your Honor --

18   CHIEF JUSTICE ROBERTS: Briefly, please.

19   MS. MOSKOWITZ: Thank you.

20   They're -- the courts are divided

21   internationally on whether equitable discretion exists

22   to return a child that has been determined to be

23   settled. But I think, on balance, there should be some

24   level of equitable discretion to return a settled child,

25   but not under -- simply because of facts of concealment

1   that were firmly within the minds of the drafters when

2   drafting Article 12.

3   CHIEF JUSTICE ROBERTS: Thank you, counsel.

4   MS. MOSKOWITZ: Thank you.

5   CHIEF JUSTICE ROBERTS: Ms. O'Connell.

6   ORAL ARGUMENT OF ANN O'CONNELL,

7   FOR UNITED STATES, AS AMICUS CURIAE,

8   SUPPORTING THE RESPONDENT

9   MS. O'CONNELL: Mr. Chief Justice --

10   CHIEF JUSTICE ROBERTS: Justice Scalia.

11   JUSTICE SCALIA: What's the government's

12   position on -- on this question we've just been

13   discussing, whether Article 12 is absolute or whether

14   there is discretion even within Article 12, even though

15   specific elements of discretion are contained in Article

16   13?

17   MS. O'CONNELL: It's our position that,

18   under Article 12, there is discretion to return a

19   settled child and that that comes from Article 12

20   itself. As you pointed out, the language of Article 12

21   says that, if more than a year has passed, the court

22   shall order the return of the child, unless the child is

23   settled in her new environment.

24   And that -- I mean, I think it's clear that

25   that could be read in two ways, and the Court has said

1   that, when the "similar except shall" formulation -- and

2   we cited in our brief the Department of Commerce v. U.S.

3   House of Representatives case. The "similar except

4   shall" language, it's interpreted depending on the

5   context in which it appears.

6   And we think it's very clear from the

7   Convention that in the context of the Convention and

8   specifically Article 12, that the better reading is that

9   a settled child may be returned.

10   JUSTICE SCALIA: Why doesn't the context

11   include Section 13, which -- which lists specific

12   reasons why you can depart from 12? I mean, it seems

13   very strange to say, and in addition to that, there's a

14   whole pot load of other reasons within -- within 12

15   itself.

16   MS. O'CONNELL: Well, Article -- it's true

17   that Articles 13 and 20 are written in expressly

18   discretionary language, but those are sort of set out as

19   exceptions to the rule of Article 12. Article 12 is

20   written up differently, but there's nothing in the

21   Convention that ever says that a child has to stay in

22   the country where she has been abducted to.

23   JUSTICE KENNEDY: What's -- what's the -- an

24   example of where a settled child might be returned? A

25   very -- two very good parents, and the child is very

1   adaptable, and so the child can -- is well settled now,

2   but the child will be well settled in the new

3   environment at well. Is that the -- is that the

4   hypothetical?

5   MS. O'CONNELL: In exercising the discretion

6   the court should be -- it's not just a free --

7   free-wheeling discretion that the court is exercising

8   under Article 12. We think it's guided by the purposes

9   stated in the Convention. So, yes, first, you look at

10   whether the child is settled, and that could be enough

11   to defeat the presumption that an abducted child should

12   be returned.

13   You can also look at whether the child could

14   easily resettle if the child was sent back. For

15   example, a 10-year-old child who was in school and had a

16   lot of friends and a routine in London was abducted to

17   the United States for a year. That child may not -- may

18   be settled in the United States, but she may not have a

19   difficult time resettling.

20   JUSTICE SCALIA: You would expect all the

21   signatories to this treaty to come up with essentially

22   the same exceptions, under -- under what you say is --

23   is the interpretation of Article 12?

24   MS. O'CONNELL: Well --

25   JUSTICE SCALIA: I mean, it seems to me it

1   just makes that article impossible to apply consistently

2   country to country.

3   MS. O'CONNELL: No, I don't think so.

4   And -- and, the other signatories have -- have almost

5   all, I mean, I think the Hong Kong court does say that

6   it doesn't have discretion, but it said, in that case,

7   nevertheless, it would, even if it had discretion, it

8   wouldn't order the children returned. But the other

9   courts of signatory countries that have interpreted

10   Article 12 have all found a discretion, whether it be in

11   Article 12 or in Article 8.

12   And if I --

13   JUSTICE SCALIA: Have they exercised it --

14   have they exercised it, that discretion which they say

15   is there?

16   MS. O'CONNELL: I mean --

17   JUSTICE SCALIA: Have they exercised that

18   discretion not to apply the -- the mandatory requirement

19   of Article 12?

20   MS. O'CONNELL: Yes. I mean, courts in the

21   United States have done that. I think courts in -- in

22   other countries --

23   JUSTICE SCALIA: I'm talking about foreign

24   courts.

25   MS. O'CONNELL: -- have as well. Yes.

1   JUSTICE KAGAN: If I understand the way you

2   think this works, you don't -- there's not even a

3   presumption that a settled child will stay, right?

4   You're just saying, once you've found a settled child,

5   the obligation to return the child goes away, but at

6   that point, it really is a kind of "all things

7   considered" inquiry, with no presumption operating at

8   all, just in light of the purposes of the treaty?

9   MS. O'CONNELL: Well, I think the -- the

10   last part, Justice Kagan, is the most important part,

11   that it has to be guided by the objectives of the

12   treaty; that it's not a free-wheeling, best interests of

13   the child analysis or where this child should be, but

14   you could take into account the principle in Article 12,

15   that it's harmful to uproot a settled child, but you can

16   also weigh against that the idea that this Convention is

17   really geared in the first place toward preventing

18   abduction.

19   CHIEF JUSTICE ROBERTS: I would think it

20   would be very unusual for a family court in that

21   situation not to go ahead with the custody proceeding

22   before it because it would think the child is settled.

23   Now, do I send the child back. So that they can do the

24   custody proceeding in England, or just go ahead and do

25   it here? Don't you think most family court judges would

1   say, let's just go ahead and do it here?

2   MS. O'CONNELL: Well, if there's -- if

3   there's reason to send the child back, even -- even a

4   settled child, we think that the purposes of the

5   Convention should -- should prevail there.

6   CHIEF JUSTICE ROBERTS: What kind of

7   reasons -- what kind of reasons would there -- would

8   there be?

9   MS. O'CONNELL: That the --

10   CHIEF JUSTICE ROBERTS: To send the child

11   back?

12   MS. O'CONNELL: That the parent engaged in

13   behavior like concealing the child that is -- that is

14   not condoned under the Convention, that --

15   CHIEF JUSTICE ROBERTS: So you would visit

16   on the child the behavior of the parent?

17   MS. O'CONNELL: We think the court -- I

18   mean, the court has discretion, we think, to order a

19   child's returned even if she's settled. I mean, that --

20   that discretion could be abused if a child has been in

21   the United States, for example, for 5 years, and the

22   court says, well, the child was being concealed, so we

23   will send the child back.

24   But -- but we think -- and there will be

25   some cases in which the court could probably not abuse

1   its discretion by deciding the case either way.

2   But, yes, we think on the one hand equitable

3   tolling is not a good way to deal with this problem

4   because Article 12 specifically wants courts to take

5   into consideration the interest of the child --

6   JUSTICE SOTOMAYOR: Counsel, whatever fears

7   my colleagues have, I've only found two -- or I should

8   say my clerks have only found two published decisions in

9   which courts have returned the child, so it's not as if

10   they are ignoring the settlement issue. In fact, some

11   might say that they are not giving abduction enough

12   weight in -- in enough cases.

13   But I -- the Hong Kong court who said there

14   might not be discretion to return a settled child was

15   not the highest court of Hong Kong, either.

16   MS. O'CONNELL: That's -- that's right. I

17   don't think any of these decisions are from the highest

18   court.

19   JUSTICE SOTOMAYOR: And so, if we're going

20   to give uniform meaning, the uniform meaning of

21   international weight is that abduction is one factor for

22   a court to consider in its equitable weighing on

23   settlement because that's the whole purpose of the

24   Convention. That's a central reason in the preamble.

25   MS. O'CONNELL: That's right.

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 1        JUSTICE SOTOMAYOR:        But isn't there --

 2        JUSTICE SCALIA:          There's always -- isn't

 3   there always abduction?  As your friend has pointed out,

 4   the whole treaty only applies where the child has been

 5   abducted, so you say, oh, well, there's a special

 6   exception to the rules of the treaty where the child has

 7   been abducted, but that's what the treaty applies to.

 8        MS. O'CONNELL:           We understand that an

 9   abduction is going to take place in every case.  I think

10   we are looking for something more than what happened in

11   this case, some sort of concealment that happened, so

12   that the parent that is left behind and looking for the

13   child cannot find him.

14        JUSTICE ALITO:           I don't know what sense -- I

15   don't know what sense that makes.  Let's say a child is

16   abducted in Mexico, and let's say that the parent who is

17   left behind is not a rich or sophisticated person, and

18   now, the child is brought to the United States.

19        And the parent in Mexico has a year to find

20   the child in the United States, doesn't speak English,

21   can't easily find a lawyer to handle the case.  He's got

22   an enormous country to try to find the child in the

23   United States.  How in the world is that going to be

24   done?

25        MS. O'CONNELL:           Well --
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1   JUSTICE ALITO: You don't need to do very

2   much concealment. You can go to Peoria. You can go to

3   New York City, and -- and it's going to be an enormous

4   struggle to find that child within a year.

5   MS. O'CONNELL: The first thing I'll point

6   out is that Article 12 -- the drafters assumed that

7   there was going to be some difficulty in locating

8   children, and they decided on this one-year period, but

9   also point out the State Department dedicates

10 significant resources to finding children that are

11 thought to have been abducted to the United States.

12   They have access to all sorts of federal law

13 enforcement databases to try to determine if the child

14 has come here. They have --

15   JUSTICE GINSBURG: How -- how would that aid

16 be invoked? Take Justice Scalia's example. The parent

17 left behind in Mexico, no resources of her own or his

18 own. How would the State Department get into the act?

19   MS. O'CONNELL: Typically, the left-behind

20 parent will approach the central authority in his or her

21 own country and typically with an idea of what the

22 abducting parent's connections are to other countries.

23 And so, if the United States is singled out as a country

24 to which the child might have been taken, the Mexican

25 central authority would contact the United States

1 central authority, and immediately, somebody would be

2 assigned to start looking for that child within the

3 United States.

4   And there are a great number of resources

5 that are channeled toward that through the State

6 Department in working with other Federal agencies,

7 the -- the crime databases, the Federal parent locater

8 service that's used to track down people in the United

9 States to pay child support.

10   It works with State law enforcement agencies

11 who can check school records and driver's license

12 records and things like that, so it's not like it's -- I

13 mean, it is difficult. We are acknowledging that it's

14 quite difficult.

15   JUSTICE KENNEDY: How -- how separate are

16 the two concepts of the best interest of the child and

17 the interest in policing parents, so they don't abduct?

18 At what point do they intersect?

19   MS. O'CONNELL: Well, I mean, we think --

20 the Convention starts with the presumption that a

21 settled child should be returned, and so the starting

22 presumption is always that you should not abduct the

23 child --

24   JUSTICE KENNEDY: The child settled, that's

25 when the abduction took place.

1   MS. O'CONNELL: Excuse me?

2   JUSTICE KENNEDY: You said it started that a

3   settled child should be returned?

4   MS. O'CONNELL: That -- that an abducted

5   child should be returned.

6   JUSTICE KENNEDY: Yes, abducted.

7   MS. O'CONNELL: When the -- a determination

8   that the child is settled can overcome that presumption,

9   and then the other equitable factors, like concealment,

10   come into play.

11   CHIEF JUSTICE ROBERTS: Justice Scalia?

12   JUSTICE SCALIA: You know, I have one more

13   question. At the end of the day, now that I understand

14   the government's position, I don't see any difference

15   between your position and -- and the position of -- of

16   the Petitioner here, except that he wants to call it

17   equitable tolling, and you want to say we can take

18   concealment into account under Section 12 --

19   MS. O'CONNELL: No --

20   JUSTICE SCALIA: -- and not apply the

21   absolute rule, where there's been concealment. I don't

22   care whether you call it equitable tolling or not.

23   MS. O'CONNELL: I think the positions are

24   quite different because, under an equitable tolling

25   analysis, putting aside that you may be able to satisfy

1   a different Convention defense, like one under Article

2   13 or 20, under an equitable tolling analysis, the court

3   would be prohibited from taking into account whether the

4   child is settled in her new environment in determining

5   whether to send her back.

6   CHIEF JUSTICE ROBERTS: Thank you, counsel.

7   Mr. Regan, five minutes.

8   REBUTTAL ARGUMENT OF SHAWN P. REGAN

9   ON BEHALF OF THE PETITIONER

10   MR. REGAN: I would agree --

11   JUSTICE SOTOMAYOR: That is, in fact, the

12   central difference, isn't it?

13   MR. REGAN: I would agree with Ms.

14   O'Connell, that there is a difference.

15   JUSTICE SOTOMAYOR: A huge one, whether the

16   court can --

17   MR. REGAN: The difference is not that a

18   court cannot take the facts and circumstances of the

19   child's life into account. It can. That is -- that is

20   the Mendez case. That's Reyes Olguin. That's Blondin.

21   There are innumerable cases that show that. They can --

22   the Court can take that into account. It's just a

23   question of what is the question to which the Court

24   applies those facts.

25   Under our circumstance, it's not this

1   Article 12.2, is the child doing fine here? Is the

2   child living a normal life? It's a different question.

3   Is the -- is the goal and motive and presumption for

4   return going to be defeated here because it would

5   present a risk of harm to the child? We think that's

6   the right question because that's the only question that

7   deters concealment.

8   JUSTICE BREYER: Are you -- can I ask you

9   how it works here? I realize I don't know. A year has

10   passed. The father never found out where the child was.

11   Now, he suddenly finds out. He runs to Iowa. The judge

12   looks at this Convention, and he says, well, the year's

13   passed. You've lost, let's say, and I don't have to --

14   I don't have to return him forthwith. The child's not

15   going to suffer intolerable injury. I can't use that.

16   I don't have to return him forthwith.

17   Now, I look, is he settled?   Yes. He's

18   settled. All right. End of the matter. But do we now,

19   in the discretion of the father, have a custody hearing?

20   The father can say, yes, all that's true, but I should

21   have custody. And he goes, and under Iowa law, we see

22   who is entitled to custody. And he has something going

23   for him. Namely, the mother's acted pretty badly,

24   unless she has excusing circumstances in abducting the

25   child.

1   Does that happen or not?

2   MR. REGAN: Well, the custody proceeding

3   would occur in a different court. Of course, it

4   wouldn't occur in the Federal --

5   JUSTICE BREYER: No, it would go to the

6   family court, so is that -- would that happen? Could

7   that happen? Of course, I think.

8   MR. REGAN: Of course. Of course.

9   JUSTICE BREYER: Okay. If the answer is of

10   course, what we're talking about here is, on the one

11   hand, we don't want to encourage abductions. On the

12   other hand, we don't want to treat the child as a yo-yo.

13   MR. REGAN: Absolutely.

14   JUSTICE BREYER: So the question is whether

15   the custody hearing will be in a family court in Britain

16   or whether it'll be in a family court in the United

17   States.

18   MR. REGAN: That's right.

19   JUSTICE BREYER: That's the correct

20   question; is that right?

21   MR. REGAN: That is the question. And also,

22   the question is how do we deter --

23   JUSTICE BREYER: So our issue about whether

24   there's discretion or -- it's a little bit secondary

25   because we can have a big, full-blown hearing about who

1   should have custody, though, it will be in a different

2   court. It's true. You lose. There is more incentive

3   to kidnap the child.

4   It's also true, if you win, there is a much

5   greater likelihood that the custody hearing will be in

6   Britain, rather than the United States, which is the

7   yo-yo problem.

8   MR. REGAN: And our concern here, Justice

9   Breyer --

10   JUSTICE BREYER: All right. Now, go -- now,

11   say what you want to say. Now, if I understand it

12   correctly.

13   MR. REGAN: Our concern is the deterrence

14   and prevention, which is the goal of the Convention.

15   Justice Scalia asked about other nations in uniformity.

16   And there could be no better reflection about the room

17   created in Article 12 and that this -- that the

18   uniformity is not -- or that this is not a problem where

19   we need to be so concerned about uniformity.

20   In 2006, through the special commission

21   process, the meeting of the -- of the members of the

22   Convention, the United States specifically apprised the

23   other nations that it was employing equitable tolling in

24   the 12.2 context. As the government concedes, no one

25   else disagreed. No one expressed any concern about the

1 United States doing that. That's a clear reflection

2 that there is this room in Article 12.

3   Government's and Respondent's position is

4 that concealment may be taken into account. The problem

5 there is the Respondent still has this enormous

6 incentive to conceal, which is the purpose -- that's the

7 primary goal, to prevent that from happening, concealing and

8 abduction. That's the goal of the Convention.

9   But also, there's no standard.   They haven't

10 articulated a standard. The government doesn't

11 articulate one. It -- it amounts to a standard that

12 says concealment matters, unless it doesn't. That's an

13 enormous -- that ephemeral standard is very difficult

14 for a respondent to overcome. It's very difficult for a

15 district court to apply. And what it does is it creates

16 this incentive to conceal because no one even knows what

17 the question is.

18   Equitable tolling defines the question

19 within the context of the Convention. It says, by

20 tolling, this is the question you should answer. If

21 there's not to be tolling and there are lots of

22 courts -- lots of cases where courts have found we

23 shouldn't toll because the child wasn't concealed or the

24 parent didn't exercise due diligence finding the child,

25 then we'll ask the Article 12.2 question, whether the

1   child is settled.

2   The bottom line is equitable discretion will

3   result in the abduction of more children. Equitable

4   tolling will disincentivize that. I would urge the

5   Court to look at those cases I mentioned, Mendez,

6   Blondin.

7   Reyes Olguin is another one.   2005, Westlaw

8   67094, a 2005 case in the Eastern District of New York,

9   Judge Gleeson where return was denied under these

10   circumstances. Now, that's a natural 12.1 case, I

11   believe. But the court looks at factors of settlement.

12   Excuse me.

13   CHIEF JUSTICE ROBERTS: Thank you, counsel.

14   The case is submitted.

15   (Whereupon, at 11:09 a.m., the case in the

16   above-entitled matter was submitted.)

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