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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 08-645, Abbott v. Abbott.

Ms. Howe.

ORAL ARGUMENT OF AMY HOWE

ON BEHALF OF THE PETITIONER

MS. HOWE: Mr. Chief Justice, and may it please the Court:

The Hague Convention exists to ensure that custody disputes are resolved by the courts of the country of habitual residence rather than through abduction. It thus generally requires the return of a child who is abducted in violation of a right of custody. So too, a ne exeat right permits a parent to require that the child reside in the country of habitual residence, thereby rendering international abduction illegal.

Ne exeat rights are not only rights of custody under the text of the convention, but they also track the convention's vital purpose of ensuring that children are not subject to international abduction.

Under the convention, Mrs. Abbott cannot evade the jurisdiction of the Chilean courts by

1 abducting the child to Texas and then asking a Texas  
2 State court to nullify the rights granted to Mr.  
3 Abbott under Chilean law. That's the sound view of  
4 the great majority of signatory courts to consider the  
5 issue as well as essential authorities in both the  
6 United States and Chile.

7 JUSTICE SCALIA: How many --

8 JUSTICE GINSBURG: You would be on  
9 absolutely sound ground if this were a convention on  
10 the mutual recognition of jurisdiction and judgment,  
11 but it's not. You -- you said the whole question is  
12 deferring to the courts of habitual residence, but  
13 this statute is not raised in terms of court  
14 jurisdiction. It's in terms of the right of a  
15 custodial parent.

16 MS. HOWE: Yes, Justice Ginsburg, and  
17 Mr. Abbott has a statutory ne exeat right as well.  
18 The fact that he also has this right under the order  
19 is irrelevant, we believe, because no one is arguing  
20 for -- that -- the question is whether or not he has  
21 rights of custody under Chilean law, and it's Chilean  
22 law that confers the ne exeat right.

23 The fact that he also has this right under  
24 the order is -- is irrelevant for this case. If  
25 Mrs. Abbott --

1 JUSTICE GINSBURG: You're not relying on the  
2 order; you're just relying on the statute?

3 MS. HOWE: We are relying just on the  
4 statute.

5 JUSTICE BREYER: If that's so, imagine a  
6 well-educated American woman marries a man from a  
7 foreign country X. They have a divorce. The judge  
8 says, the man is completely at fault here, a real  
9 rotter. The woman is 100 percent entitled to every  
10 possible bit of custody, and the man can see the child  
11 twice a year on Christmas Day at 4:00 in the morning.  
12 That's it.

13 Now, there's a law like Chile's that says  
14 you can't take the child out of the country without  
15 the permission of the father too, this person who gets  
16 to see the child twice a year. And you're saying that  
17 that's custody. It's custody, and -- and what is the  
18 woman supposed to do?

19 She can't get a decent job worthy of her  
20 education. The -- the -- all the courts said that  
21 she's entitled to the child. She has to choose  
22 between her life and her child. And -- and is that  
23 what this -- this convention is aimed at?

24 MS. HOWE: It would be a right of custody,  
25 Justice Breyer, that the convention doesn't look to

1 the purpose. All it looks --

2 JUSTICE BREYER: Now -- now, of course, what  
3 I'm asking you with my example --

4 MS. HOWE: Yes.

5 JUSTICE BREYER: Is why interpret it that  
6 way, where all that you have is a rule of law that  
7 applies to everybody, even in the case I've tried to  
8 imagine, where to say it's a right of custody would  
9 ruin the life of the woman, would give the husband  
10 something which he should -- certainly shouldn't have  
11 in any moral term, it would seem, and she comes back  
12 to the United States and is forced to give her child  
13 back to whatever this country is. I have called it X.  
14 Now, why give that kind of interpretation to this  
15 statute, which seems to have a purpose that's looking  
16 after women and children?

17 MS. HOWE: Certainly. The -- the statute  
18 that you hypothesize in this case, Justice Breyer,  
19 reflects the domestic country's judgment that the  
20 child should remain in the country, unless the father  
21 agrees to its departure. We don't look to why the  
22 child's -- why the --

23 JUSTICE BREYER: Well, that's your  
24 conclusion. I'm just trying to get -- to see if there  
25 is any humane purpose underlying the interpretation

1 that you have advocated, and certainly there are two  
2 interpretations here. Your opponents will soon  
3 present us with a different one.

4 MS. HOWE: Certainly -- I mean --

5 JUSTICE SOTOMAYOR: There is an alternative,  
6 isn't there?

7 MS. HOWE: There is an alternative. I mean,  
8 certainly under Chilean --

9 JUSTICE SOTOMAYOR: For the woman to go to  
10 the Chilean court?

11 MS. HOWE: Exactly, Justice Sotomayor.  
12 Under Chilean law and presumably under the law that  
13 you've hypothesized as well, Justice Breyer, the woman  
14 could go to court and ask for permission to leave the  
15 country, and that's precisely what Mrs. Abbott could  
16 have done in this case. She just never opted to do  
17 that.

18 JUSTICE KENNEDY: Well, suppose you --  
19 suppose you have a --

20 JUSTICE BREYER: That isn't my question.

21 MS. HOWE: Okay.

22 JUSTICE BREYER: I'm trying to get at what  
23 the humane purpose would be, given your interpretation  
24 of the law in this kind of situation?

25 MS. HOWE: Well, the right to determine

1 whether your child will remain in the country or go to  
2 another country is a very important right, and it's  
3 simply that that's the -- if that's the law that the  
4 -- that the country has decided to establish, the  
5 convention doesn't look to why that is.

6 And the drafters expressly envisioned,  
7 Justice Breyer, that there would be cases in which one  
8 parent would have physical custody of the child, the  
9 other parent would simply have the right to determine  
10 the child's place of residence.

11 JUSTICE KENNEDY: But what if -- what if  
12 you'd have a country in which no exeat orders are  
13 routinely imposed in every custody case? Then it's  
14 almost like your statutory case here. What does that  
15 have to do with custody?

16 MS. HOWE: Well, that, again, simply  
17 reflects that country's judgment.

18 JUSTICE KENNEDY: It seems -- excuse me,

19 MS. HOWE: Yes.

20 JUSTICE KENNEDY: -- but I'll just finish my  
21 own question.

22 MS. HOWE: Yes.

23 JUSTICE KENNEDY: It seems to me that what  
24 you are saying is that, in some countries, there --  
25 there is a presumption that there is always custody in



1 the party -- in both parties.

2 MS. HOWE: There may be a presumption. We  
3 have researched, and we don't believe that that's  
4 actually particularly common, Justice Breyer. But  
5 certainly in many countries, there's now a presumption  
6 of joint custody.

7 And so, in all of those cases, under the  
8 convention, the left-behind parent would be entitled  
9 to the child's return. And the convention, again,  
10 doesn't look to the purpose. It doesn't look to --  
11 there's nothing in the convention, certainly, that  
12 requires that there be one category of parents who  
13 have rights of custody and are entitled to the return  
14 and another category of parents who are not entitled  
15 to the return remedy. There's a -- there's a system  
16 of mutual trust under the convention and --

17 JUSTICE GINSBURG: What happens to the woman  
18 who, now she has abducted the child to Texas, and she  
19 says to the Texas court: If you send me back, I am  
20 going to be beaten by this man who has a history of  
21 being a batterer?

22 MS. HOWE: Two things, please,  
23 Justice Ginsburg. The first is that that could happen  
24 in any case, not simply a case involving a ne exeat  
25 right, but also a case in which the left-behind parent

1 had joint custody, and so to a -- the second is that  
2 the convention -- yes.

3 JUSTICE GINSBURG: You are saying that the  
4 court -- the court that's asked to give effect to the  
5 convention is helpless, that it's automatic that if  
6 there is a custody right, the court in the state to  
7 which the child has been taken must order that the  
8 child be returned?

9 MS. HOWE: No -- no, Justice Ginsburg.  
10 Article 13(b) of the convention provides an  
11 affirmative defense to -- to return if the court in  
12 the country of refuge determines that the child would  
13 face either a grave risk of physical or psychological  
14 harm or otherwise face an intolerable situation.

15 JUSTICE KENNEDY: As long as you brought  
16 that up, I was just going to ask: Should -- if you  
17 prevail in this case, should there be a remand to see  
18 if that section applies?

19 MS. HOWE: Article 13(b) has not previously  
20 been raised in this case, but in any event,  
21 regardless, if this Court were to rule in our favor,  
22 then the appropriate course would be to remand for  
23 resolution of any remaining issues, yes,  
24 Justice Kennedy.

25 CHIEF JUSTICE ROBERTS: The answer you just

1 gave about concern for the protection of the child,  
2 that applies only to the child? In other words, in  
3 the case that we have been discussing, if the woman  
4 would be subject to whatever persecution or domestic  
5 violence, but the child -- you know, there's no  
6 suggestion of any harm targeted to the child, that  
7 would not be a case in which they could grant refuge?

8 MS. HOWE: The -- the statute does -- the  
9 text does apply to the grave risk of physical or  
10 psychological harm to the child, and certainly --

11 CHIEF JUSTICE ROBERTS: To only -- only to  
12 the child?

13 MS. HOWE: Only to the child, although  
14 arguably there would be some risk of psychological  
15 harm if what the woman's allegation --

16 JUSTICE GINSBURG: Do you know --

17 CHIEF JUSTICE ROBERTS: So the woman would  
18 be subject to -- if she wanted to remain with the  
19 child, there would be no protection. She would have  
20 to choose between subjecting herself to violence or  
21 being apart from the child?

22 MS. HOWE: Well, the courts could also, of  
23 course, Chief Justice Roberts, try, you know, to solve  
24 the problem through undertakings and placing  
25 conditions on the child's return, if the -- if the

1 article 13(b) were not fully able to address the  
2 court's concerns. If the court --

3 CHIEF JUSTICE ROBERTS: That would be  
4 consistent with the convention, for the returning  
5 state to say, we are returning the child, but only  
6 if -- you know, bang, bang, bang?

7 MS. HOWE: Well, in other contexts, for  
8 example in the context of visas, yes. The Special  
9 Commission meetings, when this issue has come up, has  
10 specifically urged the court -- or urged courts to  
11 consider undertakings and also to consider  
12 intergovernmental negotiations in an attempt to ensure  
13 both the mother and the child's safe return, yes.

14 JUSTICE BREYER: What's the law -- what is  
15 the law if a mother and a child -- sorry. What's the  
16 law if a couple living in a foreign country has a  
17 decree of the court, and the decree of the court  
18 grants certain visiting rights to the father, and the  
19 father, violating those rights, takes the child to a  
20 different country. Can the mother get it back?

21 MS. HOWE: I'm sorry. Could you --

22 JUSTICE BREYER: What's the normal law where  
23 you have a couple -- they're supposed to leave the  
24 child in the country, but it doesn't say that.  
25 There's no ne exeat thing. They've just agreed to

1 certain visiting rights.

2 MS. HOWE: Yes.

3 JUSTICE BREYER: And in violation of those  
4 rights, the father, say, takes the child to another  
5 country in violation of the divorce decree of the  
6 first country.

7 MS. HOWE: If the mother had rights of  
8 custody, then those rights of custody would be  
9 breached by the --

10 JUSTICE BREYER: No, you are not  
11 understanding my question.

12 MS. HOWE: Okay. I apologize, Justice  
13 Breyer.

14 JUSTICE BREYER: My question is, outside  
15 this convention --

16 MS. HOWE: Yes.

17 JUSTICE BREYER: If -- forget the  
18 convention. Suppose there's just a divorce decree.

19 MS. HOWE: Yes.

20 JUSTICE BREYER: And suppose a parent,  
21 violating the decree, takes the child to another  
22 country in violation of an ordinary divorce decree.  
23 Does the injured parent have a way of getting the  
24 child back?

25 MS. HOWE: There's no international -- other

1 international remedy. In the United States, for  
2 example --

3 JUSTICE BREYER: I'm sure there isn't, but  
4 under the law --

5 MS. HOWE: -- there could be, for example,  
6 the UCCJEA in the United States. You could go to  
7 court with an international order and attempt to seek  
8 the child's return in that manner, yes. You would  
9 attempt to seek enforcement of the court's order in  
10 the United States.

11 JUSTICE BREYER: You would go and take the  
12 court's order to a court in the United States and try  
13 to enforce it?

14 MS. HOWE: Yes.

15 JUSTICE BREYER: And the American court  
16 would be under obligation, I guess, to enforce it?

17 MS. HOWE: In theory, yes. Yes.

18 JUSTICE BREYER: Well, all right. So our  
19 question here is which of the two mechanisms should we  
20 use?

21 MS. HOWE: We should use this convention,  
22 Justice Breyer --

23 JUSTICE BREYER: I know you think that, but  
24 I'm still worried about my mother in the case that --  
25 that you gave me.

1 MS. HOWE: One thing that -- that may give  
2 you some comfort, as far as the convention's drafters  
3 are concerned, is that this was a scenario that the  
4 convention's drafters had in mind from the very  
5 beginning of the drafting process. They had five  
6 scenarios that they --

7 JUSTICE BREYER: I've read through that, and  
8 I'll tell you that, on the basis of my reading through  
9 all that stuff, my mind is in equipoise. I find some  
10 one way, some the other.

11 I think maybe each side does a little  
12 overstating here, but -- but I -- I am in equipoise,  
13 having looked at that quickly. So I know -- I know  
14 the stuff, you can -- but that's why I am trying to  
15 get to the underlying humane idea that's supposed to  
16 underlie that, and see if it applies here.

17 MS. HOWE: Okay. The -- the convention was  
18 drafted on the premise that the best interests of  
19 children are served by their return to the country of  
20 habitual residence, so that the courts in that country  
21 can make the decisions. The convention --

22 JUSTICE GINSBURG: Ms. Howe, wasn't the --  
23 the problem that gave rise to this Abduction  
24 Convention just the situation that Justice Breyer  
25 brought up? That is, the parent that has visitation

1 rights snatches the child, takes it to that parent's  
2 home country, and then you are relying on only the  
3 court order. That's why we have the Hague Convention  
4 on the Abduction of Children.

5           It wasn't for the -- I mean, this -- this  
6 case is not the usual case. The usual case is the  
7 noncustodial parent takes the child out of the country  
8 where the custodial parent lives. And,  
9 internationally, there was a huge problem of getting  
10 the child back, and that's why we have the Hague  
11 Convention on Abduction, because courts weren't  
12 enforcing foreign court orders.

13           MS. HOWE: That's right. They were -- they  
14 were not enforcing foreign court orders, and it's  
15 true, Justice Ginsburg, as you say, that the sort of  
16 prototypical case that was present when they drafted  
17 the convention was that one parent, usually the  
18 mother, would have sole physical custody and the  
19 father would have just visitation, and it was intended  
20 to address that problem.

21           But at the time that they drafted the  
22 convention, they also had in mind the increasing  
23 prevalence of joint custody and included that in the  
24 convention. And they also recognized, as I said, that  
25 there would be scenarios in which one parent would



1 have what we'd consider to be physical custody of the  
2 child; the other parent would have other rights, such  
3 as the right to determine the child's place of  
4 residence. And they did intend for the parent who did  
5 not have physical custody but had other important  
6 rights relating to the child, such as the right to  
7 determine the child's place of residence, to be --

8 JUSTICE GINSBURG: Well, what is the -- what  
9 is the significance of their breaking down the two  
10 categories? One is the rights of custody, and the  
11 other is rights of access.

12 Because I take it that under your view of  
13 the Chilean law, given that the noncustodial parent  
14 will always have this right to block taking the child  
15 out of the country, then there's really no difference  
16 between the two categories, because every, say, father  
17 with the right of access -- not custody, just access  
18 -- would automatically by virtue of the law of Chile  
19 have this one custodial right; that is, to block  
20 taking the child out of the country.

21 MS. HOWE: It's true. But again,  
22 Justice Ginsburg, you don't look at why the country  
23 attributed those particular rights. You just look at  
24 whether the parent has those rights.

25 And I think it's helpful to think of the

1 Chilean system, in effect, as a -- as a form of joint  
2 custody, just as some countries have a presumption of  
3 what we would regard as joint custody.

4 JUSTICE STEVENS: Does your argument really  
5 boil down to the claim that this was, in effect, joint  
6 custody? It seems to me it clearly was not.

7 MS. HOWE: We believe that the Chilean  
8 system is analogous to joint custody. There's a  
9 presumption that -- but it --

10 JUSTICE STEVENS: I'd say it's not, but --

11 MS. HOWE: But --

12 JUSTICE STEVENS: But -- but are you arguing  
13 that this -- that this case is -- is the equivalent of  
14 a joint custody case?

15 MS. HOWE: No. We are arguing that the  
16 ne exeat right is a right of custody under the text of  
17 the convention.

18 If the Court has no further questions --

19 JUSTICE KENNEDY: Well, you're saying -- I  
20 know the white light's on -- but you are saying that  
21 every case that involves the Chilean government, the  
22 convention here is applicable, requiring return?

23 MS. HOWE: If the parent has visitation  
24 rights, then yes. That's simply the way that Chile  
25 has opted to do it.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Ms. Anders.

3 ORAL ARGUMENT OF GINGER ANDERS  
4 ON BEHALF OF THE UNITED STATES,  
5 AS AMICUS CURIAE,  
6 SUPPORTING THE PETITIONER

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

9 The ne exeat provision at issue in this case  
10 gave Petitioner the power to prevent exactly the harm  
11 that is the Hague Convention's central concern.

12 JUSTICE KENNEDY: Do you -- do you agree  
13 that every case originating in Chile must come out  
14 this way, so that there is a return required?

15 MS. ANDERS: I agree that Chile has by law  
16 decided that the ne exeat right should arise  
17 automatically in any parent who has visitation rights.

18 JUSTICE KENNEDY: But that seems to me  
19 remote from the concept of custody that the convention  
20 has in mind.

21 MS. ANDERS: I don't think so, Justice  
22 Kennedy. I think the convention -- the explanatory  
23 report makes clear that the convention is designed to  
24 protect all of the ways in which joint custody can  
25 arise and be awarded under domestic law. And I think

1 we have a variety of situations in every country in  
2 which joint custodial rights arise automatically.

3 For instance, in the United States, when two  
4 parents are married and separated, and there has been  
5 no custody order yet, we would say that both of those  
6 parents have automatic joint custody rights in the  
7 child. In civil law countries, there are a variety of  
8 automatic joint custodial decision-making --

9 JUSTICE STEVENS: But is there a distinction  
10 between the -- what's before us in this case and the  
11 different case in which the order specifically said  
12 custody shall be joint? The same -- would that not be  
13 a different case, in your view?

14 MS. ANDERS: It would not be a different  
15 case, because the convention protects rights of  
16 custody, and it specifies that those rights can be  
17 awarded jointly.

18 JUSTICE STEVENS: But the decree says that  
19 custody -- the mother is the one who has custody.

20 MS. ANDERS: The mother may have most of the  
21 custodial rights, what we would think of as physical  
22 custody, but the convention protects rights of  
23 custody. And I think what's particularly important is  
24 that it separates out the right to determine residence  
25 as the most important custody right with which it is

1 concerned.

2 JUSTICE BREYER: What they seem to be  
3 thinking of -- this is -- maybe you can get at what is  
4 bothering me. I'm perhaps not articulating it very  
5 well. But the -- where there's any kind of a custody  
6 right, I normally think there was a human being called  
7 a family law judge who has a very tough job, and he  
8 has looked at the situation of these two people here  
9 and the child. And he said, at least: Smith and Mrs.  
10 Smith, you are each going to have a little bit, at  
11 least.

12 Now, but in a situation where he says to  
13 Mr. Smith, nothing, I want to give you nothing -- he  
14 thinks this is Frankenstein's monster; he does not  
15 want to give him a single thing -- that, on your  
16 interpretation of this statute, that doesn't matter.  
17 Just because Chile has a general law that says you  
18 can't take anybody out of the country without  
19 permission, just because of that, even Frankenstein's  
20 monster is considered to have custody for the purposes  
21 of this, though the human being who looked at this,  
22 called the family law judge, said: Don't let him near  
23 that child. All right?

24 Now, that's -- don't pick up on my errors in  
25 that I know I haven't stated it quite right, but look

1 at what I'm driving at. And that's what's bothering  
2 me.

3 MS. ANDERS: Well, I think Chile could have  
4 made a determination as a matter of its domestic law,  
5 that it would be in the child's interest --

6 JUSTICE BREYER: I know there are ways out,  
7 but why should we include custody to be a situation  
8 where the human being who looked at this couple  
9 thought that that individual, the husband, should have  
10 nothing but visit him occasionally on Christmas? Why  
11 should we interpret the word "custody" in this treaty  
12 to include even that situation, which turns the treaty  
13 into a general "return the child" no matter what?

14 MS. ANDERS: Well, I think the convention's  
15 fundamental principles actually are in line with your  
16 concerns, because what the convention says is that  
17 anytime that the child has been abducted in violation  
18 of a decision-making right that the -- that one or the  
19 other parent has, then the child should be returned.

20 But the return remedy is not a determination  
21 that the child should live with the left-behind parent  
22 or that he should live out the rest of his life in  
23 Chile. It's simply a determination that the courts of  
24 the country of habitual residence should decide what  
25 should happen with the child going forward. That's

1 the fundamental premise in it.

2 JUSTICE SOTOMAYOR: Ms. Anders, that's the  
3 point, isn't it? The purpose of the convention is  
4 which court will decide the life of that child,  
5 correct?

6 MS. ANDERS: That's exactly right.

7 JUSTICE SOTOMAYOR: And to avoid, as I  
8 understood the convention structure, this flight from  
9 court to court and this long, drawn-out process from  
10 country to country over who's going to make that  
11 choice, correct?

12 MS. ANDERS: That's right.

13 JUSTICE SOTOMAYOR: And so the idea is,  
14 whether it's one custody right -- correct me if I am  
15 wrong -- whether it's one custody right or many, which  
16 court is going to decide what's in the best interest  
17 of that child?

18 MS. ANDERS: That's exactly right, and I  
19 think the ne exeat right is very --

20 CHIEF JUSTICE ROBERTS: So that if -- so  
21 that if you have the mother taking her daughter from,  
22 say, a country where she would be forced to be raised  
23 under sharia law and that -- that is up to that  
24 country to decide whether the child has to be  
25 returned? Or is there a basis for a domestic tribunal

1 in the court, in the -- what is it called, the country  
2 of refuge? Can that country decide that the child  
3 should not be returned?

4 MS. ANDERS: There are narrow defenses to  
5 return, and one of those is the grave risk defense in  
6 article 13(b). There's also a fundamental principles  
7 defense in article 20. But, fundamentally, I think  
8 the convention is premised on the idea that the courts  
9 of the various states parties will be well-placed to  
10 determine the custody --

11 CHIEF JUSTICE ROBERTS: So it's your  
12 position that, in that case, the mother should return  
13 her daughter to the country where she will be raised  
14 under a system that the mother finds quite offensive?

15 MS. ANDERS: Well, that would not  
16 necessarily be the case. Presumably, that mother  
17 could raise the 13(b) defense or the article 20  
18 defense to return, and --

19 CHIEF JUSTICE ROBERTS: And what -- I know  
20 Ms. Howe cited it. What is the standard on the 13(b)  
21 defense?

22 MS. ANDERS: It says, "A grave risk that the  
23 return would expose the child to physical or  
24 psychological harm."

25 CHIEF JUSTICE ROBERTS: Does -- does the



1 status of, in this case, women in the country, does  
2 that constitute grave risk, or is it an individualized  
3 determination?

4 MS. ANDERS: I think it would generally be  
5 an individualized determination. But I think the  
6 convention is based on the assumption that wherever --  
7 wherever the parent started out, wherever their  
8 custody determinations are being made to begin with,  
9 that is the country that should continue in the normal  
10 situation to determine what should be in the interest  
11 --

12 CHIEF JUSTICE ROBERTS: And that country is  
13 going to make a determination in favor of their  
14 domestic law and their domestic system. Presumably,  
15 they are not going to say: We think it's a grave risk  
16 to the child to be raised under our system.

17 MS. ANDERS: Well, it would be the -- it  
18 would be the courts in the country of residence that  
19 would be making that determination. But I think the  
20 question of which court might have a more favorable  
21 determination, that -- that kind of forum-shopping is  
22 precisely what the convention was trying to prevent.

23 JUSTICE BREYER: Well, could we interpret  
24 the words "great psychological harm" to include, for  
25 example, a situation where an educated woman with an

1 advanced degree is unable to get work in the country  
2 where her child lives and has to live under conditions  
3 that are -- that are really -- we would say are fairly  
4 primitive because of her inability to find an  
5 appropriate employment? Can you include that under  
6 great psychological harm, so that the child wouldn't  
7 have to go back?

8 MS. ANDERS: Well, I -- I presume that you  
9 could, in an individual case, offer evidence that  
10 might include things like --

11 JUSTICE BREYER: Well, has there ever been  
12 -- would you advocate that kind of very broad standard  
13 of great psychological -- and what would be your  
14 position, or what's the government's position on that?

15 MS. ANDERS: It's that the defense would be  
16 more narrow than that. But that's because, first, the  
17 convention is based on the idea that -- that the  
18 courts of the country of habitual residence can make  
19 this determination in the child's best interest, and  
20 that they should be the ones to do that -- we  
21 shouldn't allow forum-shopping -- and also because the  
22 return remedy is not a determination that the child  
23 will have to stay in the country for the rest of his  
24 life or even that the mother would necessarily have to  
25 return with him.

1 JUSTICE SCALIA: I thought it has to be  
2 psychological harm to the child; isn't that right?

3 MS. ANDERS: That's correct.

4 JUSTICE SCALIA: So psychological harm to  
5 the woman who can't work in the country would be  
6 irrelevant.

7 MS. ANDERS: Well, it might be  
8 relevant evidence --

9 JUSTICE SCALIA: -- unless that would  
10 secondarily affect the child?

11 MS. ANDERS: Right. Right.

12 JUSTICE SOTOMAYOR: Counsel, you said in  
13 your brief that this position by the Solicitor General  
14 is long-standing. I'm quoting. What do we look to,  
15 to see how far back and under how many administrations  
16 this position has been taken and in what form?

17 MS. ANDERS: Well, it's certainly the  
18 position as memorialized in our brief here. I don't  
19 believe that we have memorialized it in writing prior  
20 to this brief, but this Court has in the past looked  
21 to the government's position as memorialized in an  
22 amicus brief in this Court.

23 JUSTICE SOTOMAYOR: But we have been a part  
24 of the Special Commission since 1989, correct?

25 MS. ANDERS: That's correct. And in the

1 first Special Commission meeting in 1989 and then  
2 again in 1993, this issue was on the agenda, and the  
3 United States joined the consensus of the states  
4 parties that a ne exeat right should be considered a  
5 custody right under the convention. And so --

6 JUSTICE SOTOMAYOR: Is there anything in the  
7 history of the negotiation and passage of the -- of  
8 the treaty that -- that reflects what the U.S.'s  
9 position was on this particular issue?

10 MS. ANDERS: Not on this particular issue  
11 specifically, but this has been our position as -- as  
12 expressed in the Special Commission meetings and the  
13 reports to --

14 JUSTICE GINSBURG: You don't question what  
15 the representative of the mother has said in this  
16 case, that the emphasis -- when this Hague Convention  
17 was before Congress, the emphasis was on the custodial  
18 parent -- that is, the person in the situation of the  
19 mother here -- that what Congress was told was the  
20 urgent problem was the noncustodial parent taking the  
21 child away from the custodial parent. That was the --  
22 the major thing that drove this convention and that's  
23 what the State Department told Congress; isn't that  
24 so?

25 MS. ANDERS: I believe the State

1 Department's legal analysis stated that the typical  
2 case might be one in which a parent with -- with  
3 primary physical custody had the child, but the  
4 visiting -- the parent with visitation rights took the  
5 child to another country. But the fact that it was a  
6 typical case means that it wasn't the only type of  
7 case, and as -- as family law has developed over the  
8 past 30 years, joint rights of custody have become  
9 more and more prevalent, and we, therefore, think that  
10 this is a joint right to determine residence under the  
11 convention, because it gives the father the right to  
12 withhold or grant consent to the child's removal from  
13 the country.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
15 Mr. Hays.

16 ORAL ARGUMENT OF KARL E. HAYS

17 ON BEHALF OF THE RESPONDENT

18 MR. HAYS: Mr. Chief Justice, and may it  
19 please the Court:

20 Rights of custody and rights of access are  
21 very different and distinct substantive rights. The  
22 Hague Convention makes a distinction between those two  
23 sets of rights and provides the automatic return  
24 remedy only in those situations where there has been a  
25 breach of a right of custody.

1           What Mr. Abbott is seeking in this case is  
2 to have the Court define a bright-line rule, saying  
3 that in any instance where there is a statute or a  
4 provision which limits the rights of the custodial  
5 parent to remove a child outside of -- of the  
6 particular jurisdiction, that any time there is a  
7 statute or ordinance or order to that effect, that you  
8 confer rights of custody upon an individual who would  
9 otherwise only have rights of access.

10           JUSTICE GINSBURG: Well, you could say --  
11 you can say that the mother did not have full  
12 custodial rights. One custodial right is certainly to  
13 determine where the child will live. And the mother  
14 did not have that right with respect to taking the  
15 child out of the country.

16           MR. HAYS: The mother did not have the right  
17 to take the child out of the country without either  
18 obtaining the permission of the father or obtaining  
19 permission of the court to do that. That was a  
20 limitation on her exercise of custodial rights. It  
21 did not, in and of itself, grant a right to the  
22 father. The father was not granted a custodial right.

23           JUSTICE KENNEDY: Well, you could say that  
24 the limitation on the custodial right is the right of  
25 the husband to visit once a month or 3 -- 3 weeks a

1 month. I -- I think that's slightly an artificial  
2 approach.

3 JUSTICE GINSBURG: It's a provision --

4 JUSTICE SOTOMAYOR: Let's assume there's a  
5 law that says joint custody; mom can determine the  
6 place to live; mom can determine the education of the  
7 child; dad can visit when he wants; dad can review  
8 choices but not veto them. But we consider this joint  
9 custody.

10 Under your view, what defines custody under  
11 the convention in a way that would justify an American  
12 court saying, that's not a custodial right; even  
13 though the law of that domestic jurisdiction defines  
14 that and says, that's our terms of joint custody, but  
15 we create this kind of joint custody?

16 MR. HAYS: In -- in that situation, the --  
17 the rights are created under the law of the  
18 jurisdiction, and that -- and that -- in that  
19 instance, it would be a joint custodial right.

20 JUSTICE SOTOMAYOR: Right. Regardless of  
21 what the terms of that right are, so long as the  
22 domestic law deems it such, correct?

23 MR. HAYS: Right. But in this instance the  
24 Chilean courts have not created a joint custodial  
25 right within the common --

1 JUSTICE SOTOMAYOR: Well, except the -- the  
2 convention doesn't define custodial rights, correct?  
3 It doesn't give them meaning except in one way, the  
4 right to determine a place of residence, correct?

5 MR. HAYS: No, Your Honor. What happens is  
6 the -- the convention contains an understanding of  
7 what the parties at the time of the drafting of the  
8 convention understood custodial rights to entail. The  
9 focus of the convention was on maintaining the  
10 relationship between the parent that was providing  
11 care. And so the members of the convention --

12 JUSTICE SOTOMAYOR: Now, that's a little  
13 tough, because parents provide care in so many  
14 different ways. And weren't the convention members  
15 very cognizant of the fact that in different countries  
16 that has different meanings?

17 MR. HAYS: They were. But they understood  
18 that there was a commonly accepted understanding of  
19 custody in terms of the party who had care for the  
20 child. And that was --

21 JUSTICE SOTOMAYOR: That's not the word they  
22 used. They used "custody rights including determining  
23 the place of residence." So they didn't give any  
24 greater meaning to the word "care" than that.

25 MR. HAYS: The -- the exact definition from



1 article 5 is "rights of custody shall include rights  
2 relating to the care of the person of the child," and  
3 then they said, "and in particular, the right to  
4 determine the child's place of residence."

5 JUSTICE ALITO: Well, suppose there's a  
6 court order that prohibits the -- one of the  
7 parents -- the parent with whom the child lives most  
8 of the time from moving more than an hour's drive from  
9 the prior place of residence, would that be --  
10 would -- would the -- the other parent then have  
11 custody?

12 MR. HAYS: No. Here again, that is -- that  
13 is simply a restriction placed upon that parent's  
14 right to exercise custody. It is -- it is --

15 JUSTICE ALITO: Suppose the court order says  
16 that the -- that the child may not move from the house  
17 where the child lives now. Would that be custody?

18 MR. HAYS: Again, that is -- that is simply  
19 a restriction on that parent's right to exercise  
20 their -- their custodial authority.

21 JUSTICE ALITO: Well, what's the meaning of  
22 the phrase "determine the place of residence"?

23 MR. HAYS: "Determine the place of  
24 residence" was -- was placed into the convention  
25 because that ordinarily is a right of custody. A

1 parent who ordinarily has the care of the child has  
2 the child with them.

3 And I would hazard a guess that if you were  
4 to ask anyone in this courtroom what their residence  
5 was, they would tell you that their residence is 123  
6 Maple Street, that it doesn't entail the determination  
7 of the actual country --

8 JUSTICE ALITO: Well, okay. So, if -- it  
9 there's a court order that says the child shall not  
10 move from 123 Maple Street without the consent of both  
11 parents, do both parents then have custody?

12 MR. HAYS: In -- in that instance, there may  
13 be a -- a joint right regarding the -- the  
14 determination of the residence, which is not what we  
15 have in -- which is not what we have in this case.  
16 But here again, it is -- it is more in keeping with  
17 simply putting a restriction upon the parents who --  
18 the parent who has the right of custody, their right  
19 to exercise that.

20 JUSTICE STEVENS: Mr. Hays --

21 JUSTICE GINSBURG: If he has the right to  
22 say no, don't take the child out of the country, then  
23 he has something more than a right of access. You --  
24 you are talking, well, she has the rights of custody.  
25 But because he -- it's not just the court, because

1 it's his consent in the first instance. He has a  
2 right to determine that the child shall not live  
3 outside the country of habitual residence. That is  
4 not a right of access.

5 MR. HAYS: It's important to understand here  
6 that -- that he does not have a -- a right under the  
7 Chilean statute. If --

8 JUSTICE GINSBURG: I thought the statute  
9 says the consent of the -- of the other parent.

10 MR. HAYS: The -- the statute says, first of  
11 all, that if you -- you have the consent of the  
12 parent, but if you don't get the consent of the  
13 parent, you go -- you go to the court. So it is --

14 JUSTICE GINSBURG: Well, that's true of  
15 custody decrees generally. We get them modified by a  
16 court in the best interests of the child. So it --  
17 but in the first instance, it says -- it's he has the  
18 consent or withholding consent. And my question to  
19 you is, whatever that is, it isn't a right of access?

20 MR. HAYS: It's actually not -- it -- and  
21 that's -- and that's the position that Mr. Abbott  
22 wants this Court to -- to take, is that, well, it's a  
23 right, and since it's not a right of access, it has to  
24 be a right of custody.

25 It's -- it's actually not a substantive

1 right. It is a means of doing two things, which is  
2 what the United States recognized at the time of the  
3 drafting of the convention. It is a means of  
4 preserving the jurisdiction of the court. It is also  
5 a means of enforcing access rights. It's a procedural  
6 right; it is not a substantive right. And the -- the  
7 Hague Convention clearly makes a distinction between  
8 substantive rights of custody and substantive rights  
9 of access. But what -- what the -- Mr. Abbott wants  
10 --

11 JUSTICE GINSBURG: It just says that the  
12 right of access is the right to take a child for a  
13 limited period of time to a place other than the  
14 child's habitual residence. There's nothing about  
15 procedure or substance in this; it says this is what  
16 right to custody is, and this is what right of access  
17 is.

18 MR. HAYS: Actually, Your Honor, what the --  
19 what the convention does is not specifically define  
20 either term. The -- the terminology is -- is it  
21 includes these particular rights, because they didn't  
22 want to get specific as to what exactly rights of  
23 custody entailed, what exactly rights of access  
24 entailed.

25 JUSTICE KENNEDY: But that -- that cuts both

1 ways so far as you are concerned, because it includes  
2 -- might mean that custody includes the right to  
3 insist on living in a specific country.

4 MR. HAYS: That was not the understanding of  
5 the -- of the drafters of the convention, because --  
6 and --

7 JUSTICE KENNEDY: But, textually, that's  
8 certainly plausible.

9 MR. HAYS: Textually, when -- when you  
10 examine article -- when you examine article 5 in  
11 conjunction with article 3 and article 13, that  
12 doesn't -- that doesn't follow, because article 3 and  
13 article 13 both provide that the rights had to be  
14 actually exercised. And when you -- you read the  
15 Pérez-Vera report, which is analyzing both of those  
16 sections, it -- it's clear that the intent of the  
17 drafters at the time was that you had to have actual  
18 physical care of the child, because the purpose of  
19 this -- of this convention was to prevent the  
20 situation that this Court has already discussed, and  
21 that is, a parent who has custodial rights, full  
22 custody of a child -- the other parent kidnaps the  
23 child and takes them to another country in order to  
24 seek a -- another court order.

25 In this case, you don't have that situation.

1 Chile already determined that Mrs. Abbott had full  
2 custody of her child.

3 JUSTICE STEVENS: May I ask this question  
4 about the term "place" -- "place of residence"?  
5 Putting aside the control of the ne exeat that would  
6 prevent her from leaving the country, just looking at  
7 the situation within Chile, what -- did she have any  
8 limitation on her right to pick that place of  
9 residence within Chile?

10 MR. HAYS: Absolutely not. She could decide  
11 wherever she wanted to live in Chile under the court  
12 order that she was given. She had full control over  
13 deciding where -- where her son was to live --

14 JUSTICE STEVENS: So, the only control that  
15 the -- the husband had was the right -- whatever right  
16 was given by the ne exeat provision, that you can't  
17 take the child out of the country?

18 MR. HAYS: That's correct. That she had to  
19 first get either his permission or go to court and get  
20 permission of the -- of the court.

21 JUSTICE STEVENS: And even if there had been  
22 no fight of the kind that developed, she would have  
23 had a unrestricted right to pick the place of  
24 residence?

25 MR. HAYS: Absolutely. She -- she had the

1 absolute right to decide all issues with respect to  
2 her son.

3 JUSTICE ALITO: Which is more important,  
4 determining the house in which the child is going to  
5 live or determining the country in which the child is  
6 going to live?

7 MR. HAYS: For purposes of the convention,  
8 determining the house where -- where the child lives,  
9 determining the issues relating to the care of the  
10 child, because that was what the convention was  
11 intended to protect, that relationship, because you  
12 were having situations where a parent who had a  
13 custodial relationship with the child would have that  
14 relationship severed by the other parent taking the  
15 child, going to another country, and then seeking a  
16 court order.

17 And there is one thing that I think needs to  
18 be corrected here. When Mrs. Abbott went to Texas,  
19 she did not attempt to obtain a court order that would  
20 have stripped Mr. Abbott of his rights. In fact, in  
21 Texas the presumption is joint managing  
22 conservatorship. And she asked for sole managing  
23 conservatorship, which would have been the equivalent  
24 of what she was granted under Chilean law.

25 JUSTICE ALITO: Why would the signatories of

1 this convention have wanted to regard a parent as  
2 having custodial rights if the parent has the right to  
3 veto a change of address within a country, but not  
4 when the parent has the authority to veto the future  
5 nationality and cultural background of the child?

6 MR. HAYS: They very well may not have  
7 intended either of those instances to create a -- a  
8 joint right of -- of custody. At the point in time  
9 when the convention was being drafted, joint custodial  
10 rights were -- were basically a new concept, and there  
11 were -- there was not a lot of experience in the  
12 exercise of joint -- of joint custodial rights.

13 The -- the focus of the convention was  
14 ensuring that the parent who had the primary  
15 relationship with -- with the child, that that  
16 relationship would not be severed by someone taking a  
17 child out of -- of the country. And that was the  
18 focus of -- of the convention, which is why there was  
19 a distinct difference drawn between protecting rights  
20 of access and protecting rights of -- rights of  
21 custody.

22 Rights of access were given different  
23 protection mechanisms under -- under the convention,  
24 as opposed to the mandatory return that was -- that  
25 was envisioned by rights -- by --



1           JUSTICE ALITO: I don't want to belabor  
2 the point too much, but maybe you could just give  
3 me an example of a court order that you believe  
4 would give a parent the right to determine place of  
5 residence and, therefore, would constitute custody  
6 within the meaning of the convention.

7           MR. HAYS: Typically -- typically in -- in  
8 Texas, Texas adheres to a position of joint managing  
9 conservatorship. The presumption in Texas is that  
10 both parents have equal ability to make decisions  
11 regarding their child. And so the courts will  
12 routinely enter orders to say both parents get to  
13 decide education, both parents get to decide medical  
14 issues.

15           Even in that instance, though, the court  
16 will attribute the right to determine the primary  
17 residence of the child to one parent or the other, and  
18 will impose a -- a restriction on the exercise of that  
19 right. They will impose a geographical restriction  
20 and say, you can establish residence only in this  
21 county or -- or contiguous counties.

22           That's in the nature, though, of a -- of a  
23 joint managing conservatorship or joint custody  
24 situation. What we have in this case, though, is an  
25 instance where all of the custodial rights, all of the

1 decisionmaking authority was given solely to the  
2 mother. The --

3 JUSTICE GINSBURG: Not according to the --  
4 what is it, the Chilean central authority, you know,  
5 the letter that was sent to the Second Circuit, I  
6 think in the Duran case. The -- the authority within  
7 Chile that is responsible for the implementation of  
8 this Hague Convention said that it regarded that  
9 statute to create a custody right for purposes of the  
10 Hague Convention.

11 MR. HAYS: Actually, Your Honor, that --  
12 that statement in the briefs is a -- is a misstatement  
13 of what happened in the Beaumont case. In  
14 Duran v. Beaumont, there are -- there are distinctions  
15 that have not been made by -- by Mr. Abbott. Most  
16 importantly, there was no court order in that case.  
17 And, when there is no court order, under Chilean law,  
18 it is a situation where there is joint custody as a  
19 matter of law.

20 Secondly, the actual affidavit -- and the  
21 language of the affidavit is quoted in the dissent to  
22 that case. The actual affidavit states both parents  
23 have the guard and custody of their daughter, and the  
24 decisions of major importance must be adopted by both  
25 parents.

1           So, clearly, the Chilean authority was  
2   referencing in their -- in their affidavits they  
3   provided in that case, to the fact that this was a  
4   joint custody situation. And they -- they didn't  
5   decide it solely on the basis of -- that this ne exeat  
6   statute created a right of custody. Also --

7           JUSTICE GINSBURG: I thought there was a  
8   sentence in there -- and you can correct me if I'm  
9   wrong -- that said that the statute, under Chilean  
10  law, amounted to a right of joint custody.

11          MR. HAYS: The wording -- the wording of --  
12  of the sentence, it includes the statute. It's like  
13  the statute, comma, the guard and custody, and also  
14  decisions of major importance. It's -- it's a number  
15  of things. It's not just singled out the way that  
16  Mr. Abbott has -- has presented it to the court.

17          They don't make a statement saying, this  
18  statute equates to rights of custody. It's a  
19  situation where they say, you take all of this  
20  together, the fact that they had the guard and custody  
21  of their daughter and the decisions of major  
22  importance must be adopted by both parents -- you take  
23  all of that together as the finding of the Chilean  
24  authority that, in fact, the parent in that case had  
25  joint decisions and had -- had rights of custody that

1 were being breached.

2 JUSTICE BREYER: So if I -- if I think, as  
3 Justice Alito was starting out, that if the -- a court  
4 order in the divorce case says the father and mother  
5 will jointly decide what house to live in, that the  
6 father has a custody right, if it jointly says the  
7 father and the mother will decide what State to live  
8 in, that that's a custody right. That it says that  
9 the father and mother will decide what city, same.  
10 The father and mother will jointly what country to  
11 live in, same.

12 But suppose that there is no such decree;  
13 rather, the jurisdictional statutes of the nation,  
14 without considering this family, have a rule that says  
15 they have to live in Chile without Court permission.

16 Is there any way I can draw a line, in terms  
17 of this statute, between the two situations, the one  
18 being where the divorce judge actually focused on the  
19 needs and circumstances of a family, the other being  
20 where there was no more than a jurisdictional law in a  
21 nation that tried to protect the jurisdiction of its  
22 courts?

23 MR. HAYS: The purpose of the convention  
24 was -- was not focused on protecting the -- the  
25 jurisdiction of --

1 JUSTICE BREYER: I understand that, but what  
2 I'm wondering is if -- if -- I thought you would agree  
3 with me about that, and since I thought you would  
4 agree with me about that, you would explain to me how  
5 I could reach that result, consistent with the  
6 language of this convention, which talks about custody  
7 rights granted by operation of law.

8 MR. HAYS: Our position is that this does  
9 not give any sort of affirmative right to the father,  
10 and it is not a right to determine because, if you  
11 take the common usage of the right to determine, it is  
12 to make an affirmative decision, and --

13 JUSTICE SCALIA: Most courts in countries  
14 signatory of the treaty have come out the other way  
15 and agree that a ne exeat right is a right of custody,  
16 and those courts include the U.K., France, Germany --  
17 I believe, Canada. Very few come out the way you --  
18 how many come out your way?

19 MR. HAYS: Actually, Your Honor, the United  
20 States and Canada do, and the analysis that we --

21 JUSTICE SCALIA: Well, wait, I mean --

22 (Laughter.)

23 JUSTICE SCALIA: You're writing our opinion  
24 for us, are you?

25 (Laughter.)

1           MR. HAYS: The -- the United States and  
2 Canada -- as we point out in our brief, and I believe  
3 that it's pointed out in other amicus briefs, the --  
4 there have only been seven courts of last resort that  
5 have heard this issue. There are some 81 countries  
6 that belong to the Hague Convention.

7           JUSTICE SCALIA: Yes, but, still, in all, I  
8 mean, they include some biggies, like the House of  
9 Lords, right? And -- and the purpose of a treaty is  
10 to have everybody doing the same thing, and -- and I  
11 think, we -- if it's a case of some ambiguity, we  
12 should try to go along with what seems to be the  
13 consensus in -- in other countries that are  
14 signatories to the treaty.

15           MR. HAYS: If, in fact, there were a -- a  
16 consensus, but there -- there is not a consensus in  
17 this instance because we -- as we analyze in our brief  
18 and I believe the 11 law professors analyzed in their  
19 brief, you cannot get a clear consensus of what --

20           JUSTICE BREYER: Who's against it? I -- as  
21 I read their brief, France is not on their side. It's  
22 split.

23           MR. HAYS: Correct.

24           JUSTICE BREYER: Canada is on your side;  
25 that the House of Lords is -- has some dicta written

1 by two judges, which is good, but it wasn't a holding  
2 in the case.

3 MR. HAYS: Correct.

4 JUSTICE BREYER: And -- and that's about it,  
5 and so maybe they --

6 JUSTICE GINSBURG: You have -- you have a  
7 lady --

8 JUSTICE SCALIA: Germany.

9 JUSTICE BREYER: Germany.

10 JUSTICE GINSBURG: -- Elizabeth Butler-Sloss  
11 in the Court of Appeal in England, and that was a  
12 square holding.

13 MR. HAYS: That was -- there -- there have  
14 been -- that is one instance. However, you also have  
15 the situation of the -- the Canadian opinions which  
16 are well-reasoned opinions --

17 JUSTICE GINSBURG: Which are dicta.

18 MR. HAYS: Which, actually, even though --  
19 even though they did not return the child based on  
20 the -- on the ground, they still made the -- the  
21 decision, and the second case that followed --

22 JUSTICE GINSBURG: All right. Well, you can  
23 take the German constitutional court.

24 MR. HAYS: Well, the German constitutional  
25 court in that instance, their specific reference in

1 the case itself to the fact that this involves also  
2 joint custody rights, as do -- as do a number of the  
3 other foreign -- of the other foreign cases. Ireland,  
4 also, is one that is cited by Mr. Abbott, and that one  
5 involved a situation of joint parental responsibility.

6 JUSTICE BREYER: Who do you count for you of  
7 the seven, just so I can write it down and go back and  
8 read them? Any one of the seven for you?

9 MR. HAYS: Yes, the --

10 JUSTICE BREYER: Which?

11 MR. HAYS: The circuit courts in the United  
12 States --

13 JUSTICE BREYER: Okay. Any other for you?

14 MR. HAYS: And Canada.

15 JUSTICE BREYER: Canada. Okay. And who's  
16 against you?

17 MR. HAYS: The -- well, France is divided.  
18 France has --

19 JUSTICE BREYER: No. I asked who is against  
20 you.

21 MR. HAYS: Against us, it's -- other than --  
22 other than the dicta that -- that's pointed out in the  
23 English opinions, we take the position that the other  
24 ones, it's unclear as to -- as to how you --

25 JUSTICE BREYER: You think one against you,



1 one for you, the rest unclear?

2 MR. HAYS: Unclear, because --

3 JUSTICE BREYER: Okay.

4 JUSTICE SCALIA: Is Australia -- is  
5 Australia unclear?

6 MR. HAYS: Yes. I -- the -- the Australian  
7 case dealt, again, with a -- with a joint custody  
8 situation, and in -- in that particular case, I  
9 believe -- if I am correct in my recollection of it --  
10 the Australian court expressed some reservation about  
11 making a bright-line rule that these type of ne exeat  
12 clauses actually established --

13 JUSTICE SCALIA: Well, according to the  
14 Petitioner's brief, if this is inaccurate, the  
15 Australian court followed the English Court of  
16 Appeal's decision that Justice Ginsburg referred to,  
17 emphasizing the desirability of uniform  
18 interpretations of the convention, and I count that  
19 against you, the Australia.

20 MR. HAYS: The -- the point that we are  
21 making, however, is that, if you have a -- one or two  
22 or even three countries that have gone one way and  
23 then you have other countries that have gone the other  
24 way, that there's not a clear-cut overwhelming  
25 majority of the other jurisdictions that have ruled in

1 favor of establishing ne exeat orders, and --

2 JUSTICE SCALIA: We will have to parse them  
3 out, obviously.

4 JUSTICE KENNEDY: I had one question for  
5 the other counsel and didn't have an opportunity to  
6 ask it. If the Respondent were return to Chile, would  
7 she face criminal charges or contempt charges?

8 MR. HAYS: There -- there is a possibility  
9 of -- of that. There is also a possibility under the  
10 -- there was a question as to -- the -- what -- what  
11 remedies could -- could be used. There are -- there  
12 are -- under the Hague Convention, article 21 provides  
13 remedies for access rights, which is what Mr. Abbott  
14 has.

15 Also, as was recognized by the State  
16 Department, when they sent their -- when they sent  
17 their analysis to the Senate in favor of ratification,  
18 the State Department recognized that there are  
19 mechanisms within the United States to enforce these  
20 orders, namely the Uniform Child Custody Jurisdiction  
21 and Enforcement Act that Mr. Abbott could avail  
22 himself of.

23 And Mr. Abbott, in fact, did file an action  
24 in Texas to enforce his visitation rights.

25 JUSTICE SCALIA: Well, if these things were

1 effective --

2 JUSTICE KENNEDY: Well, but the ne exeat  
3 order --

4 JUSTICE SCALIA: -- we wouldn't -- we  
5 wouldn't have a treaty, would we?

6 MR. HAYS: If they --

7 JUSTICE SCALIA: If these local remedies  
8 were effective, we wouldn't have a treaty.

9 JUSTICE KENNEDY: And I was --

10 MR. HAYS: These --

11 JUSTICE KENNEDY: I was going to say the ne  
12 exeat order, under your view, is the one order that  
13 can't be enforced anyplace.

14 MR. HAYS: Now, the -- the -- a violation of  
15 the ne exeat provision could be enforced, but the  
16 question before this Court is whether the means of  
17 enforcing the ne exeat provision falls under the  
18 auspices of the Hague Convention.

19 JUSTICE STEVENS: May I just ask this  
20 general question? Is there any danger that the child  
21 is old enough to make the decision now, and,  
22 therefore, the cases are really moot?

23 MR. HAYS: Absolutely. Under Texas law, a  
24 child that reaches the age of 12 -- the court is  
25 entitled to consider that child's -- that child's

1 desires. And under --

2 JUSTICE STEVENS: So no matter what we do,  
3 the child may actually provide the answer in this  
4 case?

5 MR. HAYS: That, also, Your Honor.

6 JUSTICE SCALIA: Wait, does that provision  
7 of Texas law override the -- the treaty that the  
8 United States has entered into?

9 MR. HAYS: The -- one of --

10 JUSTICE SCALIA: Texas can ignore the  
11 treaty, because the child is over 12 years old?

12 MR. HAYS: That -- no, it's a specific  
13 provision of the treaty, Your Honor. Under article  
14 13, the court -- the court that is deciding whether to  
15 return the child has the discretion not to return the  
16 child if the child is of sufficient age for the court  
17 to take the wishes into account and the child doesn't  
18 want to go back --

19 JUSTICE KENNEDY: But that -- but that's a  
20 defense to a removal order.

21 MR. HAYS: It -- yes, it is a defense to a  
22 removal --

23 JUSTICE BREYER: How old is the child?

24 MR. HAYS: The child is 14 and half right  
25 now. And the --

1 JUSTICE SOTOMAYOR: The convention article  
2 13 starts at 14, right?

3 MR. HAYS: The -- the convention article  
4 does not specify the age. It leaves it up to -- to  
5 the determination of -- of the particular jurisdiction  
6 in which the case is -- is tried. However, because  
7 this is in Texas, the -- the Texas statutes provide  
8 that you begin to take a child's --

9 JUSTICE SOTOMAYOR: Is Mr. Abbott still in  
10 Chile?

11 MR. HAYS: Mr. Abbott's still living in  
12 Chile, yes.

13 JUSTICE SOTOMAYOR: And at the time when the  
14 child was removed, there was ongoing custody motions  
15 before the court in Chile?

16 MR. HAYS: Actually, that's incorrect, Your  
17 Honor. There was not a custody proceeding in -- in  
18 Chile at the time. There were three proceedings going  
19 on. There was a protective order proceeding. There  
20 was a request by Mr. Abbott to increase his visitation  
21 rights, his rights of access. And then there was a  
22 child support action where my client was attempting to  
23 get some \$23,000 in past-due child support.

24 Those were the actions that were pending.  
25 There was no attempt at that time by Mr. Abbott to

1 change custody. Just as I was saying, there was no  
2 attempt by my client to change custody when she moved  
3 to Texas.

4 JUSTICE BREYER: Why didn't your client just  
5 ask the judge there to leave Chile?

6 MR. HAYS: Your Honor, I don't know. I  
7 don't know.

8 If there's no further questions --

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
10 Ms. Howe, you have 4 minutes remaining.

11 REBUTTAL ARGUMENT OF AMY HOWE,  
12 ON BEHALF OF THE PETITIONER

13 MS. HOWE: Thank you, Mr. Chief Justice.

14 With regard to the child support, there was  
15 an ordinary dispute over the amount of child support  
16 that's not addressed in the record and which was  
17 finally resolved and which Mr. Abbott paid.

18 The question of criminal charges -- we are  
19 not aware on any charges pending in Chile. Mr. Abbott  
20 has no intent to bring such charges if Mr. Abbott --  
21 if Mrs. Abbott returns to Chile.

22 And with regard to article 13 and the  
23 question about the child's age, article 13 is  
24 discretionary rather than mandatory, so all that the  
25 court in the United States would be doing would be to

1 send the child back so that the courts there could  
2 resolve the dispute.

3           Turning to the -- the issues about -- the  
4 question of both "determining" and "the place of  
5 residence." As, Justice Alito, you alluded, this is  
6 an international convention. The convention doesn't  
7 care if Mrs. Abbott moved with the child from one  
8 address in Chile to another. The convention cares  
9 very much when a child is abducted from one country to  
10 another.

11           And as regards the definition of residence,  
12 it's not defined in article 5(a), but it also appears  
13 in article 5(b), which refers to rights of access. It  
14 refers to the right to take the child to a place other  
15 than the child's habitual residence. And the drafting  
16 history on this point makes quite clear that this  
17 refers not only to the right to take -- take the child  
18 from the home, but to the right to take the child out  
19 of the country.

20           In the convention context, the word  
21 "determine" can't have the decisive, unilateral  
22 meaning that Mrs. Abbott would attribute to it. The  
23 convention contemplates that rights will be held  
24 jointly and requires parents to work collaboratively.  
25 So in this case, the Abbotts, by virtue of the ne

1 exeat right, by virtue of the ne exeat statute, had a  
2 shared, enforceable right to determine whether their  
3 child would remain in Chile or would move somewhere  
4 else.

5           And despite what Mr. Hays has argued and has  
6 argued in his brief, it is a substantive right. The  
7 parent who holds the right has the right to ensure  
8 that his child remains in the country of habitual  
9 residence, which has huge implications for the  
10 language and culture in which the child will be  
11 raised, and it ensures that the courts of Chile can  
12 resolve any disputes relating to the child. It's  
13 certainly not a mere enforcement mechanism for Mr.  
14 Abbott's access right.

15           With regard to the question of whether or  
16 not Mr. Abbott needed to have care and control of the  
17 child to invoke rights of custody, article 5(a) of the  
18 convention is what defines rights of custody. There  
19 is nothing in the text of that statute that requires  
20 the person invoking the convention to have physical  
21 care of the child.

22           JUSTICE BREYER: Can we read that exception  
23 there to say -- "grave injury" and so forth -- can we  
24 read it as in essence saying, look, do what's best for  
25 the child?



1 MS. HOWE: That -- you could read that as a  
2 form of a best interests of the child standard. I  
3 believe that we would regard it as a little bit  
4 narrower and a grave risk of harm to the child or  
5 otherwise place the child in an intolerable situation.  
6 But it is a form of the best interest standard,  
7 certainly.

8 JUSTICE STEVENS: May I ask you, do you  
9 agree with your opponent, putting aside removing the  
10 child from the country, that within Chile itself the  
11 custodial parent had the full right to determine the  
12 place of residence?

13 MS. HOWE: We do agree, yes.

14 CHIEF JUSTICE ROBERTS: I'm sorry, I'm a  
15 little taken aback by your answer to Justice Breyer.  
16 You think the grave prosecution standard means  
17 whatever is the best interest of the child?

18 MS. HOWE: No, I believe it's a stricter  
19 standard than simply the best interests of the child.  
20 It's the -- you know, it's a -- I believe it speaks  
21 for itself. It is a grave risk of psychological harm  
22 to the child. The convention --

23 CHIEF JUSTICE ROBERTS: And you agree with  
24 what I understood to be the Solicitor General's  
25 position, that that's an individual-specific and not a

1 culture-specific determination?

2 MS. HOWE: Yes, we do.

3 Article 13 is simply an affirmative defense  
4 to the -- once a judge has found that rights of  
5 custody exist and have been breached. There's  
6 certainly nothing in the history of the convention  
7 that reflects any intent by the drafters to narrow the  
8 meaning of "rights of custody" through article 13.

9 And finally, Mr. Hays cannot point to  
10 anything other than a single French trial court  
11 decision that holds squarely in his favor, and when  
12 that trial court decision was raised at the 1993  
13 Special Commission meeting, it garnered no support  
14 from the delegates.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 The case is submitted.

17 (Whereupon, at 12:06 p.m., the case in the  
18 above-entitled matter was submitted.)

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