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IN THE SUPREME COURT OF THE UNITED STATES

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WATER SPLASH, INC., :

Petitioner : No. 16-254

v. :

TARA MENON, :

Respondent. :

- - - - - x

Washington, D.C.

Wednesday, March 22, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:22 a.m.

APPEARANCES:

JEREMY GASTON, ESQ., Houston, Tex.; on behalf of the Petitioner.

ELAINE J. GOLDENBERG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting the Petitioner.

TIMOTHY A. HOOTMAN, ESQ., Houston, Tex.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:22 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 16-254, Water Splash v. Menon.

Mr. Gaston.

ORAL ARGUMENT OF JEREMY GASTON

ON BEHALF OF THE PETITIONER

MR. GASTON: Thank you, Mr. Chief Justice, and may it please the Court:

At issue in this case is whether The Hague Service Convention permits service of process by mail if the State of destination does not object. Our position is that such mail service is allowed, and it's a three-part argument.

First, purely textual evidence of meaning shows that this reading of the treaty is at least reasonable.

Second, some additional considerations, namely, this Court's decision in Schlunk, as well as the history of events leading up to the treaty, further confirm that this is a reasonable reading of Article 10(a).

JUSTICE SOTOMAYOR: Counsel, your adversary basically starts from the proposition that this text is unambiguous.

1 MR. GASTON: Yes.

2 JUSTICE SOTOMAYOR: Do you agree with that  
3 proposition?

4 MR. GASTON: No. We do not agree the text  
5 is wholly unambiguous. We believe the text begins as  
6 very ambiguous. Looking at Article 10(a), (b), and (c),  
7 where (a) uses the word "send," (b) and (c) use the word  
8 "effect service." And instantly, just looking at that  
9 small area, one says, well, wait, what does "send" mean  
10 here? Does it mean send to serve? Send for nonservice?  
11 Send for both purposes? Is it the same or different  
12 than to effect serve?

13 And we have a presumption that has been used  
14 in the statutory context the different words are usually  
15 going to mean different things. It's not a irrebuttable  
16 presumption, but even that presumption leaves ambiguity  
17 because it --

18 JUSTICE SOTOMAYOR: All right. So why do  
19 you think the drafters used those two different phrases?  
20 What's your best answer?

21 MR. GASTON: The -- -- the -- the best --  
22 there's a practical answer and then there's a -- a legal  
23 answer.

24 The practical answer -- and this involves  
25 the circumstances leading up to the treaty -- is that

1 there were three prior treaties dating back to 1896,  
2 where a French term "addressee" was used in the  
3 analogous provision, and that, in French, was also not a  
4 term of art for "service."

5           There were two other French terms of art for  
6 "service," and the convention used "nova casiam" and  
7 "signif casiam" as terms for service. And then in this  
8 section, which was 6(1) of the earlier treaties, at  
9 least of the 1954 treaty, it used the term "addressee."  
10 And in context, it was very clear that it meant  
11 "service" because there were other references to  
12 "service" later in that section, and it was understood  
13 to mean "service" because the term in French was broad  
14 enough to cover "service."

15           And what happened in 1964, during the  
16 drafting of the treaty adopted in 1965, they had to  
17 prepare, for the first time, an English version of the  
18 treaty. Because they would have two texts, French and  
19 English, and, as a practical matter, what they did is  
20 they took that language and simplified the article to  
21 which it would be part of, and it lost some of its  
22 context.

23           JUSTICE KENNEDY: Is it -- is it fair to say  
24 that your first argument, you were talking about the  
25 first argument text, but then it seems to me that you

1 went a little bit beyond text.

2 Is one of your arguments that maybe "send"  
3 is ambiguous when you look at (a), but when you look at  
4 (b) and (c), you know why they used the word "send" and  
5 so it's not ambiguous -- even though it's ambiguous, the  
6 much better interpretation is your interpretation, just  
7 by looking at (a), (b), and (c)?

8 Is that your argument? Is that your first  
9 argument?

10 MR. GASTON: No. The first argument is that  
11 all -- there -- there is quite a bit of textual evidence  
12 beyond (a), (b), and (c) that suggests "send" in  
13 Article 10(a) means "serve" --

14 JUSTICE KENNEDY: Right.

15 MR. GASTON: -- despite a presumption that  
16 different words usually mean different things. And --  
17 and that first happens as you draw outward from (a),  
18 (b), and (c) to Article 10 as a whole, which has a right  
19 of objection by a State of destination.

20 So states that are party to the treaty can  
21 object to Article 10(a) or 10(b) or 10(c). And if 10(a)  
22 means "send" for nonservice purposes, it's basically  
23 saying, okay, you can send these judicial documents for  
24 unofficial, nonlegal, nonbinding purposes, unless the  
25 State of destination objects.

1 JUSTICE ALITO: There's a body of law, a  
2 body of international law regarding the way in which  
3 treaties should be interpreted, and there are certain  
4 rules about the interpretation of treaties. But  
5 treaties are also the law of the United States. So the  
6 question that you started out answering is a rule for  
7 interpreting laws of the United States.

8 So what do we do in a situation where there  
9 might be a conflict between these two bodies of  
10 interpretive standards?

11 MR. GASTON: And -- and I think, luckily,  
12 this case I don't think rings up the conflict, because  
13 the only way you remove the ambiguity in a -- in a way  
14 against Petitioner's position is to take a canon that  
15 words usually mean different things and make it  
16 irrebuttable, and that's -- that's not the law under --  
17 under Federal law. This Court has -- has not applied  
18 that canon in some situations.

19 And here, you -- you get to a greater  
20 meaning by -- and if I could carry out the answer to  
21 the -- the State of destination objecting -- it would be  
22 very odd to put in a treaty about service, some  
23 provision that -- to allow states to object to the use  
24 of their mails for unofficial purposes.

25 It -- it really -- I think most people would

1 say: Well, before the treaty I could use the mail for  
2 unofficial purposes; after the treaty, I ought to be  
3 able to use the mail for unofficial purposes.

4 And even the -- the delegates of members who  
5 have met in the years after the treaty have said: Yes,  
6 even if a State objects or not, you can certainly use  
7 the mail for -- for unofficial purposes because that  
8 doesn't affect any sovereign interest of the State.  
9 They don't have a -- a need to object.

10 That structural argument, which is part of  
11 Federal law looking at the structure of treaties, is  
12 enough, I would -- I would say, by itself to drastically  
13 reduce the ambiguity here. And then any remaining  
14 nearly textually vanishes when you think about the  
15 entire treaty as a whole, which is it's a treaty on  
16 service.

17 The title is the Convention on the Service  
18 Abroad of Judicial and Extrajudicial Documents. The  
19 preamble discusses simplifying service, expediting  
20 service, making service more reliable.

21 And in -- in that context, I think the best  
22 that -- that -- that Respondent can get to is the idea,  
23 well, maybe there's still some remaining ambiguity,  
24 because it certainly seems that -- that send here is  
25 a -- a rule of service. And we have domestic examples



1 where rules of service, after they've made clear we're  
2 talking about service, they use common verbs of  
3 transmission: Send, deliver, mail. In Texas, you can  
4 effect service by mailing and so the verb is -- is  
5 "mail." In -- in that context, the word "send" in  
6 Article 10(a), although this is -- is a legal argument,  
7 this is not practically what happened, but -- but send  
8 is a -- is a perfect word for the directness of the  
9 transmission.

10           Every other transmission in the treaty  
11 requires some sort of intermediary, whether it's a  
12 central authority, a consulate or a diplomatic  
13 individual or channel or a judicial officer in -- in the  
14 State of destination. When you're talking about sending  
15 through the mail, serving documents, you send them, and  
16 it's the only case where you can directly effectuate  
17 service.

18           The -- the other of -- in terms of -- in  
19 terms of text still, the context of certain other words  
20 also shows that send is used and meant as service.  
21 There are three channels, other than the central  
22 authority, that are mentioned in the treaty: Diplomatic  
23 channels, postal channels and consular channels. All  
24 three use the word "channels." And that's in Articles 9  
25 and 10.

1 And then later, in Article 11, it talks about channels  
2 of transmission. And then later in Article 21, it  
3 speaks of more generally methods of transmission. And I  
4 think these are also contextual evidence that all the  
5 channels that have been discussed are service channels.

6 And then, finally, the -- if -- if there is  
7 any ambiguity remaining, the extrinsic evidence that  
8 this Court has said we can consider, at least absent  
9 wholly unambiguous text, is overwhelmingly in support of  
10 the idea that, in fact, at the time of drafting, the --  
11 the drafters and those who adopted it at that convention  
12 intended to allow service by mail.

13 JUSTICE GINSBURG: There have been a number  
14 of countries that have said: We don't want you to use  
15 mail. They have taken that option.

16 MR. GASTON: Yes. I have counted --  
17 actually, of the 71 countries who have either acceded or  
18 ratified the treaty, nearly half, 30, have expressed  
19 their objection to -- to mail by lodging a declaration  
20 with the government of the Netherlands. And there are a  
21 handful who have lodged a qualified objection where they  
22 say, well, yes, mail is okay, but if you do it this  
23 particular way.

24 So, yes, certainly that number indicates  
25 that. And in some cases, such as Canada, in this case

1 their declaration -- who doesn't object -- specifically  
2 states, we understand. We are saying we don't object to  
3 service by mail. And that's not in every case, but --  
4 but several -- several of the declarations.

5 JUSTICE GINSBURG: Have positively said we  
6 don't object.

7 MR. GASTON: Yes.

8 JUSTICE GINSBURG: If -- if you -- you are  
9 right, does Menon, does she get any chance to defend on  
10 the merits? Or if she suffered a default judgment, is  
11 that it?

12 MR. GASTON: In -- in general, that is not  
13 it because the convention has two provisions in Articles  
14 15 and 16 that enable a person to -- to potentially void  
15 a judgment or to extend the time to appeal if certain  
16 conditions are shown. Whether that could be introduced  
17 in a enforcement proceeding, for example, in Canada, if  
18 the judgment were sought to be enforced, if I were on  
19 the other side, I would be trying to argue Articles 15  
20 and 16 and try and -- and try and show there was a  
21 problem with the judgment. But at least in this -- the  
22 forum State, I think if -- if those articles are not  
23 raised at the default judgment stage or within a  
24 reasonable time after the judgment --

25 JUSTICE SOTOMAYOR: The articles. What are

1 the articles?

2 MR. GASTON: Articles 15 and 16.

3 JUSTICE SOTOMAYOR: No, what do they say?

4 MR. GASTON: So Article 15 precludes the  
5 entry of a default judgment depending on whether the  
6 forum State -- and in this case, that's the  
7 United States -- whether they have opted to go in the  
8 first half of Article 15 or the second half of  
9 Article 15.

10 The first half of Article 15 based --

11 JUSTICE SOTOMAYOR: Where does the person  
12 get to raise the defense that they didn't actually  
13 receive notice?

14 MR. GASTON: They can certainly raise it in  
15 the -- in the proceeding where the judgment was entered  
16 within a reasonable time after they got actual notice of  
17 the judgment. And that's Article 16 specifically. They  
18 have to show they didn't have notice, they have to show  
19 they had a prima facie defense, and then they could get  
20 relief from the finality of it.

21 And if the Court has no further questions, I  
22 would reserve the remainder of my time.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Ms. Goldenberg.

25 ORAL ARGUMENT OF ELAINE J. GOLDENBERG

1 FOR UNITED STATES, AMICUS CURIAE,  
2 SUPPORTING THE PETITIONER

3 MS. GOLDENBERG: Mr. Chief Justice, and may  
4 it please the Court:

5 Article 10(a) of the Hague Service  
6 Convention permits service through postal channels on  
7 persons abroad if the law of the forum State -- that's  
8 the State where the case is pending -- authorizes such  
9 service and if the receiving State where the mail will  
10 be delivered hasn't objected to Article 10(a).

11 And I'd like to start with this permit  
12 authorize framework, because I think there's been a lot  
13 of confusion in the lower courts on this subject. The  
14 question presented here is perhaps phrased a little  
15 inartfully in terms of authorization, and it would be  
16 really helpful if this Court would clarify this point.

17 Article 10(a) says that provided the State  
18 of destination does not object, the present convention  
19 shall not interfere with the freedom to send judicial  
20 documents by postal channels to persons abroad. So it  
21 is not interfering with freedom. It is -- it's not the  
22 same thing as providing an affirmative authorization for  
23 service by mail. That affirmative authorization has to  
24 be found elsewhere. And the place where you find it is  
25 in the law of the forum State.

1           So, for instance, in our Federal system, if  
2 you look at Rule 4 of the Rules of Civil Procedure,  
3 there is a subsection of Rule 4 that says where an  
4 international agreement permits, but does not authorize  
5 service on persons abroad, here are a bunch of things  
6 you can do. And some of those options include service  
7 by mail, using registered mail by -- sent by the clerk  
8 of the court, service by mail if the district court  
9 judge in a particular case directs it, and so on.

10           So that's where you get the authorization.  
11 You have to -- the forum State has to authorize the  
12 service by mail on a person abroad.

13           At the other end of the process, you have to  
14 see whether the receiving State has objected to service  
15 by mail. And as my friend indicated, nearly half of the  
16 countries that have acceded to or ratified this treaty  
17 have indeed objected to service by mail. Some of them  
18 have given a sort of conditional objection that they'll  
19 only service by mail if --

20           JUSTICE GINSBURG: Did they --

21           MS. GOLDENBERG: -- it's done in a certain  
22 way.

23           JUSTICE GINSBURG: Did they make a  
24 distinction, any of them, between the initiating  
25 document, the complaint, as distinguished from documents

1 later on in the litigation?

2 MS. GOLDENBERG: None of them do, no. None  
3 of the -- the statements that countries have made when  
4 they've stated whether they object to Article 10(a) or  
5 not simply state either we object to service by mail or  
6 we don't. Some of them don't actually use the word  
7 "service." Many of them do; more than -- more than half  
8 of them do. Some States that have not objected have  
9 also used the word "service" when they've made that  
10 statement. So I think that is an indication -- one of  
11 many indications that other contracting parties to this  
12 convention, like the United States itself, understand  
13 that Article 10(a) is about service and not simply about  
14 some kind of informational mailing.

15 So as I said before, we think it would be  
16 helpful if the Court would clarify the -- the permit,  
17 authorize, object framework. The court of appeals  
18 decision that we think best captures this is the  
19 Brockmeyer decision from the Ninth Circuit, which lays  
20 this out correctly and also has a very helpful  
21 discussion of how Rule 4 interacts with the treaty.

22 Beyond that, as my friend said, there are a  
23 lot of textual indications here that this is a  
24 convention that is about service. Just to highlight one  
25 that he didn't touch on, there's a structural argument,

1 which is that Articles 8, 9, 10(b), 10(c), 11 are all  
2 about alternative channels for service, and it would be  
3 very odd for this convention to suddenly jump to  
4 something that wasn't about service in Article 10(a) and  
5 then jump back again to service in 10(b), 10(c), and 11.

6 JUSTICE KAGAN: Why do you think they used a  
7 different word?

8 MS. GOLDENBERG: I think my friend correctly  
9 gave the reasons, which is there is a historical reason  
10 and a practical reason. The historical reason is that I  
11 think they simply carried over the French word  
12 "addresser" from the 1954 civil procedure convention  
13 that replaced -- that this convention replaced as to  
14 States that were parties to both. Addresser had been  
15 understood by everyone and it was clear in context to  
16 capture service. And so I think if you actually compare  
17 the language of the 1954 treaty and the language of  
18 Article 10(a) in French, they are virtually identical.  
19 It was just the drafters carried it over. And that  
20 that's the way that people understood it.

21 On a practical level I do think that "send"  
22 is just a very natural way to refer to putting something  
23 in the mail, and so it makes sense to use that verb  
24 there rather than a different verb, especially when  
25 you're talking about a situation in which the service



1 can go directly from one party to another.

2           We think the contrary interpretations really  
3 don't work here, but at the very least there's ambiguity  
4 in this treaty, and at that point this Court's decisions  
5 are clear; you turn to extrinsic sources of information.  
6 Here, each and every extrinsic source points strongly in  
7 the direction of the interpretation we're espousing.  
8 You have the -- the history, and that is the draft  
9 convention and the contemporaneous understanding of  
10 people who were there when it was drafted. You have the  
11 consistent interpretation of the executive, which is  
12 entitled to great weight, and here, has been completely  
13 consistent from the beginning till now. You have the  
14 consistent interpretation of other contracting parties,  
15 which this Court has said are entitled to considerable  
16 weight, and you also have an expert consensus among  
17 scholars and so on.

18           So affirming the court below would take us  
19 out of step with the rest of the world. 70 other  
20 countries are parties to this treaty -- to this treaty,  
21 and it could believe an irritant if they think that  
22 we're not living up to our obligations.

23           It also would make service more difficult  
24 for U.S. plaintiffs who are looking to serve defendants  
25 who are abroad. It would take away from them the

1 ability to use the mails in situations where they might  
2 be trying to serve someone in a country where the  
3 central authority is slow or expensive. And so for all  
4 those reasons, we think that the Court should reverse  
5 the judgment below.

6 If the Court has no further questions.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Hootman.

9 ORAL ARGUMENT OF TIMOTHY A. HOOTMAN

10 ON BEHALF OF THE RESPONDENT

11 MR. HOOTMAN: Mr. Chief Justice, and may it  
12 please the Court:

13 Before I get into the -- into the thrust of  
14 my argument, I'd like to address a couple of questions  
15 that came up here.

16 Why is -- was a different word used, okay?  
17 The lead scholar on this, which is cited to in both  
18 the -- the Solicitor General's brief and my -- my  
19 opponent's brief, Bruno Ristau, he's -- he's the  
20 acknowledged expert in this whole area of -- of  
21 extrajudicial service. In his two-volume treatise,  
22 he -- he says -- he goes through all this talk, all this  
23 analysis about all these different cases that -- on this  
24 very issue, and then in the -- in -- in sum, he says  
25 it's a mistake. It was -- I call it -- I call this case

1 the case of *Bartleby, the Scrivener*, because it turns on  
2 this mistake that the lead scholar says that is out  
3 there.

4 And so if -- if you look at the -- the  
5 obvious section of the treaty on page 8 of the Joint  
6 Appendix, under the mistake --

7 JUSTICE SOTOMAYOR: I -- I think that  
8 leading scholar -- maybe I'm wrong, but I thought I read  
9 it, thought that it -- that it may have been the  
10 scrivener's mistake, but the intent was clearly to  
11 effect service by the --

12 MR. HOOTMAN: It clearly comes down on -- on  
13 their side of the camp. That -- that's undoubtedly.

14 JUSTICE SOTOMAYOR: So this leading scholar  
15 calls it a misuse of words, but that the intent was  
16 clear in -- for all the reasons everyone else is giving?

17 MR. HOOTMAN: Exactly. And it also uses a  
18 similar analysis that the dissenting opinion in the  
19 Texas Court of Appeals said. Basically, you look at all  
20 these other things out there beyond the text to -- to  
21 come up --

22 JUSTICE SOTOMAYOR: So why is this clear?  
23 Your adversary says isn't the lack of clarity inherent  
24 in the question; what do they mean by "send"? They  
25 don't define "send." They don't define "service." So

1 doesn't that automatically create an ambiguity? And why  
2 isn't the ambiguity approached the way the other side  
3 says?

4 MR. HOOTMAN: Okay. First of all, I do not  
5 think that there is an ambiguity in -- in this  
6 particular point that we're all here talking about. And  
7 I -- and I say that for the reasons that were cited  
8 basically in the Fifth Circuit opinion, but that whereas  
9 if you take the words to "effect service" -- or  
10 actually, "effect service of" -- and substitute those  
11 for "send," then -- then it is crystal clear for them.

12 So then if you use the -- I don't really  
13 think it's a canon. I think it's more of a rule of  
14 usage, that if I alter the -- the word that I'm using  
15 throughout a document for something else, well, then I'm  
16 just trying to alter the -- the message that I'm  
17 sending.

18 JUSTICE GINSBURG: Is it a convention on the  
19 service of documents? It's not a convention about  
20 sending documents, but it's a convention -- everything  
21 in this convention relates to service, and the whole  
22 purpose of it was to facilitate international  
23 cooperation in litigation.

24 MR. HOOTMAN: No doubt about it.

25 JUSTICE GINSBURG: And so just -- just as

1 in -- in this case, the service is sought to be made in  
2 Canada, there will be cases where courts abroad want to  
3 serve somebody in the United States. The whole purpose  
4 of this was to make it easier to conduct litigation,  
5 international -- to facilitate international cooperation  
6 in litigation.

7 MR. HOOTMAN: No doubt about it. And I  
8 would -- and I would suggest that sending documents  
9 that are -- okay. The -- the question -- the follow-up  
10 question from what you're saying, Your Honor, would be,  
11 well, what -- what -- does it mean just service of  
12 initiating documents, service of process, or service of  
13 any judicial documents?

14 Now, if you -- the -- the first part of the  
15 treaty talks about service of -- of judicial documents.  
16 And so it would seem to me logical to include within a  
17 treaty that's focusing on service of documents  
18 internationally, also service of documents after service  
19 of process. And so from my perspective -- and I think  
20 I'm a fairly reasonable man -- so from the reasonable  
21 person's perspective, you would think that it -- that  
22 you would include service of other types of documents  
23 within a service of process treaty.

24 And now also there's a really important  
25 extrajudicial -- and I'm -- I'm going to jump into

1 some extra text --

2 JUSTICE GINSBURG: I'm -- I'm not grasping  
3 what you mean by "process." It's on the -- the  
4 convention is on the service of documents.

5 MR. HOOTMAN: Yes. Judicial documents.

6 JUSTICE GINSBURG: Yes. And so is the  
7 notion of process the way we think about it in the  
8 United States, a process server? That's not universal,  
9 is it? I mean, a lot of civil law countries don't have  
10 the notion of tagging -- having a process server tag the  
11 defendant.

12 MR. HOOTMAN: Right. Okay. The -- the  
13 history -- okay. I do want to jump into some extra  
14 textual information which specifically addresses that  
15 and a lot of other things.

16 Okay. So the history of this -- of this  
17 treaty was -- was such that they weren't -- they were  
18 really trying to kill this French method of service  
19 in -- in France, "nova de cashiano" -- I don't speak  
20 French, so -- but the Schlunk case talks all about it.  
21 And -- and the problem there was that an official in  
22 France, once you give the citation, the -- the  
23 certificate or citation or summons, to the official  
24 there, that is service. And so -- so defaults were  
25 being entered against parties that never actually got

1 notice.

2           And so then -- then the United States had --  
3 had passed a -- had passed Public Law 88-619 in 1964,  
4 whereby we allowed foreign countries to come here and to  
5 easily effectuate foreign service by going to a district  
6 judge and getting an order signed to serve, say, a  
7 French or Ugandan or wherever, a -- a summons on -- on  
8 an American -- or whatever person is in the  
9 United States. So they could get judicial assistance  
10 from the United States very easily.

11           Okay. So within the context of that act,  
12 then the United States went -- sent their  
13 representatives to The Hague to start getting engaged  
14 with this -- this Hague Conference to normalize  
15 international laws. And -- and so the motive was to get  
16 the other countries to make it easy for our citizens to  
17 serve overseas and also to -- to push forward due  
18 process, okay.

19           And so then the -- when the drafters,  
20 they -- they got this -- this convention prepared, then  
21 they came to the -- the Senate committee, and then the  
22 lead spokesman at that Senate committee was asked  
23 specifically -- and I have the page here -- I don't have  
24 it handy, but basically the -- the spokesperson for  
25 that -- for America told the Senate -- the senators --

1 that the only thing America is giving up is the same  
2 thing that we had already given in that Federal act that  
3 I just mentioned. And that Federal act doesn't have  
4 anything in it about -- about mail.

5 So -- so the actual lawmakers of the  
6 United States that signed off on this treaty were told  
7 by the people that participated in the -- in the  
8 convention drafting that -- that we're going to -- it  
9 wasn't all about service, like you were saying, Your  
10 Honor. It was either -- it was, in large part, about  
11 due process. And the only thing that we're giving up is  
12 the same thing that we gave up in -- in this Federal act  
13 that I'm talking about.

14 JUSTICE SOTOMAYOR: Well, I'm sorry. Did we  
15 give up or do you think they thought we were giving up  
16 the right to authorize States to permit service by mail?

17 MR. HOOTMAN: Service by mail was --

18 JUSTICE SOTOMAYOR: Or your position is --  
19 is that we did; that in the treaty, we intended, by  
20 signing the treaty, to give up the power of States to  
21 authorize the service by mail?

22 MR. HOOTMAN: Service by mail was actually  
23 not talked about in the Senate hearings. There was  
24 one --

25 JUSTICE SOTOMAYOR: I'm asking you, do you



1 think it's a fair reading of a treaty for us to read it  
2 to constrict the rights of States to effect service  
3 consistent with due process? Because there's no doubt  
4 that we consider mail service consistent with due  
5 process.

6 MR. HOOTMAN: Okay --

7 JUSTICE SOTOMAYOR: The United States  
8 authorize it, right?

9 MR. HOOTMAN: Well, the -- under --  
10 according to Brockmeyer, the case -- the -- the position  
11 that the Solicitor General wants the Court to adopt, the  
12 actual holding in that case was that the Article 10(a)  
13 does -- does not authorize service by mail. It permits  
14 it --

15 JUSTICE SOTOMAYOR: All right.

16 MR. HOOTMAN: -- meaning, you've got to look  
17 at the local law --

18 JUSTICE SOTOMAYOR: I -- I accept that. But  
19 many states permit service by mail, correct?

20 MR. HOOTMAN: Well, Texas doesn't, according  
21 to the majority opinion in this case, because all four  
22 of my points were sustained in the -- in the lower  
23 court. And one of those points was specifically whether  
24 or not Texas authorizes service by mail.

25 So if you were to --

1                   JUSTICE GINSBURG: But -- take Rule -- Rule  
2 4(e) of the Federal Rules of Civil Procedure. It  
3 authorizes service, as in the courts of the State where  
4 the district court is located. And I think Justice  
5 Sotomayor is referring to some States -- not Texas --  
6 but some States do authorize service of the summons and  
7 complaint by mail.

8                   MR. HOOTMAN: I'm sure some States somewhere  
9 do. They -- they could theoretically, let's put it that  
10 way. And so then you -- then you -- then you're with --  
11 up to the question of -- okay, let me -- let me put this  
12 way.

13                   In *Brockmeyer*, the Court said that the  
14 treaty does not authorize it, but Rule 4(f) of the  
15 Federal Rules of Civil Procedure allows it in some  
16 circumstances; namely, when the clerk sends it. So the  
17 clerk can mail the -- the process, but the party can't  
18 and, therefore, I win in my case.

19                   Now, in this -- in my case, the Texas -- the  
20 Texas Court of Appeals, the majority opinion actually  
21 sustained all four of my issues that were raised in  
22 the -- in the court of appeals. And one of those was --  
23 and by the way, the -- the dissent said I waived that  
24 one issue, but -- but the majority of that panel  
25 sustained it, which -- and that issue was whether or not

1 Texas law authorizes service by mail.

2 So if the Brockmeyer logic were to be  
3 adopted by this Court, you would basically say, well,  
4 yes, the -- the treaty permits it, permits it being  
5 service by mail, if the local law allows it. And so,  
6 yes, it's permitted, but the Texas court has already  
7 ruled on it and, therefore, a decision -- the lower  
8 court's ruling is affirmed.

9 So -- so even if you go this -- this route  
10 of it's not authorized, but it's permitted, you still  
11 have to affirm the -- the Texas judgment because the  
12 majority said that --

13 JUSTICE GINSBURG: Well, if it's -- if it's  
14 permitted under a Federal treaty, then how can Texas not  
15 permit it?

16 MR. HOOTMAN: Because unless -- that took me  
17 a long time to figure that distinction out. But  
18 basically, the question is -- and the question of the  
19 service was granted on is whether or not the treaty  
20 authorizes service by mail. That means the treaty  
21 itself says you can serve pursuant to the treaty by  
22 sending it in the mail versus the Brockmeyer  
23 distinction, which is that the treaty doesn't say that  
24 you serve by mail pursuant to the treaty, rather, that  
25 the treaty allows the other States or the Federal

1 government to pass a rule so that the local law, the  
2 local United States law allows service by mail. Okay.  
3 So then Brockmeyer says work through that and said,  
4 well, yes, Rule -- Rule 4(f) permits it, but only if the  
5 clerk sends it. And since the clerk in that case didn't  
6 send it, the default was set aside.

7 And so -- then then you take that line of  
8 thinking and apply it to my case and you say, okay,  
9 well, no, the treaty doesn't authorize it, because we  
10 follow the Brockmeyer line of thinking, but it does  
11 permit it if Texas law allows it. Well, a Texas court  
12 already passed on it and said -- in the majority  
13 opinion, because they sustained my four issues, Texas  
14 law does not authorize service by mail.

15 JUSTICE SOTOMAYOR: I'm sorry. I thought --  
16 I thought I had read this and I'm looking at it. The  
17 blue brief at page 9 says, "Under Texas law, a plaintiff  
18 can serve a foreign defendant in several ways, including  
19 by certified mail return receipt requested, either by  
20 sending it to any defendant directly, or if certain  
21 conditions are met, by sending it to the Secretary of  
22 State, by complying with the provisions of any  
23 applicable treaty, and if certain other conditions are  
24 met by other court-ordered means."

25 So -- and there's a citation to the two

1 sections of the Texas Civil Procedure Act. So it seems  
2 to me that Texas law, on its face, authorizes service by  
3 certified mail, return receipt requested, or by any  
4 other court-ordered means. So why was the service here  
5 ineffective under Texas law?

6 MR. HOOTMAN: Right. It's rule -- Texas  
7 Rule of Civil Procedure 108(a). It's entitled service  
8 of process in foreign countries.

9 JUSTICE SOTOMAYOR: Right.

10 MR. HOOTMAN: Right. And it -- and it  
11 provided -- it has all this stuff that can happen.  
12 Basically, there's about -- there's six different ways  
13 that it can occur.

14 JUSTICE SOTOMAYOR: So why wasn't the  
15 service here pursuant to one of those authorized Texas  
16 ways?

17 MR. HOOTMAN: Well, the short answer is  
18 because the Texas court said it wasn't the proper way to  
19 do it. Now, I think the more sophisticated response to  
20 that would be similar to the Brockmeyer holding,  
21 which -- which is because it was sent by -- I walked  
22 down -- I walked down to the post office and dropped a  
23 summons in the mail and send it to Uganda or wherever to  
24 serve somebody, the Texas court said you can't do that.

25 Now, in the Brockmeyer case, the specific

1 reason was is because the clerk didn't do that. Now, if  
2 the clerk -- I -- I send a request to the -- to the  
3 clerk and I say, hey, please send this -- this summons  
4 to Uganda and they drop it in the mail, that would be  
5 appropriate under -- under the Ninth Circuit case.  
6 Okay? But the -- but the point here is that -- that if  
7 you follow the Brockmeyer line of thinking, you have  
8 to -- to -- service by mail is proper, if our local  
9 authority allows it. And in our case, the majority  
10 opinion sustained all four points, and one of those  
11 points was that Texas law doesn't allow it.

12 And -- and also, you know, the technical --  
13 I don't mean to be overly technical, but we didn't --  
14 you didn't grant cert on the question of whether or not  
15 the Texas law allows it. We -- we granted on whether or  
16 not the treaty authorizes it.

17 And so I've got that holding from the Texas  
18 court on the Texas law. I think that's dispositive,  
19 assuming you get to that. And the only way you get to  
20 that is if you say that the treaty -- if you say that  
21 the treaty authorizes service by mail, you don't even  
22 get into that can of worms, because the treaty itself is  
23 the vehicle through which you're serving process.

24 Okay?

25 If you follow the Brockmeyer line of

1 thinking, you say, well, no, the treaty doesn't  
2 authorize it, but it permits it, then you run into the  
3 Texas majority holding which has already ruled on that  
4 question. And --

5 JUSTICE KAGAN: Do you think it's a problem  
6 for your position that no other court in the world has  
7 construed the treaty this way?

8 MR. HOOTMAN: That's clearly a problem.  
9 That's why I focused so hard on text.

10 (Laughter.)

11 MR. HOOTMAN: I mean -- I mean --

12 CHIEF JUSTICE ROBERTS: Someone's got to be  
13 first, right?

14 (Laughter.)

15 MR. HOOTMAN: Then that now -- that is why I  
16 cited to -- I forgot what they call it, but it's  
17 basically the -- the restatement of law in Europe.  
18 That's why I cited to that, to see what their mindset  
19 is. And I don't know if you recall that quote in my  
20 brief, but basically, they will look at a document when  
21 they're interpreting it, if it says X, but -- but  
22 everyone's intent was Y, they go with Y. And that's --  
23 that just runs train -- a steam train roller over our  
24 separation of powers concept.

25 JUSTICE KAGAN: Well, this goes back to

1 Justice Alito's question. I mean, is that -- is that  
2 your answer to it, that it's just they're all construing  
3 this because he -- they use a completely different  
4 interpretive stance than we do?

5 MR. HOOTMAN: No doubt about it. It's a  
6 whole different mindset. They -- they're looking at the  
7 subjectivity of what everybody wanted. And here,  
8 because of our separation of powers, who's the law  
9 maker, that's why I go off in the area and all that  
10 other really interesting stuff, and I think it's  
11 actually crucial here because --

12 JUSTICE KAGAN: Well, one question I suppose  
13 might be whether that is in fact producing the disparity  
14 in -- in judgments. But even suppose you're right that  
15 it is, I mean, these are treaties. So the idea that,  
16 you know, we would be consistently interpreting a treaty  
17 differently from the entire rest of the world would seem  
18 to create problems for our treaty-making powers, for  
19 our -- our ability to conform with what our treaty  
20 partners expect. I mean, it would be -- be sort of a  
21 problem for international relations, wouldn't it? If  
22 we're like, well, we just interpret everything that we  
23 write differently from the way everybody else in the  
24 world does.

25 MR. HOOTMAN: Clearly, we've got to be



1 respectful to our foreign friends. Clearly, we don't  
2 want to be -- come across as, you know, arrogant four  
3 sort of thinking.

4           Okay. We do have also to respect the  
5 Constitution. Who -- who passes these laws? The  
6 lawmakers.

7           JUSTICE GINSBURG: You are taking a  
8 statement from a -- it's not exactly restatement; it's  
9 sort of this European project written by a law professor  
10 in Denmark. And you're saying that's how  
11 all Europeans -- they don't -- you don't think that they  
12 have the same debates that we have on the extent to  
13 which you go beyond the text? You think they all agree  
14 about the way you interpret text and it's all that --  
15 what Orlando said is -- that's true, generally? I think  
16 you find it -- they have the same debates that we do.

17           MR. HOOTMAN: I'm definitely no European  
18 legal scholar, by any means, but I do -- I do believe  
19 that -- that cite that I gave, I did some research to  
20 see how respected it was, and I believe -- maybe I'm  
21 wrong on that, but I think it's on par with our  
22 restatement.

23           Do they -- do they do what we do here?  
24 Well, if you look at the Vienna Convention --

25           And someone brought that up, by the way.

1 The Vienna Convention says how you're supposed to  
2 interpret treaties. They actually do the opposite of  
3 that, that quote that -- that you're -- that I gave you  
4 and now you're giving back to me. And they focus hard  
5 on text, just like I'm urging the Court to do under our  
6 separation of powers doctrine.

7 So I surmise that -- that a fair amount of  
8 them do look at that -- that section, but then a whole  
9 lot of 'em others also surely look at the Vienna  
10 Convention, because they're the ones that most of the  
11 European countries, if not all of them, have actually  
12 signed off on it. And the United States has not.

13 But it is -- it is a codification of  
14 customary international law. And, therefore, you know,  
15 if -- depending on how much emphasis we put on customary  
16 international law, we're going to look at the Vienna  
17 Convention to help us interpret a treaty, assuming you  
18 get beyond the text like I've urged the Court in the  
19 first half of my brief.

20 So in answer to your question --

21 JUSTICE GINSBURG: The -- the source that  
22 you cite is not talking about the interpretation of  
23 statutes; it's talking about the interpretation of  
24 private contracts between two individuals.

25 MR. HOOTMAN: That's primarily the -- yes, I

1 would agree with that. And I -- and I didn't mean to  
2 cite to that as, oh, look here, here's my number one  
3 cite at all. I was just trying to give a perspective  
4 on, hey, look, I do have all these international cases  
5 against me, but let's look at their mindset a little  
6 bit.

7 CHIEF JUSTICE ROBERTS: Well, one of the --  
8 I mean, if you are talking about -- and I think this is  
9 a distinction between statutes and treaties. We  
10 visualize treaties, anyway, as close to -- to contracts.  
11 And if you're talking about contracts, it's very  
12 important to -- what the conduct and expectations of the  
13 parties were as they went into the contract, and it's  
14 significant evidence of sort of how they dealt with the  
15 situations after the contract, somewhat unlike how you  
16 might interpret a statute.

17 MR. HOOTMAN: I have a real problem -- and I  
18 realize the cases make this analogy to contracts -- but  
19 I have a real problem with that analogy, because it --  
20 it doesn't factor in the -- the Constitution. We -- we  
21 adopt a treaty and make it a Federal law, just like a  
22 Federal statute, except it's done through the President  
23 and et cetera.

24 And so it's really not -- yes, it's like a  
25 contract, but, no, it's not. Because this Court has to

1 apply the Constitution to it. And so here, you -- if --  
2 you have the drafters and then the nice Bartleby's  
3 error, the scrivener's error -- and by the way, this  
4 Court has written on when there's a scrivener's error,  
5 we're not going to just fix it, because that's  
6 legislating. Unless -- unless the error has -- has, you  
7 know, a ridiculous -- the absurdity doctrine and it's  
8 got a -- so under -- under you-all's kind of authority,  
9 you can't just fix the scrivener's error.

10           And so the scholar, Mr. Ristau, I thought,  
11 did me a great favor by, yes, he went page after page  
12 that I lose, I lose, it's okay. But then he says it's a  
13 scrivener's error. So then when you apply the  
14 separation of powers doctrine principles to that, you  
15 can't just fix it because there's a logical reason to  
16 include service of -- service of process-type documents.  
17 Because it makes perfect -- to me, it makes perfectly  
18 good sense. It make -- it doesn't -- it doesn't make  
19 sense to me to not include that in there.

20           And so if you use the -- the canon of -- you  
21 call it canon or a method of usage, and -- and different  
22 word -- there's a different meaning, if you can see the  
23 different meaning, you don't -- you don't have an  
24 ambiguous situation here. And so you are bound by the  
25 Constitution to interpret the words of the -- of the --

1 of the treaty and say: Well, it's not authorized.

2 So that's kind of how I analyze it.

3 And then -- and then I really want -- this,  
4 to me, is a really big point, and I haven't articulated  
5 it well, but the Solicitor General cited to the Senate  
6 Record where the -- the international guys that went  
7 over to the Hague and brought this beautiful treaty that  
8 they put a whole lot of work into with the history of  
9 this -- this Federal statute that I'm talking about,  
10 everyone wanted to start cooperating.

11 Then they get before the Senate testifying,  
12 and one of the senators is asking something like, well,  
13 what do we get out of this? And -- and -- and he's got  
14 this section in there, it's -- it's on -- it's on  
15 page 24 and 25, he's the U.S. delegate, Philip Amram,  
16 and -- and he said due process and also we are giving  
17 nothing we had not already given in -- in Public Law  
18 88619.

19 So the senators that actually signed off on  
20 this, that's what they heard. And you got to understand  
21 that that -- it's so important, I put it in my little  
22 book here. Okay. That Public Law 88619 was a big deal  
23 back then, because America says: Hey, we're going to  
24 let the foreigners come over here, go to a district  
25 judge, request an order to serve, you know, a French

1 petition or whatever.

2                   And then after that -- and that was a -- you  
3 know, that was politically a big deal. We open our  
4 doors and we want them to open their doors to us.

5                   So they go -- they go -- they go prepare  
6 this treaty, and then they come back and testify to  
7 the -- to the people that are going to actually make our  
8 law and they tell them that's -- that's what -- what  
9 happened. And now we got this mail thing going on.

10                   So -- so from the lawmakers' perspective,  
11 they didn't actually hear that.

12                   Now, there is a bar review article that the  
13 same man that testified, Mr. Amram, there's a little  
14 section in there, which the Solicitor General cites in  
15 their brief, where they say something like service by  
16 mail. He -- and I read the article. It goes on and on  
17 about this treaty, a little bit mind-numbing. But  
18 it's -- and then he says Article 10(a) service by mail,  
19 it's a little bitty snippet. You can see it in the  
20 Senate record. But it doesn't -- it doesn't -- service  
21 by mail says the same thing that the treaty says. It  
22 doesn't say service of process by mail.

23                   And so, to me, it would seem like you don't  
24 have an ambiguity here. There was a change in usage  
25 that makes perfectly good sense to allow service of

1 post -- service of process documents, and you can't fix  
2 the Bartleby, the scrivener error because of you-all's  
3 previous cases, *Chan v. Korea*, in particular.

4 And -- and then you have the other issue,  
5 which is even if you go with this Brockmeyer scenario,  
6 then -- then Texas has already passed on this question,  
7 and Texas law doesn't allow service by the participant  
8 by mail. And so you got to affirm anyway.

9 So if there's no further questions, I'll  
10 turn it over to the other -- other side.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 MR. HOOTMAN: Thank you.

13 CHIEF JUSTICE ROBERTS: Mr. Gaston, you have  
14 seven minutes.

15 REBUTTAL ARGUMENT OF JEREMY GASTON

16 ON BEHALF OF THE PETITIONER

17 MR. GASTON: Thank you, Mr. Chief Justice.

18 JUSTICE SOTOMAYOR: Mr. Gaston, would you  
19 start with the Brockmeyer question? Do you agree with  
20 the government on the issue that the treaty only  
21 permits, doesn't necessarily authorize? And then your  
22 adversary's position that the Texas court has already  
23 said that under Texas law, you can't serve this way.

24 MR. GASTON: Yes, Justice Sotomayor.

25 We -- Petitioner agrees with the United

1 States' position and it points out, actually, an  
2 ambiguity in the word "authorize," which is the  
3 question presented that -- that -- that ambiguity is my  
4 responsibility, because "authorized" can mean empower or  
5 it can mean permit. And in this situation, permit is  
6 what the Brockmeyer case reads it as, it's what the  
7 United States suggests is correct, and we -- we think  
8 that is correct because of the ambiguity in the statute  
9 of what the freedom to do things means.

10           And -- and I would also alert the Court to  
11 some more specific discussion of that. The Permanent  
12 Bureau of the Hague Conference puts out a handbook every  
13 so many years, and the 2016 edition, which is the fourth  
14 edition, at paragraph 257, discusses some extrinsic  
15 evidence from the 1964 Special Commission discussions  
16 during the drafting, making it clear that it was a  
17 two-part test. If the State doesn't object, State of  
18 destination, you have to look at the law of the forum  
19 and see if it affirmatively authorizes it.

20           Moving then to the -- to the contention that  
21 the court of appeals here has already ruled that service  
22 by mail wasn't allowed under Texas law, that's -- that's  
23 the result of the holding because the Court held that  
24 the treaty preempts Texas law. And it -- and it -- and  
25 if the treaty, in fact, prohibits service of process by



1 mail, it does preempt Texas law. And that's what the --  
2 this Court in Schlunk said. It said that the treaty  
3 is -- is mandatory and it preempts inconsistent methods  
4 of service under -- under State or Federal law. But  
5 that was not a determination that, apart from the  
6 treaty, service of process here was not consistent with  
7 Texas law and --

8 CHIEF JUSTICE ROBERTS: Is that preemption  
9 question before us?

10 MR. GASTON: No. I would say it has been --  
11 it has been decided by this Court in -- in Schlunk, and  
12 the Court -- and it cited a prior case --

13 CHIEF JUSTICE ROBERTS: Well, we're not  
14 being asked to rule on that because I gather the Texas  
15 Court of Appeals has a different view on that.

16 MR. GASTON: I think the Texas Court of  
17 Appeals has the same view, which is that -- that if the  
18 treaty prohibits service by mail, the fact that it's  
19 authorized under Texas law is dead letter and  
20 therefore --

21 JUSTICE GINSBURG: But we were told by the  
22 other side that Texas law -- forget about treaties --  
23 Texas law does not permit service of process by mail  
24 period.

25 MR. GASTON: And that is nowhere in the

1 court of appeals decision. And the Texas State law  
2 determinations that we -- this Texas State law that we  
3 cite at pages 9 and 10 of -- of the blue brief provide  
4 three or four ways in which service of process by mail  
5 on --

6 JUSTICE BREYER: If you win in -- this  
7 Article 10, in fact, permits service by mail, then  
8 you'll go back to Texas and you'll say, see, it permits  
9 it expressly. So the rest of the treaty doesn't preempt  
10 the provision that allows service by mail, so Texas law  
11 no longer prohibits it; is that right?

12 MR. GASTON: Yes.

13 JUSTICE BREYER: So we should send it back.

14 CHIEF JUSTICE ROBERTS: It doesn't say that  
15 at all. What Article 10 says is whether or not the  
16 convention shall interfere with a particular way. So  
17 then you simply say if you're right, okay, the  
18 convention doesn't interfere with it, but Texas law can  
19 prohibit it.

20 MR. GASTON: Yes.

21 JUSTICE BREYER: Absolutely say it doesn't.

22 MR. GASTON: Yes, that is absolutely  
23 our position.

24 CHIEF JUSTICE ROBERTS: But the Court of  
25 Appeals said otherwise?

1 MR. GASTON: No, the court of appeals held  
2 that The Hague Service Convention prohibits service of  
3 process by mail and, therefore, it sustained the  
4 Respondent's challenge to the trial court judgment on  
5 the basis that there was no valid service of process  
6 because the service that was effected was prohibited by  
7 The Hague Service Convention. The --

8 JUSTICE KAGAN: So, I'm sorry, you're saying  
9 it just never got to this question of what Texas law  
10 says.

11 MR. GASTON: Correct.

12 JUSTICE KAGAN: Okay.

13 MR. GASTON: On our blue brief at 32 and 33,  
14 I think it's clear, not only did the negotiator for the  
15 United States tell the Senate that this treaty involved  
16 service -- allowed service by mail and the Executive  
17 Branch internally relayed that message to the -- to the  
18 President, so it's very clear internally that the  
19 United States Executive Branch understood that the  
20 United States' intent was that it allowed service by  
21 mail. Respondent makes a distinction between service of  
22 process and service of post-answer documents.

23 I think while one might imagine a treaty  
24 that would do that, this treaty doesn't make any  
25 internal distinctions between judicial documents that

1 are process and other judicial documents with the  
2 limited exception of Article 15 that only talks about  
3 getting relief from a default judgment with respect to a  
4 summons not -- not being served. And so as one lower  
5 court has said, it would be very odd if Article 10(a)  
6 was about service of every judicial document except  
7 process, which is what would be required to -- to go  
8 with Respondent's interpretation.

9                   And unless the Court has any further  
10 questions, I would cede the rest of my time.

11                   CHIEF JUSTICE ROBERTS: Thank you, counsel.

12                   The case is submitted.

13                   (Whereupon, at 12:13 p.m., the case in the  
14 above-entitled matter was submitted.)

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