

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHELLE MONASKY, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 18-935  
 )  
 DOMENICO TAGLIERI, )  
 )  
 Respondent. )  
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Pages: 1 through 64  
Place: Washington, D.C.  
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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 18-935,  
5 Monasky versus Taglieri.

6 Mr. Tayrani.

7 ORAL ARGUMENT OF AMIR C. TAYRANI

8 ON BEHALF OF THE PETITIONER

9 MR. TAYRANI: Mr. Chief Justice, and  
10 may it please the Court:

11 The Hague Convention on the Civil  
12 Aspects of Child Abduction is designed to  
13 protect children who have a country of habitual  
14 residence from the harmful effects of wrongful  
15 removal from that country. In this case,  
16 however, the Convention was applied to separate  
17 two-year old A.M.T. from her mother, the only  
18 caregiver A.M.T. had ever known, and to return  
19 the child to Italy, a country where A.M.T. had  
20 spent only the first eight weeks of her life.

21 The Sixth Circuit's decision upholding  
22 A.M.T.'s return to Italy rests on an erroneous  
23 definition of habitual residence. The Sixth  
24 Circuit held that A.M.T.'s parents could share  
25 an intent to raise A.M.T. in Italy even if they

1 had no meeting of the minds. The court never  
2 explained how parents can share an intent about  
3 where a child will live if there is no actual  
4 agreement between them.

5 Tellingly, neither Taglieri nor the  
6 United States defends the Sixth Circuit's  
7 habitual residence standard. They instead urge  
8 this Court to adopt an amorphous, all relevant  
9 circumstances inquiry. But, in cases involving  
10 infants, the foreign jurisdictions on which  
11 Taglieri and the United States rely actually  
12 apply a different habitual residence standard.  
13 That standard focuses on the primary caregiver's  
14 connections to the country of removal, a far  
15 more appropriate inquiry.

16 Ultimately, however, under any of the  
17 competing definitions of habitual residence and  
18 standards of review, the outcome of this case is  
19 the same. Eight-week-old A.M.T. was not  
20 habitually resident in Italy. Indeed, the  
21 district court's unchallenged finding that  
22 Monasky intended to return to the United States  
23 with A.M.T. as soon as possible is virtually  
24 dispositive.

25 This Court should put an end to this

1 already four-year-old litigation by entering an  
2 order directing A.M.T.'s return to the United  
3 States.

4 I'd like to turn first to the  
5 definition of habitual residence.

6 The Sixth Circuit applied a shared  
7 parental intent standard in name only because it  
8 held that A.M.T.'s parents could share an intent  
9 for her to live in Italy even if they had no  
10 meeting of the minds or actual agreement on that  
11 issue.

12 JUSTICE GINSBURG: Mr. Tayrani, a -- a  
13 problem with your position, I take it your view  
14 is this child, taken to the United States at  
15 eight weeks old, has no habitual residence?

16 MR. TAYRANI: That is our position,  
17 Your Honor.

18 JUSTICE GINSBURG: And if that's so,  
19 then there are many children who would not be  
20 covered by the Convention. The whole idea of  
21 the Convention was to stop unilateral decisions  
22 to move a child. And you would be taking out of  
23 the Convention's coverage cases of very young  
24 children.

25 MR. TAYRANI: With respect, I disagree

1 with the proposition that our approach would  
2 lead to a large number of children who do not  
3 have a country of habitual residence. First of  
4 all, we're talking in this case only about  
5 infants. Older children are evaluated under a  
6 different standard, and in all likelihood, based  
7 on their connections, their acclimatization to  
8 the country in which they reside, they would  
9 have a country of habitual residence. Even with  
10 respect to infants, we're dealing here with the  
11 unusual case where the breakdown of the parties'  
12 relationship was simultaneous with Monasky's  
13 pregnancy and the birth of the child.

14 In any case, where the breakdown of  
15 the relationship occurs later in time, in all  
16 likelihood, there will be an agreement between  
17 the parents as to where the child will live for  
18 at least the foreseeable future. But, from the  
19 standpoint of the objectives of the Hague  
20 Convention, there's nothing wrong with  
21 recognizing that a subset of children will have  
22 no country of habitual residence, because --

23 JUSTICE GINSBURG: The problem with  
24 the -- a standard that says if you -- the  
25 parents have to have an agreement, in many of

1 these cases, the relationship between the  
2 parents is so acrimonious that the likelihood of  
3 -- of a actual agreement is slim to none.

4 MR. TAYRANI: That would only be the  
5 case, Your Honor, if the acrimony was  
6 simultaneous with the pregnancy and birth. In  
7 other cases involving infants, the breakdown of  
8 the relationship may occur later in time. And  
9 if there was a meeting of the minds after the  
10 child's birth, that would be controlling. A  
11 single parent could not unilaterally disavow  
12 that agreement.

13 But from --

14 JUSTICE ALITO: So you think this  
15 agreement is irrevocable? If there's a -- I  
16 doubt that there are going to be very many cases  
17 where there's a written agreement. So you think  
18 that if, at the beginning, at the time of the  
19 child's birth, there's a tacit agreement between  
20 the parents, that's irrevocable, and then, if  
21 the relationship breaks down over a period of  
22 time that -- where you might otherwise infer  
23 that there is no longer any agreement, that  
24 would not count?

25 MR. TAYRANI: That's exactly our



1 approach, Your Honor. The -- the agreement,  
2 once it's in place, is irrevocable until the  
3 standard for older children comes into play,  
4 which would be an acclimatization-based  
5 standard.

6 But, for infants, once the parents  
7 have reached a meeting of the minds, a single  
8 parent cannot unilaterally disavow that  
9 agreement.

10 CHIEF JUSTICE ROBERTS: Counsel, we're  
11 -- we're talking about an international  
12 convention, and yet none of the other parties to  
13 the Convention have adopted your position. The  
14 -- the courts of Canada, the U.K., the EU,  
15 Australia, and others have, in fact, rejected  
16 it.

17 We have said one of the important  
18 guiding principles when interpreting the  
19 Convention is what the other countries do. Why  
20 should we depart from that guideline here?

21 MR. TAYRANI: Your Honor, every  
22 circuit that has addressed this issue applies  
23 some version of the shared parental intent  
24 standard to infants. Some circuits apply the  
25 additional actual agreement requirement that

1 we're urging this Court to adopt. But every  
2 circuit applies some version of shared parental  
3 intent.

4 CHIEF JUSTICE ROBERTS: Well, but I'm  
5 -- you don't dispute the fact that no other  
6 country, no other signatory to the Convention,  
7 has adopted your position?

8 MR. TAYRANI: I don't dispute that,  
9 Your Honor. But, to the extent that this Court  
10 is inclined to follow the approach of foreign  
11 jurisdictions, then the relevant test here is  
12 not the all relevant circumstances test  
13 advocated by Taglieri and the United States.

14 It's the primary caregiver focus  
15 standard that the relevant foreign jurisdictions  
16 actually apply in cases involving infants. And  
17 that's the EU Court of Justice in the Mercredi  
18 decision. It's the U.K. Supreme Court in the A  
19 versus A decision. It's the Australian High  
20 Court in the L.K. decision. All of those courts  
21 have recognized that in cases involving infants,  
22 it's the primary caregiver's connections to the  
23 country of removal that determine whether the  
24 infant has a country of habitual residence.

25 And --

1 JUSTICE BREYER: But how did you get  
2 that out of -- I read Chief Justice Hale's  
3 opinion, and it seems to me that she made a huge  
4 point that this is family law. You know,  
5 families differ. There are vast differences.

6 And don't treat these words "habitual  
7 residence" as if it's like a black-letter tax  
8 code. They're more like a factual matter. And  
9 let the judge who's closest to it, even though  
10 he's not a family court judge -- unfortunately,  
11 it's a federal system because it's a treaty --  
12 let them hear all the evidence and decide it.  
13 And that's it.

14 I mean, not 100 percent it, but that's  
15 it. And as soon as nine people who know --  
16 speaking for myself, know very little about  
17 this, start laying down black-letter standards,  
18 all we're going to do is maybe help people in  
19 some cases and just cause chaos and hardship in  
20 others.

21 MR. TAYRANI: Well, there need --

22 JUSTICE BREYER: That's -- that's  
23 basically what I got out of her opinion. It  
24 seems to me that's the British court, and that  
25 sounds pretty sensible to me.

1           MR. TAYRANI: Your Honor, the U.K.  
2 Supreme Court makes clear that while an all  
3 relevant circumstances test is generally  
4 appropriate, in the case of an infant, the  
5 infant's connections to her environment are  
6 formed through her primary caregiver.

7           JUSTICE BREYER: Well, that may be in  
8 some cases. That may well be. And in other  
9 cases, maybe it isn't. I don't know every  
10 family in the world.

11           And so, I mean, maybe we read it  
12 differently, but I really read Justice Hale's  
13 opinion as just saying what I just said. So,  
14 Judge, be careful. This is factual. It  
15 involves families. Don't adopt a standard.  
16 Just let them apply these words.

17           Now where is it -- where -- where is  
18 that -- where did I get it wrong?

19           MR. TAYRANI: Your Honor, the U.K.  
20 Supreme Court follows the approach of the  
21 European Union Court of Justice in the Mercredi  
22 decision, and Mercredi makes very clear that, in  
23 cases involving infants, a primary caregiver  
24 focused approach is the test that should be  
25 applied. But, under any of the competing tests

1 that we're discussing here today, the outcome is  
2 the same on these facts.

3 JUSTICE ALITO: Can I ask you a  
4 question about your position that somewhat  
5 puzzles me? You think that in this case the  
6 dispositive question is whether there was an  
7 agreement between the parents? Am I right?

8 MR. TAYRANI: Yes, Your Honor.

9 JUSTICE ALITO: And then you say that  
10 there should be review de novo. But that's a --  
11 if the question is whether there was an  
12 agreement between the parents, isn't that a pure  
13 question of fact? Why would it be reviewed de  
14 novo?

15 MR. TAYRANI: It would be reviewed de  
16 novo, Your Honor, because, while historical  
17 facts would be reviewed for clear error, the  
18 application of the habitual residence standard,  
19 the actual agreement requirement to those facts,  
20 is a mixed question of law and fact.

21 JUSTICE ALITO: Why -- why is it a  
22 mixed question? Was there an agreement between  
23 the parents or was there not an agreement  
24 between the parents? It's a question of fact,  
25 pure fact.

1 MR. TAYRANI: Because there does not  
2 need to be a written agreement. There doesn't  
3 even need to be an express oral agreement. An  
4 agreement can be --

5 JUSTICE ALITO: Well, was there a  
6 tacit agreement? It's a question of fact.

7 MR. TAYRANI: It is just as much a  
8 question of fact as a reasonable suspicion or  
9 probable cause determination, which this Court  
10 has held --

11 JUSTICE ALITO: No --

12 MR. TAYRANI: -- would be --

13 JUSTICE ALITO: -- because those  
14 involve the application of a complicated legal  
15 standard.

16 MR. TAYRANI: Your Honor, the fact  
17 that we're here today would suggest that the  
18 habitual residence standard is less than  
19 straightforward.

20 Lower courts are in need of guidance  
21 from appellate courts setting forth clear legal  
22 principles about how to make a habitual  
23 residence determination, just as lower courts  
24 need guidance about how to ascertain the  
25 existence of reasonable suspicion and probable

1 cause.

2 This Court emphasized the need for  
3 clear guidance in the Ornelas case, where it  
4 held that probable cause and reasonable  
5 suspicion are reviewed de novo.

6 And it's not only courts that need  
7 guidance. It's parents who are confronted with  
8 these difficult decisions about whether to  
9 remove a child from a dangerous situation.

10 They need to know, if a child is  
11 removed, what is the likelihood that the child  
12 will be returned under the Hague Convention.

13 JUSTICE GINSBURG: But over and over  
14 in the -- in the history of this Convention is  
15 that they don't want any rigid test. They don't  
16 want domicile. They don't want nationality.  
17 They want a totality of the circumstances.

18 And -- and the government points to  
19 the Seventh Circuit case, the Redmond case, and  
20 saying that no one factor should be considered  
21 controlling. You just take all the factors and  
22 a district judge should weigh those and come to  
23 a conclusion.

24 MR. TAYRANI: Your Honor, the problem  
25 with that approach is that it will breed

1 disuniform outcomes. It will prolong Hague  
2 Convention litigation. It will undermine the  
3 deterrent effect of the Hague Convention by  
4 undermining the clear rules that would otherwise  
5 apply in this setting.

6 But, to the extent that this Court is  
7 inclined to look at the approach of foreign  
8 courts, we would urge the Court to adopt a  
9 primary caregiver focused standard. If the  
10 Court applies an all relevant circumstances  
11 test, however, it is essential that this Court  
12 not only adopt that standard but then go on and  
13 apply that standard to the facts of this case.

14 The Hague Convention sets a goal of  
15 resolving these cases within six weeks. This  
16 case has been going on for four and a half  
17 years. Under Article II of the Hague  
18 Convention, signatory states have an obligation  
19 to use the most expeditious procedures available  
20 to resolve these cases.

21 JUSTICE KAVANAUGH: On -- on -- on the  
22 standard of review, doesn't de novo review  
23 necessarily prolong the matter?

24 MR. TAYRANI: I don't think so, Your  
25 Honor. De novo review facilitates the --



1 JUSTICE KAVANAUGH: Because it's going  
2 to push everything into the court of appeals  
3 then, rearguing everything that's already been  
4 decided by the district court without any  
5 deference, so people will take appeals much more  
6 readily.

7 MR. TAYRANI: Given the stakes in  
8 these cases, it's likely that the losing parent  
9 in the district court will appeal whatever the  
10 standard of review is. De novo appellate review  
11 promotes the development of clear legal  
12 principles that district courts can apply more  
13 readily, more expeditiously, and that appellate  
14 courts, in turn, can also apply in an  
15 expeditious manner.

16 If this Court adopts an all relevant  
17 circumstances test, then it would be displacing  
18 the shared parental intent standard that every  
19 circuit applies, which is why it is of  
20 overriding importance that this Court --

21 JUSTICE GINSBURG: Every circuit, not  
22 the Seventh Circuit.

23 MR. TAYRANI: That -- that is not a  
24 case involving infants, Your Honor, the Redmond  
25 case. Every circuit that looks at the habitual

1 residence of an infant applies a test that looks  
2 to shared parental intent. Some circuits also  
3 look at actual agreement as part of that shared  
4 parental intent inquiry.

5 The need for guidance from this Court  
6 is of surpassing importance because this Court  
7 would be adopting for the first time an all  
8 relevant circumstances test that no lower court  
9 currently applies in a case involving infants.

10 In order to live up to the United  
11 States' obligation to use the most expeditious  
12 procedures available to resolve these cases,  
13 this Court should not only adopt a standard and  
14 -- a standard of review and a definition of  
15 habitual residence but should go on and apply  
16 that standard to the facts of this case so that  
17 this four-and-a-half-year-old litigation is  
18 brought to an end, so that district courts have  
19 guidance about how the habitual residence  
20 standard will be applied.

21 On the facts of this case --

22 JUSTICE GINSBURG: How -- how will it  
23 be brought to an end? The child is now in  
24 Italy, and no doubt the Italian courts would  
25 weigh in, so this -- this determination of

1 habitual residence is not going to settle where  
2 this child -- the custody of this -- this child.

3 MR. TAYRANI: That's correct, Your  
4 Honor. Hague Convention cases don't determine  
5 custody. They determine the venue in which  
6 child custody determinations will be made.

7 The appropriate venue for this child  
8 custody determination is the United States.  
9 And, in fact, there has been no child custody  
10 determination in Italy. The Italian courts  
11 refused to make that determination because  
12 Monasky's parental rights were terminated in an  
13 ex parte proceeding of which she had no notice  
14 and no opportunity to be heard.

15 If A.M.T. is returned to the United  
16 States, then there will be a full and fair child  
17 custody hearing.

18 JUSTICE GINSBURG: But that will  
19 depend on the Italian authorities returning her.  
20 And given the position that they've taken up  
21 until now, that seems most unlikely.

22 MR. TAYRANI: Your Honor, we believe  
23 as a matter of comity that the Italian courts  
24 would return A.M.T. and would adhere --

25 JUSTICE GINSBURG: The court that has

1 declared her a non-parent --

2 MR TAYRANI: Your Honor --

3 JUSTICE GINSBURG: -- would do that?

4 MR. TAYRANI: -- as -- as a matter of  
5 comity, we believe that the Italian courts would  
6 adhere to an order from this Court directing the  
7 re-return of A.M.T. There is precedent for  
8 foreign courts following re-return orders.

9 In the Larbie case, which is one of  
10 the cases that this Court cited in its Chafin  
11 opinion as an example of a case where a district  
12 court issued a re-return order, the case went  
13 all the way up to the U.K. Supreme Court as to  
14 whether to adhere to that re-return order, and  
15 the U.K. Supreme Court ordered the child  
16 returned --

17 CHIEF JUSTICE ROBERTS: Well --

18 MR. TAYRANI: -- to the United States.

19 CHIEF JUSTICE ROBERTS: -- there  
20 hasn't been any case where we're talking about a  
21 -- a time in the -- the other country as long as  
22 this. This would be the longest period of time  
23 in which any re-return order has been entered,  
24 wouldn't it?

25 MR. TAYRANI: I don't know if it is

1 the longest period of time. To the extent that  
2 Taglieri has concerns about the propriety of  
3 re-return, those are issues that he could raise  
4 before an Italian court when we move to enforce  
5 the re-return order. But in the absence --

6 CHIEF JUSTICE ROBERTS: Which would  
7 just delay the proceedings that have already  
8 been delayed far longer than the Convention  
9 contemplated.

10 MR. TAYRANI: But, Your Honor, in the  
11 absence of a re-return order, the grave error  
12 committed by the lower courts will remain  
13 unremedied. As this Court held in the Chafin  
14 case, a re-return order is typical appellate  
15 relief.

16 JUSTICE BREYER: But I'm not  
17 interested for the -- hypothetically, oddly  
18 enough, in the law. Suppose I were interested  
19 in how do we get to what's in the best interests  
20 of the child. Look at it from that point of  
21 view. What do we do?

22 MR. TAYRANI: The best interests --

23 JUSTICE BREYER: And I also think  
24 judges, particularly federal judges, don't know  
25 much about this.

1           So, in Italy, is there a family court,  
2           or what's -- what do I do? I don't know. This  
3           is a -- a genuinely open question. I don't know  
4           what to do if my object is to try to secure the  
5           best interests of the child. And you're  
6           familiar with this case, you tell me.

7           MR. TAYRANI: Your Honor, the best  
8           interests of the child would be furthered by  
9           returning A.M.T. to the United States so that  
10          there can be a full and fair child custody  
11          hearing at which a state court judge, steeped in  
12          family law issues, can make a determination  
13          about who should have custody and what is, in  
14          fact, in A.M.T.'s best interest.

15          But, in the absence of a re-return  
16          order, no court --

17          JUSTICE SOTOMAYOR: I'm sorry, I  
18          thought that there was a special order of the  
19          Italian court giving the mother some visitation  
20          rights, albeit limited. It's not clear to me  
21          that you're representing to me that there is no  
22          method or manner for her to go back to the  
23          Italian court and reopen or revisit the custody  
24          issue?

25          MR. TAYRANI: I'm not representing

1 that there is no procedural --

2 JUSTICE SOTOMAYOR: So assuming, as I  
3 do, that there has to be something that can  
4 secure greater rights for her, why should it be  
5 here instead of there, assuming -- and you don't  
6 want me to assume this -- that the totality of  
7 the circumstances suggests that she has  
8 acclimated?

9 MR. TAYRANI: Your Honor, Monasky has  
10 --

11 JUSTICE SOTOMAYOR: I mean, after two  
12 and a half years, even under the Convention, you  
13 don't have to return a child who's been settled  
14 for greater -- greater than one year. So --

15 MR. TAYRANI: That's correct, Your  
16 Honor. That does not bear upon the availability  
17 --

18 JUSTICE SOTOMAYOR: No, of --

19 MR. TAYRANI: -- of a re-return --

20 JUSTICE SOTOMAYOR: -- of the return  
21 -- of the return, but -- but I still am  
22 wondering why it is that it's the American  
23 court, rather than the Italian court, who should  
24 be dealing with the custody issue.

25 MR. TAYRANI: Well, first of all,

1 because Italy was not A.M.T.'s country of  
2 habitual residence. So she never should have  
3 been returned to Italy in the first place. The  
4 only way to remedy that wrong --

5 JUSTICE SOTOMAYOR: Well, that --  
6 that's a really interesting question, because  
7 I'm not sure -- unless we accept your premise  
8 that the mother's intent controls, but she was  
9 only here a couple of months when the father  
10 sought custody -- re-return of her. So it's  
11 hard to say she was acclimated in those couple  
12 of months either.

13 MR. TAYRANI: But, Your Honor, the  
14 question is whether A.M.T. had the type of  
15 meaningful, settled, stable, existence in Italy  
16 when she was removed at eight weeks of age to  
17 establish a habitual residence there.

18 And she must --

19 JUSTICE GINSBURG: How old -- how old  
20 is the child now?

21 MR. TAYRANI: She is four and a half  
22 years old, Your Honor. A.M.T. did not have that  
23 type of existence within her fleeting eight  
24 weeks of living in Italy. The Hague Convention  
25 is designed to protect children who have a



1 stabled -- stable, settled existence.

2 That is what is explained in paragraph  
3 72 of the accompanying explanatory report.

4 There will be some children such as A.M.T. who  
5 don't form those types of settled connections to  
6 a country and whose return to the country of  
7 removal is actually detrimental --

8 JUSTICE ALITO: But --

9 MR. TAYRANI: -- to the interests --

10 JUSTICE ALITO: -- let me understand.

11 Your position is that she had no habitual  
12 residence at that time?

13 MR. TAYRANI: That's correct, Your  
14 Honor.

15 JUSTICE ALITO: Is that correct? Not  
16 that she had habitual residence -- all right.  
17 So either parent at that time could snatch her,  
18 and possession would be ten-tenths of the law,  
19 right?

20 MR. TAYRANI: The Hague Convention  
21 would not speak to that removal, Your Honor.  
22 That doesn't mean that the left-behind parent  
23 would be without remedies. The left-behind  
24 parent could seek relief, for example, under the  
25 Uniform Child Custody Jurisdiction and

1 Enforcement Act. The left-behind parent would  
2 have the opportunity to participate in a child  
3 custody hearing in the country of removal.

4 That --

5 JUSTICE GINSBURG: The Convention,  
6 which was meant to solve this problem of  
7 unilateral removal, would not apply?

8 MR. TAYRANI: The Convention would not  
9 apply if a child had no country of habitual  
10 residence. But, as the very foreign  
11 jurisdictions on which Taglieri and the United  
12 States rely, including the U.K. Supreme Court,  
13 the Australian High Court, and courts in New  
14 Zealand have recognized, not every child will  
15 have a country of habitual residence --

16 CHIEF JUSTICE ROBERTS: How -- how  
17 long does the child have to -- how old does a  
18 child have to be before you would say they have  
19 a habitual residence?

20 MR. TAYRANI: It --

21 CHIEF JUSTICE ROBERTS: Eight weeks  
22 under your theory is not enough, but one year,  
23 two years?

24 MR. TAYRANI: Well, at a certain  
25 point, around 18 to 24 months, the focus would

1 shift to the child's own acclimation to his or  
2 her surroundings, because the child --

3 CHIEF JUSTICE ROBERTS: Where do you  
4 get -- where do you get that number from?

5 MR. TAYRANI: Based on the development  
6 of a child, child psychology. At a certain  
7 point, the lower courts shift their test from  
8 shared parental intent to acclimatization, once  
9 the child has formed his or her own connections.

10 Under the shared parental intent  
11 standard for infants, the inquiry looks at  
12 whether the intent of the parents is a proxy for  
13 the type of settled, stable, meaningful ties  
14 that an older child would be able to form. And  
15 there will be some children who do not have a  
16 country of habitual residence because they did  
17 not form the type of settled, stable ties that  
18 the Hague Convention is designed to protect.

19 Returning a child to a country where  
20 it did not have meaningful connections is just  
21 as harmful to that child as permitting the  
22 child's removal from a country of habitual  
23 residence.

24 JUSTICE KAGAN: Mr. Tayrani, Judge  
25 Boggs suggests that in the case of children,

1 children who have lived in a single place for  
2 their entire lives, in the case of infant  
3 children, that is, who have lived in a single  
4 country their entire lives with both parents,  
5 that the usual rule should be that's their  
6 habitual residence, not irrebuttable, but that  
7 that should be the usual rule, that that's their  
8 habitual residence.

9           And that's certainly a very  
10 administrable rule. It provides a lot of  
11 guidance. And it deters anybody, either parent,  
12 from taking the child anywhere else, which seems  
13 to be of value too.

14           So why isn't the Judge Boggs rule the  
15 right one for infants?

16           MR. TAYRANI: The problem with that  
17 approach, Your Honor, is that it conflates a  
18 child's residence with her habitual residence.  
19 If the signatories to the Hague Convention had  
20 wanted to enact an agreement that was all  
21 encompassing, that applied to all children, they  
22 would have prohibited the removal of a child  
23 from his country of residence without the  
24 approval of both parents.

25           What they instead did was enact a more

1 targeted provision that prevents the wrongful  
2 removal of a child from his country of habitual  
3 residence because the signatories recognize that  
4 removing a child from a country of habitual  
5 residence, where the child has meaningful ties,  
6 has a stable existence, would be harmful to the  
7 child.

8 But they also recognize that returning  
9 a child to a country where it lacks those ties,  
10 lacks those connections, would be just as  
11 harmful to the child's interests. That is the  
12 fundamental problem with the one country rule  
13 advocated by the panel in the Sixth Circuit.

14 But whatever the test is that this  
15 Court adopts, the outcome is the same. The  
16 facts are overwhelming here that, as a result of  
17 the physical and sexual abuse to which Monasky  
18 was subject, she formed the intent during her  
19 pregnancy to return to the United States with  
20 her child as soon as possible. That's what the  
21 district court found, at Pet. App. 94a, that  
22 Monasky intended to return to the United States  
23 with A.M.T. as soon as possible.

24 And that's what she did. The day that  
25 A.M.T.'s U.S. passport arrived, Monasky left and

1 returned to the United States, fled from the  
2 dangerous situation in which she found herself.  
3 The signatories to the Hague Convention would  
4 never have intended to prevent a mother from  
5 removing her child from those dangerous  
6 circumstances.

7 JUSTICE BREYER: Why? That's a  
8 question I have here. Of course, there's child  
9 abuse or spousal abuse raised throughout this,  
10 which is a serious problem. So why does this  
11 case not involve Article 13, where you don't  
12 return a child if there is a grave risk that his  
13 or her return would expose the child to physical  
14 or psychological harm or otherwise place the  
15 child in an intolerable situation?

16 That provision would seem designed for  
17 the problem of spousal abuse.

18 MR. TAYRANI: Mr. Chief --

19 JUSTICE BREYER: Why isn't it here?

20 MR. TAYRANI: -- Justice, may I answer  
21 the question?

22 CHIEF JUSTICE ROBERTS: Yes.

23 MR. TAYRANI: Your Honor, we did urge  
24 the district court to apply the exception for  
25 grave risk of harm to A.M.T. Unfortunately,

1 lower courts have construed that exception  
2 narrowly. And in this case, even though the  
3 district court credited Monasky's allegations  
4 about the extensive physical and sexual abuse to  
5 which she was subjected, the court concluded  
6 that that abuse directed to Monasky was not  
7 sufficient to create a grave risk of harm to  
8 A.M.T.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Mr. Joshi.

12 ORAL ARGUMENT OF SOPAN JOSHI  
13 FOR THE UNITED STATES, AS AMICUS CURIAE,  
14 SUPPORTING NEITHER PARTY

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

17 Habitual residence is a flexible,  
18 fact-intensive concept. That's precisely why  
19 the drafters and ratifiers of the Hague  
20 Convention picked it over the alternatives, like  
21 domicile or nationality. It asks a very  
22 straightforward question: Where does the child  
23 usually live? Where's the child at home?

24 Answering that question requires  
25 looking at the case-specific facts on the

1 ground, unencumbered by rigid, mechanical,  
2 per se tests. That includes Petitioner's rigid,  
3 mechanical, per se test about a shared -- or,  
4 I'm sorry, a subjective agreement or a meeting  
5 of the minds.

6 That is not necessary to establishing  
7 a child's habitual residence. It's not even  
8 necessary to establishing a shared parental  
9 intent, which itself is not necessary to  
10 establishing habitual residence.

11 And that test applies equally to  
12 infants and to older children. Nothing in the  
13 Convention's text or structure suggests that  
14 habitual residence carries a different  
15 definition depending on the age of the child.  
16 So that takes care of one question presented.

17 On the other one, because determining  
18 habitual residence is primarily a factual  
19 inquiry and involves factual work, this Court's  
20 framework in U.S. Bank or Lakeridge applies, and  
21 there's no reason to deviate from that rule.

22 In fact, that rule would also provide,  
23 we believe, the most consistent results,  
24 including consistency of outcome, as Petitioner  
25 asks for, because the best way to be consistent



1 is to be right, and the best way to be right on  
2 a fact-intensive question is to trust the  
3 district judge.

4 JUSTICE ALITO: Well, this is what --

5 JUSTICE SOTOMAYOR: When --

6 JUSTICE ALITO: -- puzzles me about  
7 your position, which does seem to reflect the  
8 decisions of foreign courts, and maybe something  
9 has just been lost in -- in translation.

10 But it's -- it's fine to say take  
11 everything into account and be flexible. But  
12 that's not very helpful unless one knows the  
13 question to be answered after taking everything  
14 into account and being flexible. And so the --  
15 the -- the critical point is what is meant by  
16 habitual residence.

17 Now you said it's where the child  
18 usually lives. If that's the test that Judge  
19 Boggs had, I understand it. But, if it's  
20 something more than that, then I really don't  
21 know what habitual residence means.

22 MR. JOSHI: So we think where a child  
23 usually lives is the test. And it's sort of  
24 hard to explain it more than that. In most  
25 cases, it's going to be quite easy to tell where

1 the child usually lives, including for infants.

2 I mean, I -- I would wager if you walk  
3 down the streets of D.C. and found parents with  
4 infants and said where does your infant child  
5 usually live, they'd say with us at home.

6 And it's oftentimes when these cases  
7 are in dispute, when habitual residence is in  
8 dispute, and it's a very small fraction even of  
9 Hague Convention cases, in those situations,  
10 it's going to be very hard to come up with an ex  
11 ante rule or test that's going to be useful in  
12 that circumstance.

13 JUSTICE ALITO: Well, what if the  
14 parents live, from the time of the child's birth  
15 until the time when the issue comes up, in a  
16 particular country, but it was never their  
17 intention to stay there permanently? Would that  
18 country be where the child usually lives?

19 MR. JOSHI: It -- that -- that's a  
20 very difficult question. And I -- I can imagine  
21 many factors that might push you one way or the  
22 other.

23 For example, if that's where they had  
24 been living for quite some time but just had  
25 some future plans to move, that might well be

1 where the child was usually living on the date  
2 of the -- or, you know, immediately before the  
3 -- the wrongful retention or removal, as Article  
4 III calls for.

5 On the other hand, if you're telling  
6 me that, in fact, they have a permanent  
7 residence in another country and they were, you  
8 know, in the country of birth just on vacation  
9 and she went into early labor and the child was  
10 born there, but all their connections are back  
11 in the other country, it might be a much more  
12 difficult question.

13 The point is where habitual residence  
14 is disputed in those small fraction of cases,  
15 there's very little ex ante guidance that's  
16 going to be useful, except to say the question  
17 is, where does the child usually live or, if it  
18 helps to think of it this way, where is the  
19 child at home? And so --

20 JUSTICE SOTOMAYOR: Counsel --

21 CHIEF JUSTICE ROBERTS: Well, that's  
22 kind of a meaningless concept, where the child  
23 usually lives, if you're talking about somebody  
24 who's eight-weeks-old.

25 MR. JOSHI: Again, as I --

1 CHIEF JUSTICE ROBERTS: I mean, it's  
2 not as if they'd laid down roots.

3 MR. JOSHI: That -- that's --

4 CHIEF JUSTICE ROBERTS: Eight-year-old  
5 -- eight-week-old infants don't have habits,  
6 well, other than one or two, but --

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: -- but it  
9 doesn't seem to me that that's the notion that  
10 the Convention drafters were looking at.

11 MR. JOSHI: It -- it isn't. And --  
12 and I think it's important to realize that,  
13 although the word is habitual, the -- the term  
14 habitual residence and the use of the word  
15 habitual originated in the Hague Convention in  
16 French.

17 And the English copy here is official,  
18 but, nevertheless, the term habitual residence  
19 began as -- I'm not even going to attempt to  
20 pronounce it in French -- but -- but habitual in  
21 that context translated means usual or  
22 customary. It doesn't necessarily mean as a  
23 habit.

24 And I think it's important that in the  
25 ordinary case, even an infant, as I said, I

1 think, ask the parents of any newborn, and I  
2 think if you ask where do you usually live, they  
3 would have an answer, just like --

4 JUSTICE KAGAN: Well, does that mean  
5 Judge Boggs is right, that the place where an  
6 infant usually lives is the place where the  
7 infant has lived since birth with both parents?

8 MR. JOSHI: Judge Boggs may well be  
9 right, and he did add the qualification for  
10 absent unusual circumstances.

11 JUSTICE KAGAN: Absent unusual  
12 circumstances, right.

13 MR. JOSHI: And -- and I think that's  
14 perfectly fine. I think the problem, though, is  
15 if -- if there's any sort of guidance like that  
16 coming from this Court, lower courts will tend  
17 to rigidly follow it instead of answering the  
18 ultimate question, which you asked about  
19 earlier, which is, where does the child usually  
20 live?

21 As a practical matter and as a -- you  
22 know, and in theory, the judge can consider  
23 facts that are relevant to that question. And,  
24 of course, that itself is a constraint.

25 JUSTICE GINSBURG: There's a --

1 there's a problem with your solution. On the  
2 two questions presented, I take it you agree  
3 with Respondent. But you said the bottom line  
4 should be a remand, not a determination.

5 And this child is now  
6 four-and-a-half-years-old. To remand to do  
7 what? What factor didn't the district court  
8 take into account that the district court should  
9 have taken into account?

10 You say totality of the circumstances,  
11 not just shared intent, as a single factor, but  
12 it seems to me that the district court did have  
13 everything before it.

14 What -- if -- if -- if we remanded,  
15 what should the district court do that it hasn't  
16 already done?

17 MR. JOSHI: So, Justice Ginsburg, we  
18 don't take a position on the outcome of this  
19 case. The Court's usual practice, when  
20 announcing a new standard, is to remand.

21 The only thing I'll say is that both  
22 the court of appeals and the district court  
23 appeared to view the facts through the lens of a  
24 -- a notion that shared parental intent was the  
25 only thing that mattered.

1                   And probably the parties briefed the  
2 case that way in the court of appeals, all to  
3 shared parental intent.

4                   To the -- to the extent there are  
5 other facts that might have been germane to  
6 determining where the child usually lives that  
7 the parties didn't bring forward, you know, we  
8 -- we just don't --

9                   JUSTICE GINSBURG: What would they be?

10                  MR. JOSHI: I -- I don't know, and  
11 it's hard to predict, you know, I would -- as an  
12 example, I'll give you a -- a very recent case  
13 that's posted on the Hague Convention site that  
14 tracks cases under the Convention.

15                  It's called X against Y -- those are  
16 pseudonyms obviously -- from the court of  
17 appeals of the Hague. Mom alleged that the  
18 apartment in the Netherlands was where they  
19 usually lived. The apartment in Spain was a  
20 vacation home. Dad alleged exactly exactly the  
21 opposite.

22                  The court had to decide who was right,  
23 looked at a lot of facts on the ground. But the  
24 most compelling one that the court decided would  
25 tip the issue was that the mom had deregistered

1 herself from the municipal persons database and  
2 put Spain as her forwarding address, and  
3 deregistered the company she ran from the Dutch  
4 Chamber of Commerce.

5           It's impossible to predict that that  
6 was going to be the fact ex ante. But, when  
7 you're looking at where the family in that case  
8 or the child usually lives, it's the parties who  
9 are going to come forward with evidence, and the  
10 judge is going to assign -- decide whether it's  
11 relevant and, if it's relevant, assign weight to  
12 it.

13           JUSTICE BREYER: All right. So -- so  
14 would you agree then with Lady Hale's  
15 observation in terms of a young child, infant  
16 and parent intent, shared parent intent, she  
17 says that these common-sense observations are  
18 best seen as helpful generalizations of fact,  
19 which will usually but not invariably be true,  
20 not as propositions of law.

21           So Hale -- Boggs may be right, except  
22 that he's calling it a proposition of law.

23           MR. JOSHI: I would agree with that.  
24 And I would just -- again, I would -- I would  
25 caution this Court from laying down principles



1 like that because, when this Court says it,  
2 lower courts usually take it as proposition of  
3 the law --

4 JUSTICE KAGAN: Then why --

5 JUSTICE BREYER: Well, then, if that's  
6 so, then is -- is it the less risky path to send  
7 it back? If we say it and don't send it back,  
8 more likely to be taken as laying down  
9 propositions of law?

10 MR. JOSHI: That may well be true, but  
11 --

12 JUSTICE BREYER: What do you think?

13 MR. JOSHI: So we -- we -- we -- we  
14 don't take a position on it, other than to say,  
15 you know, ideally, this Court's opinion will say  
16 that habitual residence is a --

17 JUSTICE BREYER: No, you don't have to  
18 take a position, but I find it rather difficult.  
19 So can you help me?

20 (Laughter.)

21 MR. JOSHI: Again, as I said, it's --  
22 it's where the child usually lives. And with  
23 the facts we know --

24 JUSTICE SOTOMAYOR: I'm sorry, where  
25 did you get that standard? I look at the

1 European court and it had a different standard.  
2 It says some degree of integration by the child  
3 in a social and family environment. That's the  
4 definition the Bates Court, Lady Hale, adopted.

5 I think, once we say where a child  
6 ordinary live -- ordinarily lives, we fall into  
7 the trap that you had, which is, I think, courts  
8 will be focusing on ordinary out of context.

9 Are you disavowing what the other  
10 courts are doing?

11 MR. JOSHI: No, we're not. If I may,  
12 Mr. Chief Justice.

13 We think they are looking at the right  
14 question, which is where the child ordinarily  
15 lives. In difficult cases, oftentimes --

16 JUSTICE SOTOMAYOR: No, that's a  
17 translation. They didn't use those words.

18 MR. JOSHI: We -- we think the words  
19 they used are certainly relevant to that  
20 ultimate determination, and, in any event, that  
21 is what the text of the Convention says. And we  
22 think that's what the Court should apply here.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Mr. Pincus.

1 ORAL ARGUMENT OF ANDREW J. PINCUS

2 ON BEHALF OF THE RESPONDENT

3 MR. PINCUS: Thank you, Mr. Chief

4 Justice, and may it please the Court:

5 Just to pick up on Justice Sotomayor's  
6 question, I -- I think the -- the European and  
7 U.K. courts have talked about the family and  
8 social environment in which the child's life has  
9 developed. I think that, to me, is not that  
10 different from where the child usually lives.

11 It may avoid the problem of duration.  
12 I think a lot of the problems in these cases  
13 sometimes result from the fact that habitual  
14 residence to a U.S. ear may connote some degree  
15 of permanence, but the courts, the foreign  
16 courts, have made clear that that actually isn't  
17 the case. It doesn't require permanence. It's  
18 -- it's just what's usual during the period  
19 before the allegedly unlawful return.

20 We agree with the SG regarding the  
21 test. And I just wanted to start by saying a  
22 few words about Petitioner's actual agreement  
23 test. As Justice Ginsburg pointed out, it would  
24 largely eliminate the Convention's protection  
25 for very large -- for very young children

1 because they would have no habitual residence  
2 and because one of the spouses in the cases  
3 where there is marital discord during the  
4 pregnancy and the birth could simply say I  
5 withhold agreement on where the child should  
6 live, and that would mean there was no habitual  
7 residence as long as there was no agreement.  
8 That's obviously a significant gap.

9           Petitioner cites some cases saying  
10 that a child may not have a habitual residence,  
11 but I think it's important to point out that  
12 those statements were made in a very different  
13 context, which is actually the one presented in  
14 the very large majority of decided Convention  
15 cases, and that's the situation where the child  
16 and the parents live together in country A, then  
17 the child moves to country B with one or both  
18 parents -- it could be a temporary stay with  
19 grandparents, could be for a job -- and then the  
20 parent who was with the child in country B says,  
21 I'm not sending the child back. And so the  
22 question is, what is the child's habitual  
23 residence, country A or B?

24           And courts have said in that  
25 circumstance it's possible to lose the habitual

1 residence in A before gaining it in B. Whether  
2 that's true or not, that's obviously a very  
3 different situation from the one presented here,  
4 where the parents are in one country and the  
5 child is born there and stays there until the  
6 challenged removal.

7           And we agree with Judge Boggs as a  
8 factual matter, not as a legal principle, that  
9 those facts are very likely to lead to the  
10 conclusion that the child's habitual residence  
11 is that country, absent unusual circumstances.  
12 There can be different facts. The child is born  
13 on vacation. The child is born at a place of  
14 birth selected for medical benefits that were  
15 provided. But that also makes sense.

16           The reason for identifying the child's  
17 habitual residence is to determine which country  
18 should make the custody determination. And if  
19 the parents of child -- and the child have lived  
20 in only one place, it's logical for that country  
21 to make the determination, again, absent unusual  
22 circumstances.

23           JUSTICE KAGAN: Which -- which, as you  
24 say, is what Judge Boggs said. And so I'm  
25 curious as to why you're not just accepting that

1 as a formulation of the legal standard. Judge  
2 Boggs was careful to say, absent unusual  
3 circumstances. And I suppose I would say that  
4 the benefit of doing that is, you know, if you  
5 take the solicitor general's test, this is on  
6 page 26 and 27, I'm not going to read it because  
7 it would take too long to --

8 (Laughter.)

9 JUSTICE KAGAN: -- to do all the  
10 factors that they think ought to go into this  
11 inquiry. And I'm -- I guess I'm a little bit  
12 afraid. I mean, I -- I don't mind totality of  
13 the circumstances tests when they make sense,  
14 but I guess I'm a little bit afraid that by the  
15 time you get through all those factors,  
16 everybody's going to have forgotten what the  
17 ultimate question is.

18 And if the ultimate question is just  
19 where does the child usually live, then why not  
20 just sort of say that when it comes to an infant  
21 or a very small child, the child usually lives  
22 where the child has lived with both parents all  
23 her life?

24 MR. PINCUS: Well, I don't want to  
25 resist a rule that would be beneficial to my

1 client, but -- but I guess I will say that the  
2 -- the courts, especially in the U.K., have had  
3 a lot of experience with subsidiary legal  
4 principles like that being developed. And I  
5 think the -- the result, and I think Chief  
6 Justice Hale mentions this as one decision, is  
7 that they do get too much credence in how lower  
8 courts approach the case.

9           And so I think the danger of adopting  
10 subsidiary legal rules is that they will end up  
11 being applied, as the solicitor general said, in  
12 a broader sense -- in a broader context that --  
13 than they should be.

14           JUSTICE KAVANAUGH: Wouldn't all the  
15 work be done on "absent unusual circumstances,"  
16 though? And so you would still have the out, as  
17 Justice Kagan points out, for people to argue  
18 that it's --

19           MR. PINCUS: I think so, and I'm not  
20 sure, Justice Kavanaugh, that there's much  
21 difference between saying that as a legal  
22 principle or framing it the way Justice Breyer  
23 did, which is, when the facts are that the child  
24 has lived in one country with her parents for --  
25 for her whole life, absent some unusual facts,

1 that is going to lead to this decision.

2 JUSTICE ALITO: Well, what this "take  
3 everything into account and be flexible"  
4 standard seems to mean in practice, and you tell  
5 me if this is wrong, is there are a lot of  
6 different considerations and they may --  
7 particular considerations may be more important  
8 in one case than in another case, so we're just  
9 going to dump this in the hands of a particular  
10 judge to make a decision that that particular  
11 judge thinks is fair in accordance with that  
12 particular judge's value judgments, and we're  
13 not going to make it -- we're going to make it  
14 very hard to get that reversed. That's what  
15 this all seems to boil down to, with a lot of  
16 highfalutin language by the foreign courts.

17 Am I wrong on that?

18 MR. PINCUS: I'm not sure that that's  
19 right, Justice Alito. I think there is an  
20 ultimate inquiry: Where does the child usually  
21 live? Or -- or, in the European version, the --  
22 the family or -- and social environment in which  
23 the child's life has developed? I think that  
24 gives you a north star.

25 I think the problem is there are a lot



1 of different facts in these -- in these cases.  
2 You know, it's one reason why, in family law,  
3 best interests of the child is a very broad  
4 standard because there are a lot of different  
5 facts.

6 JUSTICE ALITO: Yeah, but there I know  
7 what --

8 MR. PINCUS: And so I think you can  
9 lay out --

10 JUSTICE ALITO: I --

11 MR. PINCUS: -- as we -- as this  
12 colloquy indicates, you can say, for example,  
13 when you have a -- a child who has lived only in  
14 one place, there is a pretty clear factual  
15 result that's going to obtain, absent something  
16 odd.

17 The -- the difficult cases really are  
18 these multiple country cases. Those are the  
19 cases where there are a myriad of fact patterns:  
20 Why did the child move? What were the parents'  
21 views when the child moved? Did the child get  
22 acclimated to the new country?

23 JUSTICE ALITO: Well, in the case  
24 of --

25 MR. PINCUS: Those are very

1 complicated cases.

2 JUSTICE ALITO: -- in the case of an  
3 infant, why does it matter that the -- the  
4 infant has lived all of his or her life in a  
5 particular country? That -- it wouldn't matter  
6 to that infant what country the infant was  
7 living in or whether the infant was living on  
8 the moon. The -- the infant's world is the home  
9 with the parents or a parent. So why does it  
10 matter?

11 MR. PINCUS: Well, it matters that the  
12 infant has lived in the same country with the  
13 parents. That's the critical, I think,  
14 additional fact. And I think --

15 JUSTICE ALITO: But what is the  
16 interest that is served by that?

17 MR. PINCUS: The interest -- there are  
18 two interests that are served. One is the  
19 theory of the Convention is that's the -- the --  
20 finding habitual residence is important for two  
21 reasons. One is to identify the place where the  
22 custody determination should be made, as opposed  
23 to leaving it to the unilateral decisions of one  
24 parent or another.

25 The second is to deter these

1 abductions, which are not only harmful in that  
2 they allow the gaming of jurisdictional rules,  
3 but they're harmful because they take the child  
4 away from both parents. One parent is  
5 unilaterally taking the child away from the  
6 other. And so what the --

7 JUSTICE GINSBURG: So you in this  
8 case -- and it's a troublesome case because she  
9 alleged that she was abused, so you're putting  
10 that mother in the position of, if she wants to  
11 escape domestic violence, she has to leave her  
12 child behind.

13 MR. PINCUS: Well, she doesn't -- she  
14 doesn't have to -- she can escape domestic  
15 violence by separating from her husband and  
16 staying in the country. She -- before she left,  
17 she spent two weeks under the protection -- in  
18 safe houses under the protection of the  
19 mechanisms that Italy has for that purpose. So  
20 I don't think that -- that the test requires  
21 that she stay with the husband.

22 I think one of the unusual facts could  
23 be in a situation where it was clear that the  
24 abused parent wanted to get away, was determined  
25 to get away, and the evidence is the husband

1 thwarted her at every turn.

2 JUSTICE BREYER: Now --

3 MR. PINCUS: That's not what the  
4 district court found here, however, because the  
5 district court found -- and just to -- to quote  
6 two findings, on Petition App. 98a -- she  
7 continued after the birth of her child to live  
8 in Italy and had no definitive plans to bring  
9 her to the United States until the last  
10 altercation, which precipitated her departure.  
11 And at 94a, most of the steps that Monasky took  
12 in March 2015 seemed to reflect a settled  
13 purpose and intent to remain in Italy at least  
14 for an undetermined period of time.

15 So the district court looked at all  
16 this and said that wasn't the case here. And I  
17 think those are actually factual findings. That  
18 -- those aren't even mixed questions --

19 JUSTICE BREYER: What do we do --

20 MR. PINCUS: -- of fact and law.

21 JUSTICE BREYER: -- about -- I mean, I  
22 think in their brief they said she doesn't speak  
23 Italian and doesn't have a job. And what do you  
24 do about -- and -- and this standard that I  
25 read, she didn't mention this, but it says you

1 can't place the child in an intolerable  
2 situation.

3 MR. PINCUS: Well --

4 JUSTICE BREYER: You'd think where the  
5 mother is being beaten up, that would be an  
6 intolerable situation.

7 MR. PINCUS: And --

8 JUSTICE BREYER: What do you do if the  
9 mother is in a country where there are  
10 difficulties with abused women finding adequate  
11 care and she's got to get out of there?

12 MR. PINCUS: Well, I think that --

13 JUSTICE BEYER: All right. What do we  
14 do about that?

15 MR. PINCUS: As I say, I think that  
16 could be a -- a relevant fact that might lead  
17 the general rule that we're talking about --

18 JUSTICE BREYER: Do we put it --

19 MR. PINCUS: -- to be superseded.

20 JSUTICE BREYER: -- in here, or do you  
21 say in dicta or something that it was raised, an  
22 intolerable situation includes that, or do we  
23 say nothing at all?

24 MR. PINCUS: Well, there are two  
25 options for addressing that, right? One -- one

1 is to say that, if the district court were to  
2 find that the mother was trying to get away and  
3 her -- she had a -- at the quickest possible  
4 moment, but she was thwarted because the father  
5 was preventing it through abuse or otherwise,  
6 then that might well mean that there's no  
7 habitual residence.

8 That is not, as I -- the findings that  
9 I read, that's not the case here.

10 You could also look to the Article 13  
11 exception and talk about the possibility that --  
12 that those facts may be relevant. As I -- as my  
13 colleague --

14 JUSTICE GINSBURG: But that --

15 MR. PINCUS: -- noted, that was --

16 JUSTICE GINSBURG: -- isn't Article 13  
17 about abuse of the child?

18 MR. PINCUS: It is about abuse of the  
19 child. And so that is -- that requires a  
20 broader finding, that the -- so it may be that  
21 the -- the first approach is a better one.

22 JUSTICE ALITO: Can I --

23 JUSTICE GINSBURG: Let me ask you a  
24 question about the difference between you and  
25 the government.

1           You -- you, I thought, urged that  
2           shared parental intent is relevant but not  
3           dispositive, one factor among others to be  
4           weighed.

5           But, if that is the case, doesn't that  
6           suggest the government's position, a remand,  
7           because at least in the majority of the Sixth  
8           Circuit seems to focus on this shared parental  
9           intent?

10           MR. PINCUS: Well, let me -- let me  
11           answer that in two ways, if I may, Justice  
12           Ginsburg.

13           First of all, I think it's important  
14           to unpack the phrase "shared parental intent."  
15           I think the way the lower courts, as we discuss  
16           in our brief, the low -- the way the lower  
17           courts of the United States have applied that is  
18           what's the intent of each parent, that can be  
19           proven by words, deeds, objectively, what's the  
20           -- what is the parents' intent with respect to  
21           the location of the child?

22           That none -- there's perhaps one case  
23           in which a -- a federal court of appeals  
24           indicated that -- that a meeting of the minds  
25           might be necessary. And even that court relied

1 on an alternative ground.

2 So I think the -- the question is, is  
3 the intent of the parents with respect to where  
4 the child lives relevant? I think, yes, it can  
5 be proved they don't have to have jointly  
6 agreed. They can each have the same intent.

7 In terms of this case, I think if --  
8 if we prevail on the legal issues, then that  
9 issue is determined because there's no clear  
10 error in the -- in the district court's  
11 determination.

12 So the question would be: Are there  
13 other facts that would be cognizable under the  
14 habitual residence standard that the lower  
15 courts didn't address? And our submission is  
16 those other facts are all facts that weigh in  
17 favor of Italy because they are principally the  
18 fact that the child has been located in Italy  
19 for her whole life before she was removed.

20 And that's not something that was  
21 relevant necessarily to intent, but that's  
22 clearly a highly important fact that she was  
23 there with both parents.

24 And so we don't see any other facts  
25 that could be adduced in this record. The



1 four-day trial was quite comprehensive. We  
2 don't see any other facts that could be relevant  
3 that would require or even permit a different  
4 determination on -- on the habitual residency  
5 determination, which is why we think a remand  
6 isn't necessary.

7 JUSTICE KAGAN: When you, and to the  
8 extent you know it, the SG, talk about totality  
9 of the circumstances, for older children does  
10 that mean rejecting the view of most of the  
11 circuit courts that the key thing is  
12 acclimatization?

13 MR. PINCUS: No, I think  
14 acclimatization, as children get older, it can  
15 be highly relevant. And the -- the -- the  
16 courts that have adopted this test, the foreign  
17 courts have said that.

18 I think the problem --

19 JUSTICE KAGAN: Well, but I think most  
20 courts have done more than just say that's  
21 highly relevant. Most courts have said that's  
22 the question that we're trying to answer.

23 And -- and that provides a kind of  
24 anchoring mechanism for courts. Right? Okay,  
25 now I understand what the question is. It's a

1 kind of embeddedness in a particular country's  
2 life.

3 So, you know, but if it's just like  
4 one thing that gets thrown in along with  
5 everything else, that seems sort of different to  
6 me.

7 MR. PINCUS: I -- I think the problem  
8 is there's no bright line between when you might  
9 think the young child standard applies and when  
10 you might think acclimatization becomes  
11 relevant. There probably are crossing lines at  
12 one point. It's really about the young child  
13 and -- and is he or she with her parents.

14 And then at some point later, when the  
15 kids are 15-years-old, it may be much more about  
16 them than about parental intent.

17 I think most courts have been  
18 reluctant to say the parents' intent becomes  
19 irrelevant. I think they -- the courts  
20 generally say acclimatization becomes much more  
21 relevant.

22 So I wish I could help you with saying  
23 that -- that there's --

24 JUSTICE SOTOMAYOR: Isn't that what  
25 the European --

1 MR. PINCUS: -- a dividing line there.

2 JUSTICE SOTOMAYOR: Isn't that what  
3 the European court said with respect to infants?  
4 It didn't say that you put parental intent or  
5 agreement as being the most important. It used  
6 the word just an important factor I think was --  
7 was their language.

8 MR. PINCUS: I think that's exactly  
9 right, Your Honor.

10 JUSTICE SOTOMAYOR: So how do I  
11 discern that the mother's intent was to stay in  
12 Italy or that the child had acclimated to Italy  
13 or integrated into Italy when the child was  
14 being -- during those eight weeks she was moved  
15 from one spot to another. She didn't live  
16 consistently with the father.

17 MR. PINCUS: She lived between two  
18 places.

19 JUSTICE SOTOMAYOR: Between two  
20 places, but the father wasn't in the first  
21 place. Then the mother went for a couple of  
22 weeks with the father and then brought her back  
23 into the -- the shelter.

24 The mother, I think, had some fairly  
25 potent evidence that she was making plans to

1 leave Italy. Everything about the entire  
2 situation surrounding this child was simply up  
3 in the air.

4 MR. PINCUS: Well, I think those --  
5 sorry.

6 JUSTICE SOTOMAYOR: So, why couldn't a  
7 court reasonably conclude that no settled  
8 place --

9 MR. PINCUS: Well --

10 JUSTICE SOTOMAYOR: -- no ordinary  
11 place had yet been formed for this child?  
12 That's a possibility we haven't talked about.

13 But I have to presume that if we tell  
14 a court that it's the totality of the  
15 circumstances, that it is, in fact, one of the  
16 options it has.

17 MR. PINCUS: I -- I think it is. In  
18 this case I think the -- the portions of the  
19 district court's opinion that I read on page 94A  
20 and 98A preclude that in this case because the  
21 district court rejected those -- that as the  
22 mother's intent.

23 I -- I -- I think for the reasons that  
24 we've been talking about, and I'd also say the  
25 movement from place to place is something that

1 lower courts have rejected, if it's within one  
2 country, because the idea here is to find the  
3 country of habitual residence.

4 And if those movements, the Second  
5 Circuit said, speaking through Judge Cabranes,  
6 if -- if those movements are within the country,  
7 they don't -- they don't really count with them  
8 -- when they're within two places.

9 I -- I -- I wanted to mention, Justice  
10 Breyer raised a question about Italy and what  
11 the proceedings might be there. There is a -- a  
12 proceeding in Italy, a custody proceeding, that  
13 a petitioner actually this past October has  
14 filed a custody petition.

15 She filed some prior petitions. They  
16 were rejected on jurisdictional grounds. As I  
17 understand it, this petition is in the right  
18 Italian court and raises the custody question.

19 JUSTICE GINSBURG: But what about the  
20 -- the -- this ex parte declaration depriving  
21 her of her parental rights? That's still  
22 standing.

23 MR. PINCUS: I think that's one of the  
24 issues that will be adjudicated in this Italian  
25 proceeding. And as -- as -- as Justice

1 Sotomayor pointed out, the current status is  
2 that the -- the legal custody of the child is  
3 with the Italian authorities.

4 The father has generally physical  
5 custody. The mother has visitation rights.  
6 There are periodic reports being filed by the  
7 Italian social services authority about what's  
8 going on. So the Italian authorities are pretty  
9 seized of -- of -- of this matter.

10 So just to -- to return to the  
11 question of the -- of the remand, I think our  
12 view is, for the reasons I was discussing, that  
13 the district court's findings really deal with  
14 the intent issue, his -- his factual findings,  
15 let -- putting aside his ultimate determination  
16 on habitual residence.

17 All of the other facts that could  
18 possibly be relevant under the Judge Boggs  
19 standard, framed as a -- a -- a -- a factual  
20 presumption, we think weigh in favor of Italy as  
21 the place of habitual residence.

22 And we agree that -- that it would be  
23 great to cut off these proceedings. Tomorrow  
24 will be the three-year anniversary of A.M.T.  
25 being returned to Italy. And it would certainly

1 be good for the -- this uncertainty to be lifted  
2 so that she could then -- the Italian  
3 authorities could proceed with the custody  
4 determination without this issue being raised.

5 And -- and I do think, as several  
6 members of the Court said, that there would be  
7 significant problems with the issuance of a  
8 re-return order, both in terms of the U.S.  
9 courts' ability to issue such an order, given  
10 the equitable considerations, and also the  
11 extent to which such an order would be accepted  
12 by the Italian authorities.

13 Unless the Court has any further  
14 questions, thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Two minutes, Mr. Tayrani.

18 REBUTTAL ARGUMENT OF AMIR C. TAYRANI

19 ON BEHALF OF THE PETITIONER

20 MR. TAYRANI: Thank you. Three  
21 points, Your Honor.

22 With respect to the standard applied  
23 by foreign courts to cases involving infants, I  
24 would point the courts to paragraph 55 in the  
25 European Union Court of Justice's decision in

1 the Mercredi case.

2           The Court there stated that an infant  
3 necessarily shares the social and family  
4 environment of the circle of people on whom he  
5 or she is dependent. Consequently, where the  
6 infant is, in fact, looked after by her mother,  
7 it is necessary to assess the mother's  
8 integration in her family and social  
9 environment.

10           That is the standard that Lady Hale  
11 adopts in the A versus A case at paragraph 54,  
12 sub (6): Applying that standard in this case  
13 leads to one clear inextricable conclusion, that  
14 Monasky was not integrated into a family and  
15 social environment in Italy and that, therefore,  
16 A.M.T. did not have a habitual residence in  
17 Italy.

18           This Court need look no further than  
19 the party's stipulation at JA 28 and JA 29 that,  
20 as early as August of 2014, Monasky was already  
21 laying the groundwork for her return to the  
22 United States by looking for U.S. healthcare and  
23 child care options, U.S. employment, and U.S.  
24 divorce lawyers.

25           This Court need look no further than



1 JA 200 and JA 217, which are e-mails between the  
2 parties sent in the critical days preceding and  
3 following A.M.T.'s birth, where Monasky  
4 reiterated her intent to return to the United  
5 States and to divorce Taglieri.

6 And this Court need look no further  
7 than Pet. App. 94a where the district court  
8 found that Monasky intended to return to the  
9 United States with A.M.T. As soon as possible.  
10 That's precisely what she did. The day A.M.T.'s  
11 U.S. passport arrived, when A.M.T. Was  
12 eight-weeks-old, Monasky fled the dangerous  
13 situation in which she found herself and  
14 returned to the United States.

15 This Court can and should make that  
16 determination and it should order A.M.T.'s  
17 return to the United States for a full and fair  
18 child custody hearing, which is the only venue  
19 in that -- in which that hearing can take place.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel. The case is submitted.

23 (Whereupon, at 11:10 a.m., the case  
24 was submitted.)

25

## Official - Subject to Final Review

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