

# 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 65  
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 --

11 JUSTICE GINSBURG: Mr. Tay --

12 MR. TAYRANI: -- on that issue.

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

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

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

1                   MR. TAYRANI: With respect, I disagree  
2 with the proposition that our approach would  
3 lead to a large number of children who do not  
4 have a country of habitual residence.

5                   First of all, we're talking in this  
6 case only about infants. Older children are  
7 evaluated under a different standard, and in all  
8 likelihood, based on their connections, their  
9 acclimatization to the country in which they  
10 reside, they would have a country of habitual  
11 residence. Even with respect to infants, we're  
12 dealing here with the unusual case where the  
13 breakdown of the parties' relationship was  
14 simultaneous with Monasky's pregnancy and the  
15 birth of the child.

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

25                   JUSTICE GINSBURG: The problem with

1 the -- a standard that says if you -- the  
2 parents have to have an agreement, in many of  
3 these cases, the relationship between the  
4 parents is so acrimonious that the likelihood of  
5 -- of a actual agreement is slim to none.

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

15 But from --

16 JUSTICE ALITO: So you think this  
17 agreement is irrevocable? If there's a -- I  
18 doubt that there are going to be very many cases  
19 where there's a written agreement. So you think  
20 that if, at the beginning, at the time of the  
21 child's birth, there's a tacit agreement between  
22 the parents, that's irrevocable, and then, if  
23 the relationship breaks down over a period of  
24 time that -- where you might otherwise infer  
25 that there is no longer any agreement, that



1 would not count?

2 MR. TAYRANI: That's exactly our  
3 approach, Your Honor. The -- the agreement,  
4 once it's in place, is irrevocable until the  
5 standard for older children comes into play,  
6 which would be an acclimatization-based  
7 standard.

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

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

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

23 MR. TAYRANI: Your Honor, every  
24 circuit that has addressed this issue applies  
25 some version of the shared parental intent

1 standard to infants. Some circuits apply the  
2 additional actual agreement requirement that  
3 we're urging this Court to adopt. But every  
4 circuit applies some version of shared parental  
5 intent.

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

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

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

1 infant has a country of habitual residence.

2 And --

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

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

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

23 MR. TAYRANI: Well, there need --

24 JUSTICE BREYER: That's -- that's  
25 basically what I got out of her opinion. It

1 seems to me that's the British court, and that  
2 sounds pretty sensible to me.

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

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

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

19 Now where is it -- where -- where is  
20 that -- where did I get it wrong?

21 MR. TAYRANI: Your Honor, the U.K.  
22 Supreme Court follows the approach of the  
23 European Union Court of Justice in the Mercredi  
24 decision, and Mercredi makes very clear that, in  
25 cases involving infants, a primary caregiver

1 focused approach is the test that should be  
2 applied. But, under any of the competing tests  
3 that we're discussing here today, the outcome is  
4 the same on these facts.

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

10 MR. TAYRANI: Yes, Your Honor.

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

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

23 JUSTICE ALITO: Why -- why is it a  
24 mixed question? Was there an agreement between  
25 the parents or was there not an agreement

1 between the parents? It's a question of fact,  
2 pure fact.

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

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

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

13 JUSTICE ALITO: No --

14 MR. TAYRANI: -- would be --

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

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

22 Lower courts are in need of guidance  
23 from appellate courts setting forth clear legal  
24 principles about how to make a habitual  
25 residence determination, just as lower courts

1 need guidance about how to ascertain the  
2 existence of reasonable suspicion and probable  
3 cause.

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

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

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

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

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

1                   MR. TAYRANI: Your Honor, the problem  
2 with that approach is that it will breed  
3 disuniform outcomes. It will prolong Hague  
4 Convention litigation. It will undermine the  
5 deterrent effect of the Hague Convention by  
6 undermining the clear rules that would otherwise  
7 apply in this setting.

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

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

23                   JUSTICE KAVANAUGH: On -- on your --

24                   MR. TAYRANI: -- these cases.

25                   JUSTICE KAVANAUGH: -- on the standard



1 of review, doesn't de novo review necessarily  
2 prolong the matter?

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

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

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

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

25 JUSTICE GINSBURG: In every circuit,

1 not the Seventh Circuit.

2 MR. TAYRANI: That -- that is not a  
3 case involving infants, Your Honor, the Redmond  
4 case. Every circuit that looks at the habitual  
5 residence of an infant applies a test that looks  
6 to shared parental intent. Some circuits also  
7 look at actual agreement as part of that shared  
8 parental intent inquiry.

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

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

25 On the facts of this case --

1                   JUSTICE GINSBURG: How -- how will it  
2 be brought to an end? The child is now in  
3 Italy, and no doubt the Italian courts would  
4 weigh in, so this -- this determination of  
5 habitual residence is not going to settle where  
6 this child -- the custody of this -- this child.

7                   MR. TAYRANI: That's correct, Your  
8 Honor. Hague Convention cases don't determine  
9 custody. They determine the venue in which  
10 child custody determinations will be made.

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

19                   If A.M.T. is returned to the United  
20 States, then there will be a full and fair child  
21 custody hearing.

22                   JUSTICE GINSBURG: But that will  
23 depend on the Italian authorities returning her.  
24 And given the position that they've taken up  
25 until now, that seems most unlikely.

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

4           JUSTICE GINSBURG: The court that has  
5 declared her a non-parent --

6           MR. TAYRANI: Your Honor --

7           JUSTICE GINSBURG: -- would do that?

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

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

21           CHIEF JUSTICE ROBERTS: Well --

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

23           CHIEF JUSTICE ROBERTS: -- there  
24 hasn't been any case where we're talking about a  
25 -- a time in the -- the other country as long as

1 this. This would be the longest period of time  
2 in which any re-return order has been entered,  
3 wouldn't it?

4 MR. TAYRANI: I don't know if it is  
5 the longest period of time. To the extent that  
6 Taglieri has concerns about the propriety of  
7 re-return, those are issues that he could raise  
8 before an Italian court when we move to enforce  
9 the re-return order. But in the absence --

10 CHIEF JUSTICE ROBERTS: Which would  
11 just delay the proceedings that have already  
12 been delayed far longer than the Convention  
13 contemplated.

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

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

1 MR. TAYRANI: The best interests --

2 JUSTICE BREYER: And I also think  
3 judges, particularly federal judges, don't know  
4 much about this.

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

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

19 But, in the absence of a re-return  
20 order, no court --

21 JUSTICE SOTOMAYOR: I'm sorry, I  
22 thought that there was a special order of the  
23 Italian court giving the mother some visitation  
24 rights, albeit limited. It's not clear to me  
25 that you're representing to me that there is no

1 method or manner for her to go back to the  
2 Italian court and reopen or revisit the custody  
3 issue?

4 MR. TAYRANI: I'm not representing  
5 that there is no procedural --

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

13 MR. TAYRANI: Your Honor, Monasky has  
14 --

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

19 MR. TAYRANI: That's correct, Your  
20 Honor. That does not bear upon the availability  
21 --

22 JUSTICE SOTOMAYOR: No, of --

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

24 JUSTICE SOTOMAYOR: -- of the return  
25 -- of the return, but -- but I still am

1 wondering why it is that it's the American  
2 court, rather than the Italian court, who should  
3 be dealing with the custody issue.

4 MR. TAYRANI: Well, first of all,  
5 because Italy was not A.M.T.'s country of  
6 habitual residence. So she never should have  
7 been returned to Italy in the first place. The  
8 only way to remedy that wrong --

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

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

22 And she must --

23 JUSTICE GINSBURG: How old -- how old  
24 is the child now?

25 MR. TAYRANI: She is four and a half



1 years old, Your Honor. A.M.T. did not have that  
2 type of existence within her fleeting eight  
3 weeks of living in Italy. The Hague Convention  
4 is designed to protect children who have a  
5 stable -- stable, settled existence.

6 That is what is explained in paragraph  
7 72 of the accompanying explanatory report.  
8 There will be some children such as A.M.T. who  
9 don't form those types of settled connections to  
10 a country and whose return to the country of  
11 removal is actually detrimental --

12 JUSTICE ALITO: But --

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

14 JUSTICE ALITO: -- let me understand.  
15 Your position is that she had no habitual  
16 residence at that time?

17 MR. TAYRANI: That's correct, Your  
18 Honor.

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

24 MR. TAYRANI: The Hague Convention  
25 would not speak to that removal, Your Honor.

1 That doesn't mean that the left-behind parent  
2 would be without remedies. The left-behind  
3 parent could seek relief, for example, under the  
4 Uniform Child Custody Jurisdiction and  
5 Enforcement Act. The left-behind parent would  
6 have the opportunity to participate in a child  
7 custody hearing in the country of removal.

8 That --

9 JUSTICE GINSBURG: But the Convention,  
10 which was meant to solve this problem of  
11 unilateral removal, would not apply?

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

20 CHIEF JUSTICE ROBERTS: How -- how  
21 long does the child have to -- how old does a  
22 child have to be before you would say they have  
23 a habitual residence?

24 MR. TAYRANI: It --

25 CHIEF JUSTICE ROBERTS: Eight weeks

1 under your theory is not enough, but one year,  
2 two years?

3 MR. TAYRANI: Well, at a certain  
4 point, around 18 to 24 months, the focus would  
5 shift to the child's own acclimation to his or  
6 her surroundings, because the child --

7 CHIEF JUSTICE ROBERTS: Where do you  
8 get -- where do you get that number from?

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

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

23 Returning a child to a country where  
24 it did not have meaningful connections is just  
25 as harmful to that child as permitting the

1 child's removal from a country of --

2 JUSTICE KAGAN: Mr. Tayrani --

3 MR. TAYRANI: -- habitual residence.

4 JUSTICE KAGAN: -- Judge Boggs  
5 suggests that in the case of children, children  
6 who have lived in a single place for their  
7 entire lives, in the case of infant children,  
8 that is, who have lived in a single country  
9 their entire lives with both parents, that the  
10 usual rule should be that's their habitual  
11 residence, not irrebuttable, but that that  
12 should be the usual rule, that that's their  
13 habitual residence.

14 And that's certainly a very  
15 administrable rule. It provides a lot of  
16 guidance. And it deters anybody, either parent,  
17 from taking the child anywhere else, which seems  
18 to be of value too.

19 So why isn't the Judge Boggs rule the  
20 right one for infants?

21 MR. TAYRANI: The problem with that  
22 approach, Your Honor, is that it conflates a  
23 child's residence with her habitual residence.  
24 If the signatories to the Hague Convention had  
25 wanted to enact an agreement that was all

1 encompassing, that applied to all children, they  
2 would have prohibited the removal of a child  
3 from his country of residence without the  
4 approval of both parents.

5           What they instead did was enact a more  
6 targeted provision that prevents the wrongful  
7 removal of a child from his country of habitual  
8 residence because the signatories recognize that  
9 removing a child from a country of habitual  
10 residence, where the child has meaningful ties,  
11 has a stable existence, would be harmful to the  
12 child.

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

19           But whatever the test is that this  
20 Court adopts, the outcome is the same. The  
21 facts are overwhelming here that, as a result of  
22 the physical and sexual abuse to which Monasky  
23 was subject, she formed the intent during her  
24 pregnancy to return to the United States with  
25 her child as soon as possible. That's what the

1 district court found, at Pet. App. 94a, that  
2 Monasky intended to return to the United States  
3 with A.M.T. as soon as possible.

4 And that's what she did. The day that  
5 A.M.T.'s U.S. passport arrived, Monasky left and  
6 returned to the United States, fled from the  
7 dangerous situation in which she found herself.  
8 The signatories to the Hague Convention would  
9 never have intended to prevent a mother from  
10 removing her child from those dangerous  
11 circumstances.

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

21 That provision would seem designed for  
22 the problem of spousal abuse.

23 MR. TAYRANI: Mr. Chief --

24 JUSTICE BREYER: Why isn't it here?

25 MR. TAYRANI: -- Justice, may I answer

1 the question?

2 CHIEF JUSTICE ROBERTS: Yes.

3 MR. TAYRANI: Your Honor, we did urge  
4 the district court to apply the exception for  
5 grave risk of harm to A.M.T. Unfortunately,  
6 lower courts have construed that exception  
7 narrowly. And in this case, even though the  
8 district court credited Monasky's allegations  
9 about the extensive physical and sexual abuse to  
10 which she was subjected, the court concluded  
11 that that abuse directed to Monasky was not  
12 sufficient to create a grave risk of harm to  
13 A.M.T.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Mr. Joshi.

17 ORAL ARGUMENT OF SOPAN JOSHI

18 FOR THE UNITED STATES, AS AMICUS CURIAE,  
19 SUPPORTING NEITHER PARTY

20 MR. JOSHI: Mr. Chief Justice, and may  
21 it please the Court:

22 Habitual residence is a flexible,  
23 fact-intensive concept. That's precisely why  
24 the drafters and ratifiers of the Hague  
25 Convention picked it over the alternatives, like

1 domicile or nationality. It asks a very  
2 straightforward question: Where does the child  
3 usually live? Where's the child at home?

4           Answering that question requires  
5 looking at the case-specific facts on the  
6 ground, unencumbered by rigid, mechanical,  
7 per se tests. That includes Petitioner's rigid,  
8 mechanical, per se test about a shared -- or,  
9 I'm sorry, a subjective agreement or a meeting  
10 of the minds.

11           That is not necessary to establishing  
12 a child's habitual residence. It's not even  
13 necessary to establishing a shared parental  
14 intent, which itself is not necessary to  
15 establishing habitual residence.

16           And that test applies equally to  
17 infants and to older children. Nothing in the  
18 Convention's text or structure suggests that  
19 habitual residence carries a different  
20 definition depending on the age of the child.  
21 So that takes care of one question presented.

22           On the other one, because determining  
23 habitual residence is primarily a factual  
24 inquiry and involves factual work, this Court's  
25 framework in U.S. Bank or Lakeridge applies, and



1 there's no reason to deviate from that rule.

2 In fact, that rule would also provide,  
3 we believe, the most consistent results,  
4 including consistency of outcome, as Petitioner  
5 asks for, because the best way to be consistent  
6 is to be right, and the best way to be right on  
7 a fact-intensive question is to trust the  
8 district judge.

9 JUSTICE ALITO: Well, this is what --

10 JUSTICE SOTOMAYOR: When --

11 JUSTICE ALITO: -- puzzles me about  
12 your position, which does seem to reflect the  
13 decisions of foreign courts, and maybe something  
14 has just been lost in -- in translation.

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

22 Now you said it's where the child  
23 usually lives. If that's the test that Judge  
24 Boggs had, I understand it. But, if it's  
25 something more than that, then I really don't

1 know what habitual residence means.

2 MR. JOSHI: So we think where a child  
3 usually lives is the test. And it's sort of  
4 hard to explain it more than that. In most  
5 cases, it's going to be quite easy to tell where  
6 the child usually lives, including for infants.

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

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

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

24 MR. JOSHI: It -- that -- that's a  
25 very difficult question. And I -- I can imagine

1 many factors that might push you one way or the  
2 other.

3           For example, if that's where they had  
4 been living for quite some time but just had  
5 some future plans to move, that might well be  
6 where the child was usually living on the date  
7 of the -- or, you know, immediately before the  
8 -- the wrongful retention or removal, as Article  
9 III calls for.

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

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

25           JUSTICE SOTOMAYOR: Counsel --

1 CHIEF JUSTICE ROBERTS: Well, that's  
2 kind of a meaningless concept, where the child  
3 usually lives, if you're talking about somebody  
4 who's eight-weeks-old.

5 MR. JOSHI: Again, as I --

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

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

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

12 (Laughter.)

13 CHIEF JUSTICE ROBERTS: -- but it  
14 doesn't seem to me that that's the notion that  
15 the Convention drafters were looking at.

16 MR. JOSHI: It -- it isn't. And --  
17 and I think it's important to realize that,  
18 although the word is habitual, the -- the term  
19 habitual residence and the use of the word  
20 habitual originated in the Hague Convention in  
21 French.

22 And the English copy here is official,  
23 but, nevertheless, the term habitual residence  
24 began as -- I'm not even going to attempt to  
25 pronounce it in French -- but -- but habitual in

1 that context translated means usual or  
2 customary. It doesn't necessarily mean as a  
3 habit.

4 And I think it's important that in the  
5 ordinary case, even an infant, as I said, I  
6 think, ask the parents of any newborn, and I  
7 think if you ask where do you usually live, they  
8 would have an answer, just like --

9 JUSTICE KAGAN: Well, does that mean  
10 Judge Boggs is right, that the place where an  
11 infant usually lives is the place where the  
12 infant has lived since birth with both parents?

13 MR. JOSHI: Judge Boggs may well be  
14 right, and he did add the qualification for  
15 absent unusual circumstances.

16 JUSTICE KAGAN: Absent unusual  
17 circumstances, right.

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

1           As a practical matter and as a -- you  
2 know, and in theory, the judge can consider  
3 facts that are relevant to that question. And,  
4 of course, that itself is a constraint, and --

5           JUSTICE GINSBURG: There's a --  
6 there's a problem with your solution. On the  
7 two questions presented, I take it you agree  
8 with Respondent. But you said the bottom line  
9 should be a remand, not a determination.

10           And this child is now  
11 four-and-a-half-years-old. To remand to do  
12 what? What factor didn't the district court  
13 take into account that the district court should  
14 have taken into account?

15           You say totality of the circumstances,  
16 not shared intent as a single factor, but it  
17 seems to me that the district court did have  
18 everything before it.

19           What -- if -- if -- if we remanded,  
20 what should the district court do that it hasn't  
21 already done?

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

1           The only thing I'll say is that both  
2           the court of appeals and the district court  
3           appeared to view the facts through the lens of a  
4           -- a notion that shared parental intent was the  
5           only thing that mattered. And probably the  
6           parties briefed the case that way in the court  
7           of appeals, all to shared parental intent.

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

13                 JUSTICE GINSBURG: What would they be?

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

19                 It's called X against Y -- those are  
20                 pseudonyms obviously -- from the court of  
21                 appeals at the Hague. Mom alleged that the  
22                 apartment in the Netherlands was where they  
23                 usually lived. Apartment in Spain was a  
24                 vacation home. Dad alleged exactly exactly the  
25                 opposite.

1           The court had to decide who was right,  
2           looked at a lot of facts on the ground. But the  
3           most compelling one that the court decided would  
4           tip the issue was that the mom had deregistered  
5           herself from the municipal persons database and  
6           put Spain as her forwarding address, and  
7           deregistered the company she ran from the Dutch  
8           Chamber of Commerce.

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

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

25          So Hale -- Boggs may be right, except



1 that he's calling it a proposition of law.

2 MR. JOSHI: I would agree with that.  
3 And I would just -- again, I would -- I would  
4 caution this Court from laying down principles  
5 like that because, when this Court says it,  
6 lower courts usually take it as proposition of  
7 the law --

8 JUSTICE KAGAN: Then why --

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

14 MR. JOSHI: That may well be true, but  
15 --

16 JUSTICE BREYER: What do you think?

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

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

24 (Laughter.)

25 MR. JOSHI: Again, as I said, it's --

1 it's where the child usually lives. And with  
2 the facts we know --

3 JUSTICE SOTOMAYOR: I'm sorry, where  
4 did you get that standard? I look at the  
5 European court and it had a different standard.  
6 It says some degree of integration by the child  
7 in a social and family environment. That's the  
8 definition the Bates Court, Lady Hale, adopted.

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

13 Are you disavowing what the other  
14 courts are doing?

15 MR. JOSHI: No, we're not.

16 If I may, Mr. Chief Justice.

17 We think they are looking at the right  
18 question, which is where the child ordinarily  
19 lives. In difficult cases, oftentimes --

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

22 MR. JOSHI: We -- we think the words  
23 they used are certainly relevant to that  
24 ultimate determination, and, in any event, that  
25 is what the text of the Convention says. And we

1 think that's what the Court should apply here.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Mr. Pincus.

5 ORAL ARGUMENT OF ANDREW J. PINCUS

6 ON BEHALF OF THE RESPONDENT

7 MR. PINCUS: Thank you, Mr. Chief  
8 Justice, and may it please the Court:

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

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

24 We agree with the SG regarding the  
25 test. And I just wanted to start by saying a

1 few words about Petitioner's actual agreement  
2 test. As Justice Ginsburg pointed out, it would  
3 largely eliminate the Convention's protection  
4 for very large -- for very young children  
5 because they would have no habitual residence  
6 and because one of the spouses in the cases  
7 where there is marital discord during the  
8 pregnancy and the birth could simply say I  
9 withhold agreement on where the child should  
10 live, and that would mean there was no habitual  
11 residence as long as there was no agreement.  
12 That's obviously a significant gap.

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

1 question is, what is the child's habitual  
2 residence, country A or B?

3 And courts have said in that  
4 circumstance it's possible to lose the habitual  
5 residence in A before gaining it in B. Whether  
6 that's true or not, that's obviously a very  
7 different situation from the one presented here,  
8 where the parents are in one country and the  
9 child is born there and stays there until the  
10 challenged removal.

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

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

1 circumstances.

2 JUSTICE KAGAN: Which -- which, as you  
3 say, is what Judge Boggs said. And so I'm  
4 curious as to why you're not just accepting that  
5 as a formulation of the legal standard. Judge  
6 Boggs was careful to say, absent unusual  
7 circumstances. And I suppose I would say that  
8 the benefit of doing that is, you know, if you  
9 take the solicitor general's test -- this is on  
10 page 26 and 27 -- I'm not going to read it  
11 because it would take too long to --

12 (Laughter.)

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

22 And if the ultimate question is just  
23 where does the child usually live, then why not  
24 just sort of say that when it comes to an infant  
25 or a very small child, the child usually lives

1 where the child has lived with both parents all  
2 her life?

3 MR. PINCUS: Well, I don't want to  
4 resist a rule that would be beneficial to my  
5 client, but -- but I guess I will say that the  
6 -- the courts, especially in the U.K., have had  
7 a lot of experience with subsidiary legal  
8 principles like that being developed. And I  
9 think the -- the result, and I think Chief  
10 Justice Hale mentions this as one decision, is  
11 that they do get too much credence in how lower  
12 courts approach the case.

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

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

23 MR. PINCUS: I think so, and I'm not  
24 sure, Justice Kavanaugh, that there's much  
25 difference between saying that as a legal

1 principle or framing it the way Justice Breyer  
2 did, which is, when the facts are that the child  
3 has lived in one country with her parents for --  
4 for her whole life, absent some unusual facts,  
5 that is going to lead to this decision.

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

21 Am I wrong on that?

22 MR. PINCUS: I'm not sure that that's  
23 right, Justice Alito. I think there is an  
24 ultimate inquiry: Where does the child usually  
25 live? Or -- or, in the European version, the --



1 the family or -- and social environment in which  
2 the child's life has developed? I think that  
3 gives you a north star.

4 I think the problem is there are a lot  
5 of different facts in these -- in these cases.  
6 You know, it's one reason why, in family law,  
7 best interests of the child is a very broad  
8 standard because there are a lot of different  
9 facts.

10 JUSTICE ALITO: Yeah, but there I know  
11 what --

12 MR. PINCUS: And so I think you can  
13 lay out --

14 JUSTICE ALITO: I --

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

21 The -- the difficult cases really are  
22 these multiple country cases. Those are the  
23 cases where there are a myriad of fact patterns:  
24 Why did the child move? What were the parents'  
25 views when the child moved? Did the child get

1 acclimated to the new country?

2 JUSTICE ALITO: Well, in the case  
3 of --

4 MR. PINCUS: Those are very  
5 complicated cases.

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

15 MR. PINCUS: Well, it matters that the  
16 infant has lived in the same country with the  
17 parents. That's the critical, I think,  
18 additional fact. And I think --

19 JUSTICE ALITO: But what is the  
20 interest that is served by that?

21 MR. PINCUS: The interest -- there are  
22 two interests that are served. One is the  
23 theory of the Convention is that's the -- the --  
24 finding habitual residence is important for two  
25 reasons. One is to identify the place where the

1 custody determination should be made, as opposed  
2 to leaving it to the unilateral decisions of one  
3 parent or another.

4 The second is to deter these  
5 abductions, which are not only harmful in that  
6 they allow the gaming of jurisdictional rules,  
7 but they're harmful because they take the child  
8 away from both parents. One parent is  
9 unilaterally taking the child away from the  
10 other.

11 JUSTICE GINSBURG: So you --

12 MR. PINCUS: And so what the --

13 JUSTICE GINSBURG: -- in this case --  
14 and it's a troublesome case because she alleged  
15 that she was abused, so you're putting that  
16 mother in the position of, if she wants to  
17 escape domestic violence, she has to leave her  
18 child behind.

19 MR. PINCUS: Well, she doesn't -- she  
20 doesn't have to -- she can escape domestic  
21 violence by separating from her husband and  
22 staying in the country. She -- before she left,  
23 she spent two weeks under the protection -- in  
24 safe houses under the protection of the  
25 mechanisms that Italy has for that purpose. So

1 I don't think that -- that the test requires  
2 that she stay with the husband.

3 I think one of the unusual facts could  
4 be in a situation where it was clear that the  
5 abused parent wanted to get away, was determined  
6 to get away, and the evidence is the husband  
7 thwarted her at every turn.

8 JUSTICE BREYER: Now --

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

21 So the district court looked at all  
22 this and said that wasn't the case here. And I  
23 think those are actually factual findings. That  
24 -- those aren't even mixed questions --

25 JUSTICE BREYER: What do we do --

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

2 JUSTICE BREYER: -- about -- I mean, I  
3 think in their brief they said she doesn't speak  
4 Italian and doesn't have a job. And what do you  
5 do about -- and -- and this standard that I  
6 read, she didn't mention this, but it says you  
7 can't place the child in an intolerable  
8 situation.

9 MR. PINCUS: Well --

10 JUSTICE BREYER: You'd think where the  
11 mother is being beaten up, that would be an  
12 intolerable situation.

13 MR. PINCUS: And --

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

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

19 JUSTICE BEYER: All right. What do we  
20 do about that?

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

24 JUSTICE BREYER: Do we put it --

25 MR. PINCUS: -- to be superseded.

1                   JSUTICE BREYER: -- in here, or do you  
2 say in dicta or something that it was raised, an  
3 intolerable situation includes that, or do we  
4 say nothing at all?

5                   MR. PINCUS: Well, there are two  
6 options for addressing that, right? One -- one  
7 is to say that, if the district court were to  
8 find that the mother was trying to get away and  
9 her -- she had a -- at the quickest possible  
10 moment, but she was thwarted because the father  
11 was preventing it through abuse or otherwise,  
12 then that might well mean that there's no  
13 habitual residence.

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

16                   You could also look to the Article 13  
17 exception and talk about the possibility that --  
18 that those facts may be relevant. As I -- as my  
19 colleague --

20                   JUSTICE GINSBURG: But that --

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

22                   JUSTICE GINSBURG: -- isn't Article 13  
23 about abuse of the child?

24                   MR. PINCUS: It is about abuse of the  
25 child, and so that is -- that requires a broader

1 finding, that the -- so it may be that the --  
2 the first approach is a better one.

3 JUSTICE ALITO: Can I --

4 JUSTICE GINSBURG: Let me ask you a  
5 question about the difference between you and  
6 the government.

7 You -- you, I thought, urged that  
8 shared parental intent is relevant but not  
9 dispositive, one factor among others to be  
10 weighed.

11 But, if that is the case, doesn't that  
12 suggest the government's position, a remand,  
13 because at least the majority of the Sixth  
14 Circuit seems to focus on this shared parental  
15 intent?

16 MR. PINCUS: Well, let me -- let me  
17 answer that in two ways if I may, Justice  
18 Ginsburg.

19 First of all, I think it's important  
20 to unpack the phrase "shared parental intent."  
21 I think the way the lower courts, as we discuss  
22 in our brief, the low -- the way the lower  
23 courts of the United States have applied that is  
24 what's the intent of each parent that can be  
25 proven by words, deeds, objectively, what's the

1 -- what is the parents' intent with respect to  
2 the location of the child?

3 That none -- there's perhaps one case  
4 in which a -- a federal court of appeals  
5 indicated that -- that a meeting of the minds  
6 might be necessary, and even that court relied  
7 on an alternative ground.

8 So I think the -- the question is, is  
9 the intent of the parents with respect to where  
10 the child lives relevant? I think, yes, it can  
11 be proved they don't have to have jointly  
12 agreed. They can each have the same intent.

13 In terms of this case, I think, if --  
14 if we prevail on the legal issues, then that  
15 issue is determined because there's no clear  
16 error in the -- in the district court's  
17 determination.

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



1           And that's not something that was  
2 relevant necessarily to intent, but that's  
3 clearly a highly important fact that she was  
4 there with both parents.

5           And so we don't see any other facts  
6 that could be adduced in this record. The  
7 four-day trial was quite comprehensive. We  
8 don't see any other facts that could be relevant  
9 that would require or even permit a different  
10 determination on -- on the habitual residency  
11 determination, which is why we think a remand  
12 isn't necessary.

13           JUSTICE KAGAN: When you and, to the  
14 extent you know it, the SG, talk about totality  
15 of the circumstances, for older children, does  
16 that mean rejecting the view of most of the  
17 circuit courts that the key thing is  
18 acclimatization?

19           MR. PINCUS: No, I think  
20 acclimatization, as children get older, can be  
21 highly relevant. And the -- the -- the courts  
22 that have adopted this test, the foreign courts  
23 have said that.

24           I think the problem --

25           JUSTICE KAGAN: Well, but I think most

1 courts have done more than just say that's  
2 highly relevant. Most courts have said that's  
3 the question that we're trying to answer.

4 And -- and that provides a kind of  
5 anchoring mechanism for courts, right? Okay,  
6 now I understand what the question is. It's a  
7 kind of embeddedness in a particular country's  
8 life.

9 So, you know -- but, if it's just like  
10 one thing that gets thrown in along with  
11 everything else, that seems sort of different to  
12 me.

13 MR. PINCUS: I -- I think the problem  
14 is there's no bright line between when you might  
15 think the young child standard applies and when  
16 you might think acclimatization becomes  
17 relevant. There probably are crossing lines at  
18 one point. It's really about the young child  
19 and -- and is he or she with her parents. And  
20 then, at some point later, when the kids are 15  
21 years old, it may be much more about them than  
22 about parental intent.

23 I think most courts have been  
24 reluctant to say the parents' intent becomes  
25 irrelevant. I think they -- the courts

1 generally say acclimatization becomes much more  
2 relevant.

3 So I wish I could help you with saying  
4 that -- that there's --

5 JUSTICE SOTOMAYOR: Isn't that what  
6 the European --

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

8 JUSTICE SOTOMAYOR: -- isn't that what  
9 the European court said with respect to infants?  
10 It didn't say that you put parental intent or  
11 agreement as being the most important. It used  
12 the word just an important factor I think was --

13 MR. PINCUS: I think that's --

14 JUSTICE SOTOMAYOR: -- was their  
15 language.

16 MR. PINCUS: -- that's exactly right,  
17 Your Honor.

18 JUSTICE SOTOMAYOR: So how do I  
19 discern that the mother's intent was to stay in  
20 Italy or that the child had acclimated to Italy  
21 or integrated into Italy when the child was  
22 being -- during those eight weeks, she was moved  
23 from one spot to another. She didn't live  
24 consistently with the father. There were  
25 separate --

1                   MR. PINCUS: Well, she moved between  
2 two places.

3                   JUSTICE SOTOMAYOR: Between two  
4 places, but the father wasn't in the first  
5 place. Then the mother went for a couple of  
6 weeks with the father and then brought her back  
7 into the -- the shelter.

8                   The mother, I think, had some fairly  
9 potent evidence that she was making plans to  
10 leave Italy. Everything about the entire  
11 situation surrounding this child was simply up  
12 in the air.

13                   MR. PINCUS: Well, I think those --  
14 sorry.

15                   JUSTICE SOTOMAYOR: So why couldn't a  
16 court reasonably conclude that no settled  
17 place --

18                   MR. PINCUS: Well --

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

22                   But I have to presume that if we tell  
23 a court that it's the totality of the  
24 circumstances, that is, in fact, one of the  
25 options it has.

1           MR. PINCUS: I -- I think it is. In  
2 this case, I think the -- the portions of the  
3 district court's opinion that I read on page 94a  
4 and 98a preclude that in this case because the  
5 district court rejected those -- that as the  
6 mother's intent.

7           I -- I -- I think for the reasons that  
8 we've been talking about -- and I'd also say the  
9 movement from place to place is something that  
10 lower courts have rejected, if it's within one  
11 country, because the idea here is to find the  
12 country of habitual residence.

13           And if those movements, the Second  
14 Circuit said, speaking through Judge Cabranes,  
15 if -- if those movements are within the country,  
16 they don't -- they don't really count with them  
17 -- when they're within two places.

18           I -- I -- I wanted to mention the --  
19 Justice Breyer raised a question about Italy and  
20 what the proceedings might be there. There is a  
21 -- a proceeding in Italy, a custody proceeding,  
22 that a petitioner actually this past October has  
23 filed a custody petition.

24           She filed some prior petitions. They  
25 were rejected on jurisdictional grounds. As I

1 understand it, this petition is in the right  
2 Italian court and raises the custody question.

3 JUSTICE GINSBURG: But what about the  
4 -- the -- this ex parte declaration depriving  
5 her of her parental rights? That's still  
6 standing.

7 MR. PINCUS: I think that's one of the  
8 issues that will be adjudicated in this Italian  
9 proceeding. And as -- as -- as Justice  
10 Sotomayor pointed out, the current status is  
11 that the -- the legal custody of the child is  
12 with the Italian authorities.

13 The father has generally physical  
14 custody. The mother has visitation rights.  
15 There are periodic reports being filed by the  
16 Italian social services authority about what's  
17 going on. So the Italian authorities are pretty  
18 seized of -- of -- of this matter.

19 So just to -- to return to the -- the  
20 question of the -- of the remand, I think our  
21 view is, for the reasons I was discussing, that  
22 the district court's findings really deal with  
23 the intent issue, his -- his factual findings,  
24 let -- putting aside his ultimate determination  
25 on habitual residence.

1           All of the other facts that could  
2 possibly be relevant under the Judge Boggs  
3 standard, framed as a -- a -- a -- a factual  
4 presumption, we think weigh in favor of Italy as  
5 the place of habitual residence.

6           And we agree that -- that it would be  
7 great to cut off these proceedings. Tomorrow  
8 will be the three-year anniversary of A.M.T.  
9 being returned to Italy, and it would certainly  
10 be good for the -- this uncertainty to be lifted  
11 so that she could then -- the Italian  
12 authorities could proceed with the custody  
13 determination without this issue being raised.

14           And -- and I do think, as several  
15 members of the Court said, that there would be  
16 significant problems with the issuance of a  
17 re-return order, both in terms of a U.S. court's  
18 ability to issue such an order, given the  
19 equitable considerations, and also the extent to  
20 which such an order would be accepted by the  
21 Italian authorities.

22           Unless the Court has any further  
23 questions, thank you.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Two minutes, Mr. Tayrani.

2 REBUTTAL ARGUMENT OF AMIR C. TAYRANI

3 ON BEHALF OF THE PETITIONER

4 MR. TAYRANI: Thank you. Three  
5 points, Your Honor.

6 With respect to the standard applied  
7 by foreign courts to cases involving infants, I  
8 would point the Court to paragraph 55 in the  
9 European Union Court of Justice's decision in  
10 the Mercredi case.

11 The Court there stated that an infant  
12 necessarily shares the social and family  
13 environment of the circle of people on whom he  
14 or she is dependent. Consequently, where the  
15 infant is, in fact, looked after by her mother,  
16 it is necessary to assess the mother's  
17 integration in her family and social  
18 environment.

19 That is the standard that Lady Hale  
20 adopts in the A versus A case at paragraph 54,  
21 sub (6): Applying that standard in this case  
22 leads to one clear inextricable conclusion, that  
23 Monasky was not integrated into a family and  
24 social environment in Italy and that, therefore,  
25 A.M.T. did not have a habitual residence in



1 Italy.

2 This Court need look no further than  
3 the parties' stipulation at JA 28 and JA 29  
4 that, as early as August of 2014, Monasky was  
5 already laying the groundwork for her return to  
6 the United States by looking for U.S. healthcare  
7 and child care options, U.S. employment, and  
8 U.S. divorce lawyers.

9 This Court need look no further than  
10 JA 200 and JA 217, which are emails between the  
11 parties sent in the critical days preceding and  
12 following A.M.T.'s birth, where Monasky  
13 reiterated her intent to return to the United  
14 States and to divorce Taglieri.

15 And this Court need look no further  
16 than Pet. App. 94a, where the district court  
17 found that Monasky intended to return to the  
18 United States with A.M.T. as soon as possible.  
19 That's precisely what she did. The day A.M.T.'s  
20 U.S. passport arrived, when A.M.T. was eight  
21 weeks old, Monasky fled the dangerous situation  
22 in which she found herself and returned to the  
23 United States.

24 This Court can and should make that  
25 determination and it should order A.M.T.'s

1 return to the United States for a full and fair  
2 child custody hearing, which is the only venue  
3 in that -- in which that hearing can take place.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel. The case is submitted.

7 (Whereupon, at 11:10 a.m., the case  
8 was submitted.)

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