# 00-6066

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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FELIX BLONDIN,

*Petitioner-Appellant,*

- against –

MARTHE DUBOIS,

*Respondent-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF FOR *AMICUS CURIAE* THE NATIONAL ORGANIZATION FOR WOMEN LEGAL DEFENSE AND EDUCATION FUND SUPPORTING RESPONDENT-APPELLEE AND AFFIRMANCE OF THE DECISION BELOW**

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Pursuant to Federal Rule of Appellate Procedure 29, *amicus curiae* respectfully submits this brief in support of Appellee, Marthe Dubois. Both parties have consented to the filing of this brief and letters of consent have been filed with this Court.

## INTEREST OF AMICUS CURIAE

The National Organization for Women Legal Defense and Education Fund ("NOW LDEF") is a leading national nonprofit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to elimate sex-based discrimination and to secure equal rights. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women.

NOW LDEF is engaged on many fronts in efforts to eliminate gender-motivated violence. Most notably, NOW LDEF chaired that national task force that was instrumental in passing the historic Violence Against Women Act ("VAWA) and maintains a national legal clearinghouse that tracks legal developments under VAWA. Further, NOW LDEF's Immigrant Women Program ("IWP") co-chairs the National Network on Behalf of Battered Immigrant Women and is responsible for the Network's Washington based advocacy efforts to enhance legal protections and access to services for battered immigrant women and their children. The IWP is actively involved in policy efforts to promote greater

legal protections for battered immigrant women. An area in particular that IWP is working focuses on child custody protections for battered immigrant women, parental kidnapping, and international parental abduction.

NOW LDEF has participated as counsel and as *amicus curiae* in numerous cases in support of the rights of women who have been the victims of sexual assault, domestic violence and other gender-motivated violence.

## STATEMENT OF THE CASE

The relevant facts and procedural history are described in the brief of Appellee and that of the Amicus United States of America, and more importantly, in the opinion of the district court from which this appeal is taken. For present purposes it is sufficient to note that based on a well-developed record, the district court held that there was clear and convincing evidence that the return of the children to France would expose them to a "grave risk . . . [of] physical or psychological harm or otherwise place the child[ren] in an intolerable situation." *Blondin v. Dubois*, 78 F. Supp. 2d 283, 285 (2000) (Blondin III). Thus, the trial court found that the facts of the case fell within an express exception to the requirements of the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention" or "Hague Convention"), as implemented by the International Child Abduction Remedies Act (the "ICARA"), 42 U.S.C. §§ 11601-11610.

## SUMMARY OF ARGUMENT

The decision and judgment of the district court are plainly supported by the record evidence. The arguments of Appellant and Government as amicus disregard the express provisions of the Convention and the findings of fact rendered by the trial court. The arguments of both the Appellant and the United States reflect a subtle and not so subtle bias: Both are based on an insupportable assumption that domestic violence in general, and the effect of domestic violence on children – is not sufficiently extraordinary or exceptional to warrant a finding of "grave risk of . . . psychological harm." Hague Convention, art. 13 (b). They suggest that in the unexceptional circumstances associated with a run of the mill case of domestic abuse, recognizing that the exception may apply will undermine the Convention and the principles of mutual respect for the competence of the home nation that underlie the Convention.

As shown below, there is no "exceptional" or "extraordinary" requirement under the Convention and there is, in any event, no record evidence from which one could properly make a determination about whether the psychological harm that would flow from a return to the home country in this case is "exceptional" or unexceptional. Although the United States and Appellant would attempt to raise

the bar of the Article 13(b)[1] exception in cases such as this in which undertakings by the government of the home country may minimize the risk of *physical* harm, the Convention itself expressly grants an exception where there is a "grave risk . . . of psychological harm." Hague Convention, art. 13 (b) Grave risks may well arise in cases involving domestic abuse because the trauma often experienced by children in cases of domestic violence may well be grave. Efforts at repatriation, where they will reawaken the prior trauma, may, in any given case, give rise to grave risks of further psychological harm.

The fact that we have unfortunately become acclimated to hearing about domestic violence, have come to accept it as a common occurrence, and have become inured to its effects *cannot* be allowed to blind the courts to the fact that domestic violence can, and often does, give rise to grave trauma and psychological (as well as physical) harm. The trauma associated with domestic violence can be debilitating. Therefore, where the record shows, and the court has found as fact, that a child will likely suffer grave psychological harm by being returned to the state of habitual residence, it is simply no answer to say – even assuming that it

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[1] Article 13 of the Convention states "the judicial or administrative authority of the requested state is not bound to order the return of the child if the person . . . which opposes its return establishes that – (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place (continued…)

were true – that if this harm is the result of run of the mill domestic violence it should be discounted.

While it is fair to suggest that the exceptions to the Convention should be construed narrowly, the diplomatic concerns that apparently motivate the United States should play no part in the factual determination associated with the "grave risk" finding under Article 13(b). That exception is expressly recognized under the Convention; it is not a departure from its purposes. Moreover, recognition that the exception applies in the circumstances of this case reflects no disrespect for, or disregard of, the good offices of the French government: the type of harm upon which Judge Chin focused simply cannot be ameliorated by the French government and is independent of the custodial determination reserved for the French judicial system.

We explain in Part I that the trial court properly applied Article 13(b) and that Appellant and the United States' technical arguments are without merit: the record evidence fully supports the findings of the district court and the district court properly applied the Convention standards in reaching its conclusion.

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the child in an intolerable situation." Harm must be established by clear and convincing evidence. ICARA, 42 U.S.C. § 11603(2)(A).

In Part II, we explain that the bias reflected in the briefs of Appellant and the United States is unjustified and inconsistent with the Convention: the very real psychological and physical effect on children of domestic abuse can produce a situation in which there is grave risk of harm in returning a child to the child's original country of residence.

In Part III we explain that the general diplomatic concerns expressed by the United States and Appellant are misplaced. The trial court was required to make a factual finding under Article 13(b). Diplomatic issues are not part of the Article 13(b) determination.

## I. THE DISTRICT COURT'S FINDINGS ARE FULLY SUPPORTED BY THE RECORD EVIDENCE

As accurately recounted in the brief of Amicus United States, the Hague Convention was adopted to allow a federal court to address issues relating to the international abduction of children in order to facilitate the return of a child to its country of habitual residence and to allow that country to make determinations regarding custody.

That Convention also concerns itself with safeguarding children from the risk of harm. The Convention sets forth a clear exception to the otherwise applicable provisions requiring return of a child to its country of residence. Specifically, a court may refuse return where it has been shown by clear and convincing evidence that "'there is a grave risk that [the child's] return would

expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'" *Blondin II*, 189 F.3d 240, 245 (1999) (*Blondin II)* (quoting Hague Convention, art. 13(b), and citing 42 U.S.C. § 11603(e)(2)(A) for the clear and convincing evidence standard).

Judge Chin found clear and convincing evidence that return of Marie-Eline and Francois to France would indeed expose them to a "grave risk . . . [of] physical or psychological harm or otherwise place the child[ren] in an intolerable situation." *Blondin v. Dubois,* 78 F. Supp. 2d 283, 294 (2000) (*Blondin III*). After gathering and weighing all of the evidence presented in multiple proceedings, after considering the protective measures and undertakings of the responsible French officials, and after recognizing that the Art. 13(b) exception to return must be construed narrowly, Judge Chin determined that return of the children to France would expose them to a grave risk of harm. The court below properly understood the standard and its findings are controlling.

As a preliminary matter, the court below again recounted its earlier findings that Respondent "repeatedly physically abused both Dubois and Marie-Eline and had threatened to kill them on numerous occasions, and thus the children would face a 'grave risk' of physical and psychological harm at the hands of Blondin if

they were repatriated."[2] *Blondin III*, 78 F. Supp. 2d at 286. This Court acknowledged the controlling force of those findings in its prior opinion, noting that "[a]mple record evidence support[s] the District Court's factual determination regarding the risk of physical abuse that the children would face upon return to Blondin's custody." *Blondin II*, 189 F.3d at 242.

In *Blondin II*, this Court remanded to the district court for further determinations. *Id*. at 249. This Court recognized that there were two interests about which the trial court was to be mindful in making an Article 13(b) determination, the first reflecting the broader purposes of the Convention to secure the return of an abducted child to its home country and the second, encapsulated in Article 13(b), of "safeguarding the children from 'grave risk' of harm." *Id*. at 242. The district court was directed to focus due attention on the first interest, while remaining mindful of the need to protect the second, by looking for methods that might reduce the risk of harm flowing from the return to the home country.[3] Thus,

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[2] Specifically, the court found that Blondin "beat [Petitioner], often in the presence of the children. He also beat Marie-Eline . . . and twisted an electrical cord around Marie-Eline's neck." *Blondin v. Dubois*, 19 F. Supp. 2d 123, 127 (1998) (*Blondin I*).

[3] We do not, of course, take issue with this Court's approach, which is consistent with other U.S. courts. But it was not immediately apparent that the courts must take into account possible ameliorative measures when dealing with a physical threat under the current custodial arrangement monitored by the home

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the district judge was to determine whether undertakings by Blondin or the French government, or any other ameliorative methods, might reduce the grave risk of harm that the district court had found that return would otherwise present – allowing the court to return the child while still safeguarding the child from harm.

The district court did precisely as it was instructed to do.[4] It reviewed the alternatives and held that the undertakings by France and Blondin would in fact

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state. Indeed, the legislative history indicates that a broad concept of harm was meant to control.

> "A review of deliberations on the Convention reveals that 'intolerable situation' was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an 'intolerable situation' is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an 'intolerable situation' and subjected to a grave risk of psychological harm."

Public Notice 957, 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986).

[4] The lower court heard testimony from Veronique Chauveau, a witness for the government who testified regarding French custody proceedings and the support services available to Respondent in France. *Blondin III*, 78 F. Supp. 2d at 288-289. Additionally, Judge Chin contacted the French Ministry of Justice and the United

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substantially reduce the threat of physical and psychological abuse from Appellant Blondin and otherwise reduce some of the risks presented by a return to France. Thus, the district judge fully credited the ability and willingness of French officials to provide physical protection to Appellee and her children, and the authority of the French judicial system to make custody determinations.

That was **not**, however, the end of the matter for Appellee presented additional evidence on the grave risk of psychological harm that would likely flow from returning the children to France. With respect to this harm, the trial court was benefited from the testimony of Dr. Albert Solnit, who testified that the psychological impact of sending the children back to France, the site of their abuse, would "trigger a recurrence of the traumatic stress disorder they suffered in France – *i.e.*, a post-traumatic stress disorder." *Blondin III*, 78 F. Supp. 2d at 291. Dr. Solnit described the manifestations of traumatic stress disorder in Marie-Eline, which included "difficulty in eating, nightmares, interrupted sleeping and fearfulness of being away from her mother." *Id*. at 291. Dr. Solnit emphasized the children's progressive recovery from the traumatic disorders in the "'secure

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States Department of State, the appointed Central Authorities under the Hague Convention for their respective countries. *Id*. at 287.

environment of their home and extended family'" in the United States. *Id*. In that "safe environment" they could continue their recovery.

However, in "Dr. Solnit's clinical judgment, removing the children from this secure environment to return them to France would 'almost certainly' trigger a recurrence of the traumatic stress disorder they suffered in France." *Id*. Neither Appellant Blondin nor the United States presented any alternative expert opinion. As described by Solnit, and as the trial court found, given the circumstances, the "risk of post-traumatic stress disorder would be present in any proposed arrangement for returning the children to France, 'however carefully organized.'" *Id*. Thus, the court emphasized that under the circumstances of this case, the risk to the children would be experienced irrespective of the efforts of French authorities to ameliorate the situation by protecting the children from Blondin, even if custody was given to Dubois. Rather, recurrence of the post-traumatic stress disorder identified by Dr. Solnit was the predictable product of (1) forcing the children to go "back to the scene of their original trauma [France]"; (2) forcing them to leave the "place where they are beginning to feel safety and trust . . ."; and (3) thrusting them into a situation marked by "uncertainty [and] insecurity." *Id*. at 291-92. Dr. Solnit explained that the act of sending the children back, at this time and in these circumstances, would almost certainly "impair their physical, emotional, intellectual and social development." *Id*.

Judge Chin specifically credited Dr. Solnit's well-reasoned findings in concluding that "*Any* return of Marie-Eline and Francois to France, the site of their father's sustained, violent abuse, including even a temporary one-to-three month return in the custody of their mother, would trigger this post-traumatic stress disorder." *Blondin III*, 78 F. Supp. 2d at 295. In adopting those findings, Judge Chin was careful to restrict his rulings to the specific case presented. Thus, he acknowledged that uncertainty and insecurity attend any custody determination. *Id*. at 296. But here that uncertainty was "not an isolated issue": Marie-Eline is particularly sensitive to this insecurity as there have been several occasions where she has experienced a temporary peace during her parents' multiple reconciliations. In sum, Judge Chin carefully evaluated the persuasive evidence and concluded, on the basis of the record presented, that Article 13(b) plainly applied.

Appellant questions Dr. Solnit's alleged "agenda"[5], and also makes a feeble attempt to question the factual basis for those findings[6]. But there is no serious question presented here of either Dr. Solnit's qualifications, his ability to opine on

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[5] Appellant's criticism is gleaned from some of the doctor's early writings on the subject of custody determinations. Brief of Petitioner-Appellant, p. 31-33

[6] Appellant emphasized that Dr. Solnit hadn't examined Marie-Eline until it became necessary to do so for purposes of this case, an attack on almost any form of in-court psychological evaluation, arguably probative, but never determinative. Brief of Petitioner-Appellant, at ?.

this subject, or about the factual basis for his conclusions. Those conclusions were supported as well by Judge Chin's own observations of Marie-Eline in the courtroom setting and other testimony about her.[7] Neither the United States nor the Appellant presented any contrary report or testimony either to rebut Dr. Solnit's findings (which stand unrebutted) or to cast them in some different light (*i.e.* as "unexceptional" or typical of every "abuse" case). In sum, this is a case in which the district court well-understood the question presented for its determination. The district court's findings are plainly supported by the record and should be affirmed by this Court.

### A. The District Court's Fact-finding Is Subject To The Clearly Erroneous Standard

Unhappy with the district court's factual findings, the United States argues, in essence, that this Court may disregard them. It suggests that this Court might substitute its own judgment for that of the district court on the ultimate question of whether the children would be at risk of psychological harm if returned to France

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[7] Somewhat remarkably, Appellant and the United States complain that Judge Chin spoke with Marie-Eline in chambers and characterize Judge Chin's reliance on those conversations as an improper finding under Article 13 of the Convention. Brief of Petitioner-Appellant at ?; Brief of United States Amicus at ?. That overreads Judge Chin's decision. This Court specifically instructed the district court about the limited reach of that provision, which allows the judicial authority to refuse to order the child's return if it finds that the "child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." Hague Convention, art. 13.

and urges this Court to regard that question as more a matter of law then of fact. It suggests that the lower court's findings are actually "legal precepts and [the] application of those precepts to the facts." U.S. Amicus Brief, p. 13. It thus urges the Court to adopt what it calls a "plenary," and by which it means a *de novo*, standard of review. *Id*. There is no basis for the Government request.

As the government appears to concede, the decisive issue on the face of things here is a fact issue: whether return would expose the children to a "grave risk . . . [of] physical or psychological harm." Hague Convention, art. 13(b). This finding has all of the earmarks of a classical, factual determination of the type understood to be best resolved by the trier of fact and upon which the courts of appeals should be reluctant to intrude. (CITE SOME SUPREME COURT CASE on CLEARLY ERRONEOUS). It bears none of the earmarks of the kind of mixed question under which the legal and factual aspects of the determination *cannot* be disentangled, for the question that the court is asked to answer involves some specialized legal matter. Moreover, while the Government states that this Court did not address the standard of review in *Blondin II*, a fair reading of the Court's decision reveals this Court's understanding (or, at least, assumption) that it was obligated to defer to the trial court's findings unless clearly erroneous. While not explicitly addressing the standard of review, this Court plainly treated the lower court's findings as determinations of fact. The Court vacated the district court's

judgment because it was not apparent that the district court had undertaken the proper inquiry, **not** because it disagreed with the factual conclusions.

This Court may, of course, reverse the lower court in an Article 13(b) case if it is convinced that the lower court misunderstood the standard, or failed to conduct the proper inquiry, by failing to consider the relevant factors or by determinative reliance on irrelevant ones. *See Icicle Seafoods, Inc., v. Worthington*, 475 U.S.709, 713-714 (1986). These are matters of law. But the Court is not free to reject findings of fact either because it might have viewed the evidence differently, or because it wishes to defer to the expressed wishes of the Executive Branch about how it would like this case to come out. *See Anderson v. Bessemer City*, 470 U.S. 564-573-74 (1985).

In truth, the subtext of the Government's plea for de novo review is based on a different notion. At the heart of the Government's plea is the notion that this is a "Hague Convention" case, raising issues of international responsibility, and that in a case with important implications for international relations, broader policy concerns play a dominant role. Thus, the Government intimates that the abstract values and issues involved in making the relevant determination must be matters of law. U.S. Amicus Brief, p. ?

In this respect, the Government errs, for the Hague Convention provisions at issue here are amenable to factual resolution and determination. *See Shalit v.*

*Coppe*, 182 F.3d 1124, 1127 (9th Cir. 199) ("In a case brought under the Hague Convention, we review the district court's findings of fact for clear error and its conclusions about United States, foreign, and international law de novo.") The provisions of Article 13(b) set forth a matter of factual determination. And this indeed is precisely what Congress must have had in mind when it assigned the responsibility for the determination to the courts. Federal courts are well-suited to fact-finding. They are far less able to make diplomatic judgments, and should not presume that such judgments have been thrust upon them in the first instance. *See Maine v. Taylor*, 477 U.S. 131, 144-45 (1986). Thus, where the court has been assigned the task of taking evidence to make what appears to be a factual decision, there is no basis upon which to conclude that the decision requires something other than the determination of the fact assigned. That does not mean that the courts cannot understand an instruction to apply an exception narrowly, or even in a manner consistent with the overall purposes of the treaty. That type of instruction is in a form consistent with the customary role of a court, little different from the interpretation of a statute in light of its purposes. But if the trial court understands the standard, its factual findings control..[8] *See Icicle Seafoods, Inc.* 475 U.S. at 713-714.

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[8] As discussed below, we believe that the Government errs when it attempts to (continued…)

Here the Government suggests no way to view or interpret the determination that the return of Marie-Eline and Francois to France, "the site of their father's sustained, violent abuse . . . would trigger this post-traumatic stress disorder" and almost certainly "impair their physical, emotional, intellectual and social development" of the children, as something other than a finding of fact. *Blondin III*, 78 F. Supp. 2d at 291-292. Given that finding, which this Court, as a practical matter, is in no position to supercede, the case falls comfortably within the province of Article 13(b). *See Anderson*, 470 U.S. at 573-74; *Shalit*, 182 F.3d at 1127.

As the Government acknowledges, the majority of other circuits addressing the proper standard of review in Hague Convention cases apply the clearly erroneous standard to the trial court's factual findings. U.S. Amicus Brief at 14. Whatever contrary approach might be suggested by the passing footnote in *Feder* upon which the Government relies, the findings at issue here are clearly factual in nature and may only be reviewed under the clearly erroneous standard.

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inject policy considerations involving its view of international relations into the *factual* determination under Article 13(b). If policy considerations have a broader role in a particular case, that role should not be manifested in an improper attempt to corrupt the factual findings under Article 13(b). Rather, such considerations, if they may have a role at all, would have to be addressed in a different context.

### B. Appellant And The Government's Efforts To Identify Legal Errors Are Without Merit

#### 1. The District Court Did Not Err In Considering The Stable Environment In Which The Children Now Live Or The Effect Of Upsetting That Stability In Evaluating Harm To The Children

Appellant notes that Dr. Solnit and the district court looked to the stability that the children had been experiencing in their new environment and had become accustomed to it. Brief of Petitioner-Appellant, p. 20. Thus, Dr. Solnit emphasized that they would be taken from a "place where they are beginning to feel safety and trust . . ."; – and that one of the factors that informed the determination that they would be harmed by being returned to France is that the stable and reassuring bonds that they had begun to form in this environment, after years of turmoil and abuse, would be torn open. *Blondin III*, 78 F. Supp. 2d at 291. Appellant objects to the court's consideration of how deeply rooted or well-settled the children are in the new environment, arguing that "such a factor [the length of time the child is in the United States] may only be considered if the return proceeding is commenced more than one year after the abduction." Brief of Petitioner-Appellant. at 20. Appellant is wrong.

It is true enough that if a child is in the United States for less than a year when an application for return is made, a judicial authority is generally not allowed to examine whether a child is well settled in an environment. Hague Convention,

art. 12. Article 12 establishes a presumption for return *unless* a return application is made more than a year after abduction and the child is well settled in her new environment.. Unlike Article 12, however, Article 13 is not concerned with the timeliness of an application. Article 13 (b) addresses harm, and is independent of the Article 12 time analysis. The fact that the child has become settled in the new environment is simply one of the many facts that might or might not bear upon the question of whether there would be a grave risk of harm in returning the child to its country of origin. *See, e.g., Friedrich v. Friedrich*, 78 F. 3d 1060 (6th Cir. 1996) (interpreting grave harm using a variety of factors). The orientation of Article 13(b) is plainly humanitarian, focusing on the effect on the child – Is it likely to cause serious harm or not? Perez report, para. 116 (stating that Article 13 (b) deals with "situations where [] abduction has occurred, but where the return of the child would be contrary to its interests.") It is difficult to conceive that having expressly excepted from the return provisions of the Convention a return that would injure the child, the framers of the Convention would allow a child to be seriously harmed merely because one of the sources of that harm was the separation from a therapeutic and beneficial attachment developed over time. The Convention, by its terms, seeks to guard children from harm, whatever its source.

Indeed, this Court seems to have recognized as much:

QUOTE.

If the children had not developed a stable environment here and were passing from one homeless shelter to the next, the district court certainly could have recognized that there might be no particularly negative effect on the children in being left in a state of uncertainty for some additional period of time until France finalized custodial arrangements. Here, the district court necessarily considered the opposite. The district court did not err when it considered the totality of the circumstances bearing on the child's psychological well-being. Perez report, para. 23 ("While the convention contains no explicit reference to the interests of the child . . . silence on this point ought not to lead [ ] to the conclusion that the convention ignores . . . the necessity of considering the interests of the children.")

The Government, for its part, takes a similar tack in attacking the district court's ruling. It complains that in taking into account the effects of uncertainty (created by sending the children back to France for a custody determination) on the children's psychological well-being, the court "fail[s] to appreciate that crediting such uncertainties, even those existing against a background of past abuse, as a basis for non-return under the Convention expands the 'grave risk of harm' exception to the point where it threatens to undermine the central goal of the Convention, namely, the prompt return of abducted children to their country of habitual residence." U.S. Amicus at 19.

But again, there is no basis under the Convention for postulating that one or other factor, among many factors, all of which bear on the child's psychological well-being, should be excluded from consideration. Indeed this Court has so recognized, stating that the district court "will have the opportunity to exercise its broad equitable discretion to develop a thorough record to facilitate its decision." *Blondin II*, 19 F. Supp. 2d at 249. The trial court is not charged with adding up factors. Rather, the court's determination revolves around the psychological health of the child. There is simply no way to arbitrarily exclude some factors and include other factors in making an assessment whether returning the child to the home country will expose the child to harm. Here, the trial court found, it will. Nothing in the Convention suggests that the framers believed that they wished to compel courts to issue an order that would expose children to serious harm. In fact, the Convention desires the opposite. "The interests of a child in not being removed from its habitual residence . . . gives way before the primary interest of any person in not being exposed to physical or psychological danger. . ." Perez report, para. 23.

### 2. The District Court Did Not Apply The Best Interests Of The Child Standard Or Delve Into Custody Determinations

Both the Government and the Appellant appear to suggest that the district court somehow allowed itself to be lured into making a determination of custody, in effect apply a "best interests of the child" standard. The suggestion is wrong.

To be sure, a determination about whether a child will suffer harm in being returned to its country of normal residence will bear some similarities to an inquiry into the best interests of the child. But the standard is higher, as the district court clearly recognized, and the inquiry is ultimately different. In this case, the district court did not purport to determine the relative advantages of returning the children to France versus allowing them to remain in the United States. Rather, the district court identified a specific, perhaps permanently debilitating injury, that the children would be likely to suffer if returned to France. *Blondin III*, 78 F. Supp. 2d at 295. While avoidance of that harm is in the children's best interests, the district court did not apply the best interests standard.

Similarly, the Government's insistence that the courts should not delve into custody determinations has no application here. The district court did not do so. *See id*. at 298-99. Its determination of harm to the child was made independent of whether Blondin had custody or not. *See generally id*. If indeed Blondin's custody was to be given effect, the trial court's decision in *Blondin I* would control. But *Blondin III* focuses on return to France and the trauma associated with that return.

In this respect, the Government's concern that the decision of the district court somehow displays a disrespect for the offices of the French government and its undertakings is thoroughly misplaced. U.S. Amicus Brief, p. 21. The district court was at pains to credit the French government's undertakings. *Blondin III*, 78 F. Supp. 2d at 298. The district court quite clearly assumed that the French government would do all that it could to make the proper custody ruling, or to protect the children *ad interim*. *Id*.

The district court's finding was based explicitly on the fact that it was not feasible to protect the children from the real psychological harm that they would suffer if returned to France at this time. *Id*. at 294. This finding casts no aspersions on the bona fides of the French judicial system or the bona fides of the French officials who would have some role in the care of the children.

In contrast, and perversely, the scheme apparently envisioned by the Government would have the opposite effect. The Government seeks implicitly to inject diplomatic considerations into every Article 13(b) determination. Thus, the district court would be forced to somehow weigh those considerations along side the factual determination concerning harm to the child that it makes under Article 13(b). Within that framework, any failure to return a child would necessarily be viewed as casting aspersions on the ability or bona fides of the home state to do its

job. In this case, the harm at issue is real – and beyond the apparent ability of the French government to prevent.[9]

### 3. The District Court Did Not Improperly Consider The Wishes Of The Children

As one of many factors leading to the conclusion that Marie-Eline and Francois should not be returned to France, the district court concluded that while Marie-Eline was not of a sufficient age and maturity to qualify outright for the Article 13 exception to return based on a child's wishes, she was bright and articulate enough for her recollections of the abuse and wishes regarding return to be given some, although not dispositive, weight. *Blondin III*, 78 F. Supp. 2d at 296. The government argues that this is plain error, in effect saying that there is no possible way that the district court could have accorded any weight to Marie-Eline's views. U.S. Amicus Brief, p. 22. The government, however, never presented Judge Chin with any evidence casting doubt upon the veracity of Marie-

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[9] Judge Chin's decision recognizes the obvious that even state sponsored protection may not be enough to prevent the kind of harm contemplated by Article 13(b). We have come to recognize in this country that domestic violence is an intractable problem and that the legal system may be ill-equipped to deal with all aspects of the effects of domestic violence, especially on children. *See, e.g.* Naomi R. Cahn, Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions, 44 Vand. L. Rev. 1041, 1089-96 (1991). Judge Chin, as directed by this Court, looked at all of the options presented to him by the French government and still concluded that the uncertainties of the custody proceedings coupled with the proven history of serious physical abuse posed a grave risk of harm to these children. *Blondin III*, 78 F. Supp. at 296.

Eline's testimony. In fact, although the present case does not involve adjudication of custody, courts routinely consider the testimony of children, some as young as Marie-Eline, in family relations matters, including those involving domestic violence. More importantly, decisions about whether a child's testimony should be taken into account are upheld as being within the sound discretion of the trier of fact. *Jelenic v. Jelenic*, 690 N.Y.S. 2d 782, 784 (1999) ("[C]redibility determinations are clearly within the province of Family Court.")

Accounting for a child's preferences, although not dispositive, is a proper consideration in domestic relations matters. *Id.; See, e.g., Chamberlain v. Chamerberlain*, 687 N.Y.S. 2d 485, 486 (1999). It is especially appropriate in matters involving domestic violence because of the harm inflicted upon the children. *See In re Lonell J., Jr.*, 673 N.Y.S. 2d 116, 118 (1998). Children the same age as Marie-Eline have been found capable of communicating "the effects of domestic violence on their emotional and mental state." *Id.* While the government interprets Marie-Eline's statements in a particular manner and accords them minimal weight, the government is not the trier of fact: Judge Chin is, and he concluded that Marie-Eline was believable for the purposes to which he used her testimony, as one facet of many in concluding that the children would suffer a recurrence of their trauma if returned to France. *Blondin III*, 78 F. Supp. 2d at 296. The government spends considerable time interpreting cases that analyze the

Article 13 child's objection exception, but the analysis is irrelevant. U.S. Amicus Brief, at 22-27. Judge Chin did not base his decision to deny Petitioner's request on that provision of the Convention. *Blondin III*, 78 F. Supp. 2d at 296. The lower court utilized Marie-Eline's unchallenged testimony as but one factor to be considered in assessing grave risk of harm.

#### 4. The District Court Did Not Apply Too Low A Standard

As we will explain in detail below, the Government seems to believe that the district court's findings, based as they are on the conclusion that past trauma from domestic violence may contribute to psychological harm on return of the child to the home country, somehow extends Article 13(b) and trivializes the harm required to be found under Article 13(b). When called upon to explain the types of harm that might properly give rise to the application of Article 13(b), the Government readily cites war, sexual abuse, or the kind of active physical abuse that the children suffered, or witnessed, at the hands of Appellant Blondin. U.S. Amicus Brief, at ?

Yet the language of Article 13(b) clearly invites a broader inquiry. It expressly concerns itself with grave risk of psychological harm, and thus invites precisely the kind of inquiry that the district court engaged in here – assessing whether the child would suffer psychological harm from return to France. Hague Convention, art. 13 (b). In making that assessment, the district court was mindful

of the need to focus on the level of severity and the specific injury that it feared. In this respect (and as we set forth more fully below), the district court necessarily took into account that the background to this "abduction" was a history of domestic violence. *Blondin III*, 78 F. Supp. 2d at ? This was not simply a case in which a parent, disappointed with a custody determination, sets about to abduct the child, presenting the position that it is the more suitable caregiver, and the better parent, psychologically, for the child. Rather, consistent with the evidence presented to him by the parties, the district court judge focused on the specific trauma suffered by these children – and the effect of repatriation on children so traumatized. *Id*. at ? It is that fact that is ultimately disregarded by the United States and the Appellant in presenting its position.

### 5. The Convention Requires No Finding Of "Extraordinariness"

A theme running through the briefs of Appellants and the Government is the notion that if the Court were to find that Judge Chin acted properly in finding that the Article 13(b) exception applied in this case, this would somehow open the floodgates to district courts refusing to repatriate abducted children, thereby undermining the Convention. Brief of Petitioner-Appellant, at p. ?; Brief of U.S. Amicus, at p. ? Thus, we find in the briefs the notion that this case is not sufficiently exceptional or extraordinary to warrant the application of Article 13(b): if the harm rising to the standard necessary under Article 13(b) is found in

this case, harm will be found in every case alleging abuse, undermining the purpose of the Convention by enlarging the exception to the point where it becomes the rule. The support for this notion is presumably found in the idea that the overall purpose of the Convention is to secure the return of abducted children and exceptions should be applied narrowly. *See generally, e.g.,* Perez report.

While Judge Chin recognized that Article 13(b) was intended to apply in extraordinary cases, there is, of course, no requirement of extraordinariness in the Convention itself. Cite. Rather, Article 13(b) sets forth an independent exception to the return provisions of the Convention. It describes a specific limitation on the reach of the Convention's return provisions that is as much a part of the Convention as the return provisions themselves. The Article 13(b) exception includes no quota or consideration of the impact of the case on diplomatic relations. Rather, by its terms, it focuses on the circumstances of the particular case before the trial court. The command of Article 13(b) is plainly the protection of the children whose return is the subject of the return request.[10]

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[10] Neither Respondent nor Amicus NOW is asking for a blanket rule regarding all Convention cases alleging domestic violence as a basis for an Article 13(b) finding of grave risk of harm. Respondent asks only that her case be heard on its own merits. Even if the government provided the lower court with statistics regarding the use of domestic violence to meet the Article 13(b) standard, the government's argument displays a failure to appreciate, and confuses, the required factual findings under the Convention. The Convention requires a finding of grave

(continued…)

There is no dispute, of course, that the exceptions to the return provisions of the Convention are to be construed narrowly; this would arguably preclude a court from adopting a definition of "grave risk" or "harm" so artificially broadened that it would apply in virtually every case. *Blondin I, II, III, etc*. But where, as here, the facts of the case clearly and demonstrably show a grave risk of harm to the child from return to the country of habitual residence, *i.e.* satisfying the requirements of the exception as stated, there is no requirement for the district court to consider how many such cases might arise, or if there are many such cases what the effect might be on diplomatic relations.

Therefore, we may concede that the exceptions, properly applied, should apply narrowly, indeed exceptionally. But extraordinariness or exceptionality in this context does not revolve around the numbers of cases of a particular type or kind that make it to the federal court. The background against which exceptionality is to be judged involves an "ordinary" abduction, in which a parent simply seizes a child, hoping for a more favorable custody ruling, or perhaps freedom from any custody ruling by a court of law, in a different country. Against that background of the "ordinary" abduction, an abduction involving a child

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(…continued)

risk of harm. Whether the government finds the harm typical, unexceptional, or "ordinary" does not change the validity of the lower court's findings.

traumatized by domestic violence, whose return to the home country would reenergize the trauma, with the likelihood of permanent debilitating effects on the child, is plainly exceptional. *Cf, e.g.* Convention cases where abuse not proven.

The Government intimates that in cases of domestic violence similar findings might be rendered in many cases. Whether that is true or not is not apparent from the record evidence. Maybe similar findings will be wanted in a large number of cases involving extreme and persistent domestic violence experienced by the children. Hopefully, if that is the case, there will not be many instances of such persistent and extreme domestic violence brought to the federal courts under the Convention by abusive parents.[11] But even if it were true (1) that a very high percentage of cases of "abduction" and claimed return arise out of circumstances of domestic abuse and violence, and (2) such violence would predictably traumatize the children who witness it in a manner that would render it harmful for them to return them to their country of origin after achieving some measure of stability, trust and security in the United States, the mandate of the

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[11] At various points, Appellant and the Government suggest that not only must a case be exceptional to warrant the application of Article 13(b), but that domestic violence is itself so common as a reason for abduction that the court must find the case to involve an exceptional instance of domestic violence for Article 13(b) to apply. In truth, there is no exceptionality requirement. The focus of the trial court is necessarily and exclusively on the facts of the case at hand.

Convention that return not be commanded where the child would be harmed must still be respected.

## II. THE GOVERNMENT IS IMPROPERLY AND UNTHINKINGLY DISMISSIVE OF THE VERY REAL TRAUMA AND DANGER TO CHILDREN ARISING FROM DOMESTIC VIOLENCE

The Government is apparently willing to acknowledge that a finding that a child will specifically suffer the ravages of war, sexual abuse, or perhaps other forms of physical abuse, if returned to its home country, might give rise to the proper application of Article 13(b). The Government is apparently skeptical, however, of citing the trauma associated with domestic violence as part of the rationale for concluding that a child will suffer harm if returned to its country of habitual residence. Thus, the Government cautions this Court that "while allegations of abuse are not always made, invocation of such allegations is becoming more ordinary as 'parents attempt to stave off return orders in the name of the child's welfare.'" U.S. Amicus at 19.[12] We have no way of knowing

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[12] The government's language presents the image of desperate parents saying or doing anything they can to prevent return, including lying about abuse. It ignores the *reality* that domestic violence has been called an epidemic and the reasonable assumption that at least some of the parents who flee their home country with their "abducted" children do so because of domestic abuse. The government did not present to the lower court and does not present now any evidence that parents are fabricating tales of abuse to meet the Article 13(b) standard of harm. The Government assuredly does not suggest that Appellant did not engage in serious abuse in this case or that the abuse did not affect the children in a most serious way.

whether the Government is correct that such charges are "becoming more ordinary" and whether, if "more ordinary," they are true or untrue. That is a matter for the fact-finder. Moreover, even if such allegations are made, under this Court's ruling in *Blondin II*, such allegations, even if made and credited, may not be enough to stave off repatriation. Rather, the return issue will revolve not around past abuse, but on the psychological circumstances of the child and the conclusion that returning the child to the home country will, under the precise circumstances presented and the accommodations that the home country is willing to make, expose the child to a grave risk of psychological or physical harm.

Moreover, the Government's apparent willingness to overlook the effects of domestic violence, while expressing an apparent willingness to credit the effects of war or physical violence on a child, reflects a classic error: looking at harm through the eyes of an adult, and not the child itself. War, through the eyes of an adult, may well appear more terrible than domestic violence. The adult may well be able to process the panorama of a war and appreciate its horror. So, perhaps, may some children.

In contrast, many adults, perhaps particularly male adults, have become inured to domestic violence. From a child's perspective, however, domestic violence may be every bit as devastating as war, if not more so because the

perpetrator of the violence is not a faceless enemy, but a supposed caregiver, dominating the child's world.

The effect of domestic violence on children is well documented. Thus it is frequently, although not always, true that children will suffer psychological as well as physical harm from exposure to domestic violence, either directly as a first hand victim or by witnessing the abuse of a parent or sibling. Numerous studies have examined the effects of domestic violence on children, and concluded that the trauma is both immediate, resulting in shock, fear, and guilt, and long lasting, resulting in post traumatic stress disorder, impairment of cognitive, verbal, and motor abilities, anxiety, depression, and deviancy. Amy B. Levin, Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?, 47 UCLA L. Rev. 813 (2000); Linda Keenan, Note, Domestic Violence and Custody Litigation: The Need for Statutory Reform, 13 Hofstra L. Rev. 407, 419 (1985). It is irrefutable that "domestic violence affects children cognitively, emotionally, and physically." Cahn, 44 Vand. L. Rev. at 1055-1058. "Witnessing domestic violence, no matter how frequent or intense, can produce trauma rising to the level of diagnostic significance in children." Catherine C. Ayoub *et. al.*, Emotional Distress in Children of High-Conflict Divorce: The Impact of Marital Conflict and Violence, 37 Fam. & Conciliation Courts Rev. 297, 300 (1999).

A brief review of the literature reveals an immense catalogue of disorders that children raised in violent homes suffer from: "depression, anxiety [ ] withdrawal . . . aggression, 'acting out behaviors' . . . substance abuse or suicide." Levin, 47 UCLA L. Rev. at 832-833. Even when children do not directly witness attacks, they may be "deeply affected by the climate of violence in their home." Keenan, 13 Hofstra L. Rev. at 419; See Honorable Sheila M. Murphy, Guardians Ad Litem: The Guardian Angels of Our Children in Domestic Violence Court, 30 Loy. U. Chi. L.J. 281, 283-285 (1999).

Unfortunately, in many, many cases, domestic violence "is not taken seriously" in family relations matters. Cahn, 44 Vand. L. Rev. at 1072. For recognizing the debilitating effects of domestic violence on children, the government implicitly criticizes the lower court. But given the violence to which Marie-Eline and Francois were exposed to by their father's attacks, including the violence perpetrated on Marie-Eline herself, and also the unstable and shifting environment caused by Ms. Dubois' efforts to free herself from Appellant's abuse, it is perhaps not surprising that there was clear evidence of trauma in this case. In light of that evidence of prior trauma, and the further evidence of the children's stabilization and healing in a more secure environment, it should not be entirely surprising that these children were found, upon examination, to be susceptible to post-stress trauma triggered by sending them back to their country of habitual

residence for additional legal proceedings. But whether surprising or predictable, the fact remains that the evidence supports the findings of Judge Chin that these children, in this case, would suffer from their return to France at this time, placing them in grave risk of harm. *Blondin III*, 78 F. Supp. 2d at 295.

## III. THE GOVERNMENT'S DIPLOMATIC CONCERNS HAVE NO PLACE WITHIN THE ARTICLE 13(b) ANALYSIS

Finally, the Government appears to be concerned about the reaction of the French Government to the district court's findings. U.S. Amicus Brief at ? For the reasons described above, we do not believe that any French concerns are justified: The district court has found facts. Those facts, properly considered and objectively read, do not disparage the offices of the French Government in any way. Rather, they address a very real issue of harm to the children resulting from domestic violence – and a concern for the interests of the children in the circumstances of this case, which the French Government should appreciate and encourage.

But to the extent that the United States has legitimate interests in international relations that it believes should be a part of the return analysis under the Hague Convention, the United States should not seek to further that interest by injecting diplomacy into an Article 13(b) determination. As implemented by

Congress, the determination to be made under Article 13(b) is for a district court.[13] As such it should – indeed must – reflect the type of determination for which the judicial branch of government is suited. As stated, Article 13(b) requires a factual determination that requires a singular focus (consistent with legal standards) on harm to the child whose return is being sought. That determination should not be corrupted by injecting diplomatic concerns into the factual analysis.

If there were to be a broader role for diplomacy in implementing the Convention, Congress must describe that role. At a minimum, one would expect that role to be assigned to the Executive Branch. In this case, there has been no such intervention. Thus, whatever role diplomacy might play in implementing the Hague Convention, it has not been a proper part of this case.

## CONCLUSION

The judgment of the district court should be affirmed.

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[13] The Convention does not require a court system to adjudicate Hague petitions. It specifically refers to *both* the judicial or administrative authority enforcing the provisions of the Convention. *See, e.g.,* Arts. 11, 13 and 15. If Congress wished executive concerns to be a part of a petition's consideration, it was well within the legislature's authority to enforce the Convention through the executive branch, allowing an agency to express the executive's views in an administrative proceeding.

Respectfully submitted,

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