(all of which Dubois is eligible for). Id. The district court also found that, if there were immediate danger to the children, Dubois could seek an immediate protective order from a juvenile justice in France, granting her temporary custody. Id. at 288 n.5. In addition, the district court noted an agreement by the French government that, if Dubois returns to France, she will not be criminally prosecuted for the abduction. Id. Based on these facts, the district court stated that it had "every confidence in the ability of the French administrative and judicial systems to protect and support [the children] pending the adjudication of the custody case." Id. at 299.

Nonetheless, the district court again refused return based on the "grave risk" exception in Article 13(b). The district court openly questioned the wisdom of the narrow reading given to the "grave risk" provision in this Court's prior opinion. Id. at 297-98. The district court then concluded that, even if it were to apply that narrow interpretation, the standard would be satisfied here because "any repatriation arrangements, including even the return of the children in their mother's temporary custody with financial support by Blondin and French social services, would expose Marie-Eline and Francois to a 'grave risk' of psychological harm." Id. at 285. This conclusion was based on the testimony and report of psychiatrist Dr. Albert Solnit -- accepted by the court in full, id. at 290 -- that separation from their new home and extended family, and return to a country where they were abused, amidst the uncertainties of custody proceedings, would exacerbate the trauma suffered by the children due to the abuse, and would interfere with their psychological healing. Id. at 291-92, 295-96. In addition, "as one of the several reasons why I am invoking Article 13(b)," id. at 296, the district court found that Marie-Eline, at age eight, "'has attained an appropriate age and degree of maturity at which it is appropriate to take account of her views,'" id. at 296 (quoting Article 13 of the Convention). The court added that, "[a]lthough her views are by no means dispositive," Marie-Eline did not want to return to France "because she does not want to be subjected to further physical and emotional abuse at the hands of her father," id.

# Summary of Argument

The standard of review to be applied on this appeal should be plenary, as the issues present mixed questions of fact and law, and there is no dispute with regard to the district court's findings of historical and narrative fact. Moreover, appellate clarification not only of the legal standards, but also of their application to the facts, is appropriate. See Point I.A., infra. However, regardless of whether the Court considers the issues to be pure questions of law or mixed questions of fact and law, the result should be reversal of the district court's decision, as it contravenes the purposes of the Hague Convention and the specific direction of this Court. Instead of following this Court's mandate to seek to facilitate return, and in contravention of its own finding that the French authorities could protect the children from future abuse upon their return, the district court adopted testimony to the effect that the children's "best interests" and long-term psychological well-being counseled against their return to the country of France (as distinguished from return to the custody of their father). On that basis, the district court again incorrectly applied Article 13(b) and refused to order the children returned to France. See Point I.B., infra. Moreover, the district court included in its Article 13(b) analysis an erroneous interpretation of the separate Convention provision allowing a court to refuse return based on an explicit objection to return by a child of "appropriate age and maturity." That provision does not make a child's objection part of a "grave risk" analysis, but provides a separate basis to deny return if the requirements of the "objection" provision are met. Those requirements were not met here, as the child did not state an objection to return to France distinct from return to her father's custody. Moreover, the child was not of sufficient age and maturity independently to interpret her own interests and make the sort of determinative decision to which a court might give conclusive effect under Article 13. See Point I.C., infra.

**ARGUMENT**

**THE DISTRICT COURT’S FINDINGS REGARDING THE**

**FRENCH SYSTEM'S ABILITY TO PROTECT THE CHILDREN**

**FROM FUTURE ABUSE SHOULD HAVE LED TO AN ORDER OF RETURN**

**A.Standard of Review**

In Blondin II, this Court did not address the standard of review to be applied in a case such as this, brought under the Hague Convention. In the United States' view, the appropriate standard of review is that applied by the Third Circuit in such cases: "plenary review of the [district] court's choice of legal precepts and its application of those precepts to the facts," with the clearly erroneous standard applied only to "the district court's historical or narrative facts." Feder, 63 F.3d at 222 n.9. Application of this standard would comport with this Circuit's practice in other types of cases raising mixed questions of fact and law.

Ordinarily, this Court reviews the factual findings of the district court under the "clearly erroneous" standard, see Fed. R. Civ. P. 52(a), while legal conclusions are reviewed de novo, see United States v. McCombs, 30 F.3d 310, 316-17 (2d Cir. 1994). This has been the approach of all the courts of appeals to address the standard of review in Hague Convention cases, other than the Third Circuit. See Shalit v. Coppe, 182 F.3d 1124, 1127 (9th Cir. 1999); Lops v. Lops, 140 F.3d 927, 935 n.6 (11th Cir. 1998); Friedrich II, 78 F.3d at 1064.\* However, "[i]n a bench trial, . . . 'where the functions of fact-finding and exposition of law are performed by the same person, the line between the functions is not always distinct.'" McCombs, 30 F.3d at 317 (quoting American Society of Composers, Authors and Publishers v. Showtime/The Movie Channel, 912 F.2d 563, 569 (2d Cir. 1990)). Moreover, "'findings made in the context of a bench trial might be derived from legally impermissible factors, the failure to consider legally relevant factors, the application of incorrect legal standards, or the misapplication of correct legal standards.'" Id. (quoting American Society of Composers, Authors and Publishers, 912 F.2d at 569). Thus, while the reviewing court "'must respect findings of the trial judge as to what in fact happened and in addition . . . give due weight to his superior opportunity to acquire the true feel of the case,'" id. (quoting In re Hygrade Envelope Corp., 366 F.2d 584, 588 (2d Cir. 1966) (emphasis added in McCombs)), "'when the issue is [the trial court's] application of a legal standard to facts undisputed or reasonably found,'" id. (quoting In re Hygrade, 366 F.2d at 588 (brackets added in McCombs)), the reviewing court "will not shy away from plenary review" to ensure that the result is consistent with the applicable rule of law, id.; see also Muller v. Committee on Special Educ., 145 F.3d 95, 102 (2d Cir. 1998) (application of statutory and regulatory definitions to particular facts of case is mixed question warranting de novo review).

Moreover, plenary, or de novo, review of mixed questions is particularly appropriate in cases brought under the Hague Convention, because of the need for uniform interpretation, see 42 U.S.C. § 11601(b)(2)(B), and the importance of properly applying the Convention in the spirit of trust and cooperation between States necessary for the Convention's proper functioning, see Blondin II, 198 F.3d at 248 n.7. Where, as here, a court of appeals is as well positioned as the district court to assess whether the facts satisfy the standards of the Convention, and the Court's decision on these issues may have value in clarifying the law, plenary review of mixed questions should be applied. See