Docket No. 21-35210

In the

United States Court of Appeals

For the

Ninth Circuit

SETH BASIL COLCHESTER,

Petitioner-Appellee,

v.

JEWEL LAZARO,

Respondent-Appellant.

Appeal from a Decision of the United States District Court for the Western District of Washington, No. 2:20-cv-01571-JCC · Honorable John C. Coughenour

BRIEF OF *AMICI CURIAE* SANCTUARY FOR FAMILIES, LEGAL MOMENTUM, THE WOMEN'S LEGAL DEFENSE AND EDUCATION FUND, FAMILY VIOLENCE APPELLATE PROJECT, JOAN S. MEIER, LAWYERS COMMITTEE AGAINST DOMESTIC VIOLENCE, LEGAL VOICE, MERLE H. WEINER, SEXUAL VIOLENCE LAW CENTER, AND WASHINGTON STATE COALITION AGAINST DOMESTIC VIOLENCE IN SUPPORT OF APPELLANT JEWEL LAZARO AND IN SUPPORT OF REVERSAL

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FED. R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT

None of the corporate *Amici* have a parent corporation, and no publicly held corporation owns 10% or more of the stock of any of the *Amici*.

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*[1]

Amici are non-profit organizations as well as individuals that represent, advocate for, and/or support victims of gender-based violence, including victims of domestic and sexual violence and their children. *Amici* provide legal and advocacy services to tens of thousands of child and adult victims of domestic violence across the United States and have considerable experience and expertise in the dynamics of intimate partner violence present in this case, as well as the physical danger and psychological harm that domestic violence victims and their children confront. Each *Amici* is described more fully in the declaration attached to the accompanying motion, and each is deeply concerned about this appeal because the district court fundamentally denied Ms. Lazaro due process by refusing to permit the fact and expert discovery essential to her grave-risk defense—particularly given the law requires Ms. Lazaro to establish that defense by clear and convincing evidence.

[1] No counsel for a party authored this brief in whole or in part, and no party's counsel, party, or person other than amici curiae contributed money intended to fund preparing or submitting the brief.

PRELIMINARY STATEMENT

The record establishes Petitioner's physical and psychological abuse of his family but lacks expert analysis tailored to show how his abuse creates a grave risk of exposure to harm to S.L.C.—not because that analysis was unavailable, but because the district court summarily chose not to permit it. Rather than allow discovery essential to enable Ms. Lazaro to establish her grave-risk defense by clear and convincing evidence under the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention"), the district court denied all discovery, only permitted testimony from a psychologist who briefly interviewed S.L.C. for a different purpose almost a year before the filing of this case, and then discarded that testimony as unreliable.

The district court's actions were fundamentally unjust because they limited Ms. Lazaro's ability to make a record while simultaneously holding her to the highest burden of proof in a civil action to establish her grave-risk defense. The result is not only to deny Ms. Lazaro appropriate process, but to risk creating a chilling effect upon parents seeking to protect their children from harm by proving their worst fears about seeking relief—they will not be heard, they will lose their children anyway, and they will be punished with paying an abusive partner's legal fees for their efforts.

This Court should not be the first to affirm a district court's summary refusal to permit expert discovery in cases under the Hague Convention. Nor should the Court sanction ignoring scientific and specialized knowledge precisely where a district court, as factfinder, needs it to understand the far-reaching and devastating effects of domestic violence on children. The Court should reverse.

ARGUMENT

Whether a child is subject to a grave risk of exposure to harm under the Hague Convention is a complicated legal and factual inquiry. A respondent pleading a grave-risk defense must establish it by clear and convincing evidence, 22 U.S.C. § 9003(e)(2)(A), the highest standard of proof possible in a civil action. Moreover, the Hague Convention places "paramount importance" on the child's interests and safety (Hague Convention, preamble, Oct. 25, 1980[2]), thus making the grave-risk inquiry an essential part of the Court's analysis. Litigating a grave-risk defense thus almost always requires multiple expert opinions to provide a court an informed understanding of the risks of returning the child to the petitioner.

Here, the district court refused to allow Ms. Lazaro to take essential fact and expert discovery while simultaneously requiring her to prove her defense by clear

[2] *See also* Hague Convention Explanatory Report at 433 ("[T]he interest of the 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").

and convincing evidence. *First*, expert psychological evaluation of mother and child and expert testimony concerning available resources in the country to which a petitioner seeks a child to return is essential to evaluate grave risk. *Second*, the district court's decision to prohibit discovery essential to establish Ms. Lazaro's defense deprived her of that defense. *Third*, the district court misconstrued Ms. Lazaro's prior attempts to seek help as attempts to abuse the legal system. *Fourth*, the district court's award of attorneys' fees not only penalizes Ms. Lazaro from acting in good faith to protect her child, but chills similarly situated parents from seeking relief, and reinforces Petitioner's abusive authority and control over Ms. Lazaro by undermining her financial security.

I. Expert Discovery is Essential to Evaluate the Grave-Risk Defense under the Hague Convention.

In *Amici*'s experience, litigating a grave-risk defense in a case where a respondent has alleged domestic abuse and child abuse requires three types of expert opinion.[3] *First*, an opinion from an expert who has conducted a recent

[3] Nor is *Amici*'s experience uncommon. A large-scale study of Hague Convention cases found that expert testimony detailing harm to the child was a "key factor in cases where grave risk was found." Jeffrey L. Edleson, et al., *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the United States for Safety: A Study of Hague Convention Cases* 310 (2010) (citing the 2009 Federal Interagency Forum on Child and Family Statistics), available at https://www.ojp.gov/pdffiles1/nij/grants/232624.pdf (hereinafter, "Edleson Report"); *see also* Jeffrey L. Edleson, *The Role of Expert Witnesses in Proving Grave Risk to Children*, 25 Dom. Viol. Rep. 5, 6 (2019) ("Having an informed and prepared expert witness is critical to using the grave risk exception successfully").

psychological evaluation of the child specifically to assess whether there is a grave risk of exposure to harm should the child be returned. *Second*, an opinion from an expert who has conducted a recent psychological evaluation of the abused parent and who has expertise in domestic violence and trauma to explain how a petitioner's abuse of a parent creates a grave risk of exposure to harm or an intolerable situation to a child. *Third*, an opinion on the relevant laws and social services of the country to which the petitioner seeks to return the child is often needed to enable a court to assess whether the child would have access to resources that may defeat a grave-risk defense.

As discussed below, each of those three issues requires scientific or specialized knowledge to assess whether a child faces a grave risk of exposure to harm. District courts are neither psychologists nor experts on the dynamics of domestic violence or its impact on children. Consequently, district courts sitting as factfinders in Hague Convention cases require special expertise to understand whether a child suffers a grave risk of exposure to physical or psychological harm or an intolerable situation. District courts must therefore allow respondents asserting a grave-risk defense the opportunity for fulsome discovery to permit this expert input. *See, e.g.*, *Claar v. Burlington N. R. Co.*, 29 F.3d 499, 504 (9th Cir. 1994) (expert testimony required where specialized knowledge needed to draw conclusions); *see also Zolotukhin v. Gonzales*, 417 F.3d 1073, 1076 (9th Cir. 2005)

("In the circumstances of this proceeding, the denial of expert testimony violated Zolotukhin's due process rights."); *Lopez–Umanzor v. Gonzales*, 405 F.3d 1049, 1057 (9th Cir. 2005), (holding that Immigration Judge's refusal to hear testimony from petitioner's experts violated due process).

A. The Importance of a Child Psychological Expert Evaluation

First, a current psychological evaluation of the child close to the time of trial is highly probative of whether there is a grave risk of exposure to physical or psychological harm should the child be returned to a foreign state.

Courts routinely rely on expert forensic psychologists, child therapists, and other medical professionals to analyze the physical and nuanced psychological effects of abuse in children and what they need to heal. *See Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 396, 408-09 (E.D.N.Y. 2005) (court relied on the testimony of a child psychiatrist in finding a grave risk of harm and denying petition); *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1058 (E.D. Wash. 2001) (finding grave risk of harm and noting "[w]here the facts demonstrate pre-removal abuse and the evidence, including expert opinion, establishes a grave risk of physical or psychological harm, courts have applied the [grave risk] exception"); *Cuellar v. Joyce*, No. CV-08-0084-BU-RFC, 2008 WL 11394155, at *9 (D. Mont. Dec. 23, 2008), *rev'd on other grounds*, 596 F.3d 505 (9th Cir. 2010) (finding

grave risk in view of expert's psychological evaluation of respondent and another expert's assessment of the child).[4]

Expert testimony can therefore provide a court with information beyond its lay understanding of how child abuse, witnessing domestic violence perpetrated against a parent, and trauma manifests and affects a child's day-to-day life, and whether a child meets the diagnoses for PTSD or another stress disorder relevant to a grave-risk analysis. Further, expert testimony can eliminate common misunderstandings, such as the beliefs that children must see violence to be affected by it, or that violence will end once parents are separated.

Expert testimony can also bring to light the harmful psychological effect that being transplanted to a foreign country without their primary parent would have on a child exposed to domestic violence. For example, research shows that separation from a primary attachment figure, such as Ms. Lazaro, can cause a significant traumatic impact on the psychological well-being of young children. *See* Peter Haiman, Ph.D., *Protecting a Child's Emotional Development When Parents*

[4] *See also Danaipour v. McLarey*, 286 F.3d 1, 10 (1st Cir. 2002) (relying on testimony from expert in sexual abuse allegations and foreign law to reverse and remand for consideration of grave-risk defense); *Davies v. Davies*, No. 16 CV 6542, 2017 WL 361556 at *17 (S.D.N.Y Jan. 25, 2017) *aff'd,* 717 F. App'x 43 (2d Cir. 2017) (relying on multiple experts' testimony to determine that the child was at "serious risk of trauma and developmental delay" if returned and that no ameliorative measure could remove that risk).

Divorce, The Natural Child Project https://www.naturalchild.org/articles/guest/peter_haiman3.html (last visited Apr. 26, 2021); *Effects of Attachment and Separation*, Children's Services Practice Notes for North Carolina's Child Welfare Social Workers (July 1997) https://practicenotes.org/vol2_no4/effects_of_separation_and_attachment.htm; Committee on Early Childhood, Adoption and Dependent Care, *Developmental Issues for Young Children in Foster Care*, 106(5) PEDIATRICS 1145-1150 (Nov 2000), https://www.pediatrics.aappublications.org/content/106/5/1145 (finding that attachment to a primary caregiver is essential to the development of children and that any decision to separate a child from a primary caregiver who provides psychological support should be cautiously considered).[5] This is important when a child is exposed to family abuse and is being removed from a safe caregiver.

The district court deprived Ms. Lazaro of the opportunity to conduct a contemporaneous psychological evaluation of S.L.C. and to present expert testimony showing how the return of S.L.C. to Spain would create a grave risk of exposure to harm. Ms. Lazaro had no opportunity to present testimony on the

[5] While the Hague Convention does not involve a "best interests" analysis, courts conducting those analyses have weighed the effects of a child's removal from a longstanding primary caregiver. *See, e.g.*, *Ginsbach v. Ginsbach*, Nos. 59568, 61578, 2013 WL 3291458 (Nev. May 16, 2013); *In re Custody of M.T.*, 238 P.3d 1003, 1010 (Or. Ct. App. 2010); *Davis v. Davis*, 749 P.2d 647, 648 (Utah 1988).

potential traumatic effect of separating S.L.C. from her care after residing with her for a year during the pandemic, which recent psychiatric research suggests has increased anxiety and depression in children generally. *See* Darren Courtney, MD et al., *COVID-19 Impacts on Child and Youth Anxiety and Depression: Challenges and Opportunities*, 65(10) THE CANADIAN JOURNAL OF PSYCHIATRY (2020); Karen Dineen Wagner, *New Findings About Children's Mental Health During COVID-19*, Psychiatric Times (Oct. 7, 2020) https://www.psychiatrictimes.com/view/new-findings-children-mental-health-covid-19.

By its own hand, the district court only had its lay understanding of child psychology and an arbitrarily limited record to assess whether S.L.C. faced a grave risk of exposure to harm or an intolerable situation, even though this is plainly an area where a factfinder requires scientific and specialized knowledge to make that assessment. *See Claar*, 29 F.3d at 504.

B. The Importance of a Domestic Violence and Trauma Expert Evaluation of the Abused Parent

Second, where the respondent herself has alleged she has been abused, experts are vital to explain how and why the child faces a risk of exposure to physical or psychological harm or an intolerable situation if returned to the abuser's home country.

Decades of research has established the devastating and potentially life-long effects witnessing domestic violence has upon a child, ranging from "behavioral

disturbance" to "poor academic performance" to "becoming future perpetrators or victims of intimate violence." Mary A. Kernic et al., *Children in the Crossfire,* 11 VIOLENCE AGAINST WOMEN 991, 993 (2005). In particular, children exposed to domestic violence tend to exhibit symptoms of post-traumatic stress disorder and face a "higher risk for suicide, substance abuse and crime." Robert B. Strauss, *Supervised Visitation and Family*, 29 FAM. L.Q. 229, 237 (1995); *see also* Ann Coker et al., *Physical and Mental Health Effects of Intimate Partner Violence for Men and Women*, 24 AM. J. OF PREVENTATIVE MED. 260 (2002). Moreover, children exposed to domestic violence live in a perpetual "alarm state" and are acutely sensitive to stress. Lynn Hecht Schafran, *Domestic Violence, Developing Brains, and the Lifespan: New Knowledge from Neuroscience*, 53 THE JUDGE'S J. 32, 33-34 (2014).

Further, courts addressing the effects of domestic violence in Hague Convention cases have found that abuse of a child's mother can create a grave risk of exposure to harm to a child placed in the care of the abuser. *See Kahn v. Fatima,* 680 F. 3d 781, 787 (7th Cir. 2012) ("physical and psychological abuse of a child's mother by the child's father, in the presence of the child (especially a very young child, as in this case), is likely to create a risk of psychological harm to the child"); *Davies*, 2017 WL 361556, at *17 (finding child "will continue to suffer if he is returned to St. Martin" based on expert testimony linking abuse of mother to

grave risk of exposure to harm to child); *see also Walsh v. Walsh*, 221 F. 3d 204, 220 (1st Cir. 2000) ("both state and federal law have recognized that children are at risk of physical and psychological injury themselves when they are in contact with a spousal abuser"). Courts have even found that a child's prospective return to a place of trauma itself is sometimes enough to create a grave risk of exposure to harm and compel the court to preclude repatriation. *Blondin v. Dubois,* 189 F.3d 240, 249-50 (2d Cir.1999).

Nor is domestic abuse limited to discrete acts of physical violence. Abusers often engage in an ongoing pattern of acts that include not just physical violence, but sexual, psychological, emotional, and economic abuse aimed at dominating, subordinating and psychologically harming the adult victim. Researchers call this type of multi-layered abusive behavior "coercive control." For example, financial abuse is a common and effective abuse tactic. By ensuring a "lack of alternative means of economic support," an abuser restrains his victim from escaping his sphere of control. Q&A with Evan Stark, Ph.D. MSW, New York State Office for the Prevention of Domestic Violence (2013), https://www.opdv.ny.gov/professionals/abusers/coercivecontrol.html; *see also* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1734 (2004) ("The most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the

economic resources to survive without him."). Over seventy-eight percent of perpetrators inflict economic abuse upon their victims, chiefly by controlling victims' spending or access to resources such as money, transportation, or employment. *See* Diane Johnston & Divya Subrahmanyam, *Denied! How Economic Abuse Perpetuates Homelessness for Domestic Violence Survivors*, CAMBA.ORG, at 1 (Sept. 2018), https://www.fordham.edu/download/downloads/id/11883/denied_how_economic_abuse_perpetuates_homelessness_for_domestic_violence_survivors.pdf; Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Court*, 9 SEATTLE J. SOC. J. 1053, 1059 (2011). The dynamics of economic abuse are highly relevant to understanding the actions of domestic violence victims attempting to find appropriate *pro bono* legal counsel. *See infra* Section III.

By exerting multiple different layers of abuse on a victim, such as using both physical and economic abuse, an abuser can gradually exert coercive control over his victim and eventually "establish[] a regime of dominance" over her. Stark, *supra* ("Coercive control is a strategic course of oppressive behavior designed to . . . establish[] a regime of dominance [over a victim's] personal life.").

Additionally, an expert on domestic violence and trauma can explain relevant domestic violence-specific considerations; for example, why it is so

difficult and so dangerous for victims—especially victims with children—to leave an abusive relationship (*see supra,* section I.A.), the ways in which financial control goes hand in hand with domestic violence and restricts a victim's ability to protect herself and her child (*see infra,* section IV), and the empirical basis for demonstrating abusers with a history of perpetrating physical violence in the presence of children are more likely to be physically dangerous in the future. *See e.g.*, Martie P. Thompson, et al., *Risk Factors for Physical Injury Among Women Assaulted by Current or Former Spouses*, 7 VIOLENCE AGAINST WOMEN , 886-899 (Aug. 2001). Further, an expert on domestic violence and trauma can testify as to why an abusive husband's treatment of his wife has been found an accurate predictor of future physically abusive behavior towards a child. *See* Lundy Bancroft et al., *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, 55-60, (2d ed. 2012).

This case implicates each of those issues. Ms. Lazaro testified Petitioner abused her physically and psychologically, and that this abuse sometimes occurred in front of S.L.C. (3-ER-9-83). Ms. Lazaro also testified Petitioner abused S.L.C., and S.L.C. herself reported Petitioner abused her. (4-ER-723). But without expert testimony describing how these facts and this testimony relate to a grave risk to S.L.C., the district court only had a limited record and its lay understanding to infer how those facts created a grave risk of exposure to harm for S.L.C.

C. The Importance of an Expert on the Relevant Laws and Social Services of the Foreign Nation to Which the Petitioner Seeks to Return the Child

Third, an expert on the relevant laws and social services of the country to which the petitioner seeks to return the child could have explained the decided lack of resources and support programs for victims of domestic violence and child abuse in Spain. Presenting an expert familiar with the other country is "particularly important in interpreting the laws and legal system of that locale."[6] Edleson Report at 255; *see also Rehder v. Rehder*, No. C14-1242RAJ, 2014 WL 6982530, at *7 (W.D. Wash. Dec. 9, 2014). In fact, the Hague Convention envisions that proof of foreign law may be established by the use of "certificates or affidavits, Central Authority opinions, letters, and *expert testimony*." Hon. James D. Garbolino, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges, Fed. Jud. Ctr., Int'l Litig. Guide, 2012 WL 2872366 (2012) (emphasis added). The same is true with regard to resources and programs.

Here, no such expert on Spanish law was permitted to testify because the district court prohibited discovery. As a result, the district court took it upon itself

[6] According to the Edleson Report, expert testimony appeared in 60 percent of cases where the child remained with the mother in the U.S. and in 41.7 percent of the cases where judges decided to return the child to the other country. Edleson Report at 168.

to investigate or understand the resources, or lack thereof, available to Ms. Lazaro and S.L.C. in Spain as victims of domestic abuse and child abuse.[7]

II. The District Court Denied Ms. Lazaro the Opportunity to Prove Her Grave-Risk Defense by Prohibiting Essential Discovery.

Each of the areas of potential expert testimony noted above should have been available to Ms. Lazaro in this case, along with sufficient time for fact discovery to serve as the predicate for that testimony. The district court's refusal to do so artificially limited the record Ms. Lazaro could build while requiring her to prove her grave-risk defense by clear and convincing evidence. *See, e.g.*, *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1094 (9th Cir. 2018); *Indep. Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864 F.2d 927, 929 (1st Cir. 1988). That was wrong.

Here, Ms. Lazaro presented a grave-risk defense rooted in both physical and psychological abuse and the district court, as factfinder, would have benefited from specialized knowledge and expertise to evaluate it. *See, e.g.*, *Claar*, 29 F.3d at 504; *Davies*, 2017 WL 361556, at *16-18 (court relied on expert testimony in finding grave risk and concluded abuse of mother created grave risk of exposure

[7] Experts are also critical to evaluate whether ameliorative measures would mitigate any grave risk. *Gaudin v. Remis,* 415 F.3d 1028, 1035 (9th Cir. 2005) (citing *Blondin,* 189 F.3d at 2490); *see also Walsh,* 221 F.3d at 218. Although the district court did not reach that issue, it was in no position to evaluate them if it had.

for child). Specifically, Ms. Lazaro sought a pre-trial schedule that included expert discovery, including time to seek a full psychological evaluation of S.L.C., Ms. Lazaro, and Petitioner by Dr. Marsha Hedrick, a forensic psychologist, in addition to preparation of three or more additional expert witnesses and discovery into Petitioner's alleged drug trafficking. *See* 6-ER-1069–70, 1077 & n.3, 1082–84.

As discussed below, two points in particular demonstrate how the district court's ruling on discovery clashes with the purpose of the grave-risk exception to safeguard children from further harm. *First*, while the district court permitted testimony from Ms. Alicia Romero Fernandez, it was plainly inadequate to address the issues in this case—as the district court itself recognized. *Second*, the district court's denial of all discovery violates Ms. Lazaro's right to due process given that she was required to prove a grave-risk defense by clear and convincing evidence.

A. Ms. Romero's Testimony Did Not Analyze Grave Risk and Cannot Replace Appropriate Expert Testimony.

The district court allowed Ms. Romero to testify, but it was no substitute for expert testimony tailored to a grave-risk analysis—as the district court recognized but, perversely, held against Ms. Lazaro. 4-ER-768 (noting "serious reservations" about having permitted Ms. Romero's testimony).

Ms. Romero was not an expert retained or appointed in this case and she did not perform any analysis as to whether S.L.C. suffered a grave risk of exposure to physical or psychological harm should she be repatriated to Spain. Instead, she

testified to her evaluation of S.L.C. and Ms. Lazaro 10 months earlier (prior to the commencement of the Hague Convention case) to address S.L.C.'s physical safety, in Spain, following Petitioner's abuse. *Id.* at 720. Ms. Romero's evaluation of both S.L.C. and Ms. Lazaro and her subsequent report were inherently limited, a fact to which Ms. Romero herself testified. *Id.* at 756.

Ms. Romero's brief evaluation could not have been an adequate substitute for a current psychological evaluation of S.L.C. to assess grave risk of psychological harm should she be returned to Spain. Among other things:

- Ms. Romero was in no position to explain how S.L.C.'s abuse and trauma has manifested and affected S.L.C.'s day-to-day life; whether S.L.C. meets the diagnoses for PTSD or other disorders relevant to a grave risk analysis; and the negative psychological effects S.L.C. would face in returning to Spain without Ms. Lazaro as her primary caregiver after residing with her for a year and after being free from exposure to domestic violence. *See also supra* Section I.A.
- Ms. Romero had not been asked to evaluate how and why domestic violence against a parent affects the risk of exposure to psychological harm in this case if S.L.C. were returned Spain.
- Ms. Romero was in no position to testify on the role domestic violence against a parent plays in the risk of psychological harm if the child is

returned to the abuser's home country; how domestic violence and abuse of a child often increases after parents separate; and how abusers with a history of physical violence in the presence of children show a propensity for future child abuse (*see supra,* section I.B.).

- Ms. Romero was not qualified or asked to testify as to Spanish law and available resources and programs (or lack thereof) for non-citizen victims of domestic violence and their children in Spain (*see supra,* section I.C.).

Denying Ms. Lazaro discovery and only permitting Ms. Romero's out-of-context testimony meant the district court had only limited information and its lay understanding to assess whether S.L.C. would be subject to a grave risk of exposure to harm. This was plainly wrong.

Further, as this Court has recognized outside the Hague Convention context, expert testimony is critical to determinations in domestic violence scenarios. In *Lopez-Umanzor*, 405 F.3d at 1058, this Court discussed the origins of the Violence Against Women Act (VAWA), noting among other things Congress's finding that "Judges and court personnel may also lack information about the psychological, economic, and social realities of domestic violence victims." S. Rep. 103-138, 1993 WL 355617, at *46 (Sept. 10, 1993). This Court concluded Congress "recognized that information about the dynamics of abusive relationships could

help adjudicators evaluate facts more fairly," including, in that case, "expert testimony on the issue of domestic violence." *Lopez-Umanzor,* 405 F.3d at 1058.

This case mirrors that scenario: the district court failed to recognize it lacked information about the "psychological, economic, and social realities of domestic violence" and thereby prohibited discovery essential to its understanding of Ms. Lazaro's grave-risk defense. The Court should therefore reverse.

B. By Prohibiting All Discovery, the District Court Denied Ms. Lazaro the Opportunity to Meet the Extremely High Grave Risk Burden.

Additionally, the district court's decision to prohibit all discovery is particularly harsh here, where Ms. Lazaro was not only prevented from building a full record but also required to prove her grave-risk defense by clear and convincing evidence—the highest standard of proof possible in a civil action.

The district court's denial of discovery into Petitioner's alleged illegal drug activity likewise deprived Ms. Lazaro of her defense. It is obvious a parent's participation in illegal drug trafficking could risk exposing a child to harm (and an expert could have opined as much in any event), and the district court should have permitted fact discovery on that issue because it was relevant to Ms. Lazaro's pleaded defense. *See* Fed. R. Civ. P. 26(b)(1).[8]

[8] The district court's concern Petitioner would be required to "testify in matters that might implicate his criminal liability" [1-ER-19–20, 21–22, 28–29 & 32] was misplaced. Petitioner chose to bring this case, and while the Fifth Amendment applies in a civil action, "a civil plaintiff has no absolute right to both his silence

III. A Domestic Violence Victim's Multiple Efforts to Seek Safety and Protection Should Not Later Be Used Against Her.

The district court interpreted Ms. Lazaro's multiple attempts to flee her abuser, protect herself and her daughter, and seek abuse protection orders as "meritless" attempts to "abuse" the legal process. ER-7–8. That is wrong, and betrays a misunderstanding of domestic violence.

It is extremely difficult for victims of domestic violence to leave their abusers, and more difficult still to find appropriate (and often, *pro bono*) legal counsel. As a result, victims like Ms. Lazaro attempt—often without experienced domestic violence legal practitioners to help guide them—to seek redress through the legal system through multiple paths. This is not to abuse the system, but out of desperation to make the system work amid personal crisis. The district court misinterpreted Ms. Lazaro's prior attempts to seek safety and redress as abuse of the legal system, and denied the very expert discovery that would have given Ms. Lazaro the opportunity to offer the district court context to explain what she did and why.

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and his lawsuit." *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1088 (5th Cir. 1979); *see also Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518 (1st Cir. 1996) (in civil action, "one party's assertion of his constitutional right should not obliterate another party's right to a fair proceeding.").

A. Leaving an Abuser is Dangerous, Complicated, and Often Takes Multiple Attempts.

A victim of domestic abuse is a person in crisis. On average, a victim attempts to leave an abusive relationship *seven times* before being able to stay away for good. *50 Obstacles to Leaving*, National Domestic Violence Hotline, https://www.thehotline.org/resources/50-obstacles-to-leaving (last visited May 5, 2021). The difficulty in leaving is due to a number of factors.

Victims with children are often terrified of losing them if they leave.[9] Many domestic violence perpetrators threaten their victims with the "loss of child custody as a way of exerting control over [them]." Leora N. Rosen & Chris S. O'Sullivan, *Outcomes of Custody and Visitation When Fathers Are Restrained by Protection Orders: The Case of the New York Family Courts*, 11 VIOLENCE AGAINST WOMEN 1054, 1069 (Aug. 2005). And after leaving they are often faced with long and contentious litigation that allows their abusers to continue harassing them. *See* Nat'l Council of Juvenile and Family Court Judges, *Batterer Manipulation of the Courts to Further Their Abuse, and Remedies for Judges*, 12

[9] *See* Casa De Esperanza: National Latin@ Network & No More: *The No Más Study: Domestic Violence and Sexual Assault in the Latin@ Community* 11 (2015) (citing fear of losing their children as one of the top three reasons domestic violence victims do not seek help); Michael A. Anderson et al., *"Why Doesn't She Just Leave?": A Descriptive Study of Victim Reported Impediments to Her Safety*, 18 J. FAM VIOLENCE 151, 154 (2003) (finding that 24.4% of victims reported "[f]ear that I might lose my children" as a reason to stay with their abuser).

SYNERGY: THE NEWSLETTER OF THE RESOURCE CENTER ON DOMESTIC VIOLENCE: CHILD PROTECTION AND CUSTODY 1, 12 (2008 (perpetrators often identify "the use of custody proceedings [as] a strategy . . . to control or harass former partners").

Moreover, exiting an abusive relationship is often the most unsafe time for a victim. *50 Obstacles to Leaving*. As the abuser senses he is losing power, he will often act in dangerous ways to regain control over his victim. *Id.* Women are at the highest risk of severe or fatal injury when they try to leave an abusive relationship. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5–6 (1991).[10] The moment a domestic violence victim is most vulnerable and needs the most help is a critical time when she often lacks the support she needs.

B. Financial Abuse Likewise Creates Often Insurmountable Financial Barriers for Victims Seeking Safety and Assistance.

After leaving the abuser, victims of domestic violence often have difficulty finding appropriate domestic violence support services, especially if they have limited financial resources—a situation many victims find themselves in as a result of on-going financial abuse. Victims face even greater difficulty finding counsel to

[10] Of the approximately 4,000 women killed by a domestic partner each year, 75 percent were killed as they attempted to leave the relationship or after the relationship had ended. *See* DOMESTIC ABUSE SHELTER, INC., *DOMESTIC VIOLENCE STATISTICS*, https://domesticabuseshelter.org/domestic-violence (last visited May 13, 2021); *see also* Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW. 19, 19 (1999).

represent them in a Hague Convention case. *See* Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminist Concerned about Domestic Violence Here and Abroad*, 11 AM. UNIV. J. OF GENDER SOC. POL'Y AND L., 793 (2003) (discussing substantive and practical challenges battered women face in Hague Convention cases); Amelia Mindtoff, et al, *How Social Science Can Help Us Understand Why Family Courts May Discount Women's Testimony in Intimate Partner Violence Cases*, 53 FAM. L.Q. 243, 246 (2019) (hereinafter, "*Testimony in IPV Cases*") (discussing the difficulty for victims of domestic violence in navigating the legal system).

The difficulty in finding appropriate counsel is compounded by the fact that victims of domestic violence are often victims of financial abuse and therefore lack adequate funds to hire an attorney, and have no means to find *pro bono* representation particularly at the early stages of a crisis. *See also supra* Section I.B. Here, Ms. Lazaro testified Petitioner committed financial abuse that followed a pattern all too familiar to *Amici*. *See* 3-ER-462 ("we just were under Seth's control financially. He would make me beg him for -- He promised to give us an amount of money monthly, and he made me beg him on a weekly basis just for money for food.").

In *Amici*'s experience, there are painfully few lawyers available to domestic violence survivors and even fewer who can provide *pro bono* representation.

Victims have a difficult time obtaining assistance and have often navigated the legal system with little support for months or years before being able to access knowledgeable *pro bono* counsel with the resources to handle an international domestic violence case.

Nor is *Amici*'s experience unique. Finding *pro bono* representation in domestic violence cases is difficult because "few pro bono attorneys are willing to, or feel adequately experienced to, take on domestic violence cases." Iris Marcus, *Victims of Domestic Abuse Need Particular Consideration, Study Finds*, 40 MONT LAW 17, 24 (2015). The unwillingness of *pro bono* attorneys to take on domestic violence cases is exacerbated in cases involving parent-child relationships because such "cases tend to be very fact-specific, and complicated facts lead to complicated cases." Adam J. Morris, *Economic Considerations in Family Law*, Strategies for Fam. Law in Tex., 2011 WL 5073119, at *8 (Oct. 2011). Hague Convention cases involving child abduction are no exception. Hague Convention cases are complicated, costly and difficult, which "create[s] hesitancy among attorneys to represent mothers." Taryn Lindhorst & Jeffery L. Edleson, *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention*, 151 (2012) ("Defending mothers in Hague proceedings was difficult for many attorneys. And these cases often move on short timelines. Yet it takes time to retrieve from foreign institutions

the documents needed to support grave risk and other exceptions, locate witnesses and hard-to-find records, translate witness interviews and records into English for the court, and then possibly provide translators during court sessions.").

Moreover, attorneys are especially wary of representing the "taking party," here, Ms. Lazaro, because "[t]aking mothers are often perceived as the party committing an offense against their children and the left-behind parent, and thus were usually left to find their own legal representation." *See* Lindhorst & Edelson, 150 (Most who found attorneys found sole practitioners, small firms, or legal aid attorneys with few resources.) Additionally, the difficulties faced by victims of domestic violence do not stop once they obtain counsel. Gender bias and misconceptions about domestic violence often lead to the credibility of victims of domestic violence being successfully challenged in courts, making obtaining relief all the more difficult. *See* Amelia Mindthoff et al., *Testimony in IPV Cases*, 53 FAM. L.Q. at 243–44, 246.

Here, the district court misconstrued Ms. Lazaro's actions as an abuse of the legal process. ER-7–8. The reality of navigating the legal system as a victim of domestic violence—which the district court would have been able to assess if it had permitted the discovery Ms. Lazaro sought—makes clear she was not abusing the legal system but struggling, unsuccessfully, to make it work. Not only expertise in domestic violence but even more sophisticated expertise in

international law and the Hague Convention make counsel in a case like this especially difficult to find on a *pro bono* basis.

IV. Awarding Attorneys' Fees Enables Petitioner's Continued Coercive Control and Financial Abuse of Ms. Lazaro.

The district court erred in another way: by awarding fees and costs where Ms. Lazaro has alleged intimate partner violence, the decision below not only places an unacceptable financial burden upon Ms. Lazaro that penalizes her for raising a good-faith defense but sends a dangerous message to all victims of abuse seeking protection from the courts. For that independent reason, the Court should vacate the award of fees and costs as "clearly inappropriate" under the Hague Convention. 22 U.S.C. § 9007(b)(3).

Federal courts have repeatedly held awarding fees and costs is clearly inappropriate where the respondent is a victim of intimate partner violence. *See Souratgar v. Lee Jen Fair*, 818 F.3d 72, 81 (2d Cir 2016) ("it would remain clearly inappropriate to order a victim of intimate partner violence to pay an expenses award to the perpetrator, absent countervailing equitable factors, even where the victim is wealthy… we note that intimate partner violence in any form is deplorable."); *Jimenez Blancarte v. Ponce Santamaria,* No. 19-13189, 2020 WL 428357, at *3 (E.D. Mich. Jan. 28, 2020) (denying Petitioner's request for fees because "[e]quity strongly favors a finding that an award of fees and costs is clearly inappropriate" where Respondent presented "detailed allegations regarding

Petitioner's history of domestic violence towards her and cites that history as her reason for fleeing Mexico with her two minor children."); *See Aly v. Aden*, No. 12-1960, 2013 WL 593420, at *20 (D. Minn. Feb. 14, 2013) (finding any award of expenses to the prevailing petitioner clearly inappropriate in part because the petitioner "was physically and verbally abusive toward respondent"); *Guaraggno v. Guaraggno*, No. 09-187, 2010 WL 5564628, at *3 (N.D. Tex. Oct. 19, 2010) (finding that petitioner's physical abuse of respondent was "a significant factor" in reducing fee award), adopted by 2011 WL 108946 (N.D. Tex. Jan. 11, 2011); *Silverman v. Silverman*, No. 00-2274, 2004 WL 2066778, at *4 (D. Minn. Aug. 26, 2004) (petitioner's history of physical and mental abuse toward respondent contributed to finding that a fee award was "clearly inappropriate").

Here, Ms. Lazaro's testimony about Petitioner's abuse is more than sufficient to show a fee award was clearly inappropriate as a matter of law. But more than that, it illustrates precisely why the fee award here enables Petitioner's coercive control over Ms. Lazaro. While Ms. Lazaro has escaped Petitioner, she now cannot escape the district court's award of over $115,000 in fees and costs. The threat of Petitioner pursuing Ms. Lazaro for fees she cannot possibly pay[11]

[11] Domestic violence perpetrators often engage in litigation harassment as a means to continue exerting power and control over the victims after they have separated. *See, e.g.*, *Lawyer's Manual on Domestic Violence* 92 (Mary Rothwell Davis, Dorchen A. Leidholdt, & Charlotte A. Watson eds., 2015), http://ww2.nycourts.

empowers Petitioner over Ms. Lazaro—and in a situation where she has alleged intimate partner violence, it is clearly inappropriate. *See supra*, Section III.A.

Furthermore, the fee award is clearly inappropriate because it proves domestic violence survivors' worst fears may come true if they seek relief. *Id.* The fee award here has the perverse effect of impeding Ms. Lazaro's ability to maintain a relationship with S.L.C. *See Norinder v. Fuentes*, 657 F.3d 526, 536 (2d Cir. 2011) ("[a]t least two courts of appeals have recognized that a fee award in a case under the [Hague] Convention might be excessive and an abuse of discretion if it prevents the respondent-parent from caring for the child"). Although the District Court has allowed in person visits between Ms. Lazaro and S.L.C. in Spain, ER-7–8, the fee award makes this visitation right illusory.

Even if such an award could be appropriate under these circumstances, the district court ignores Ms. Lazaro's ability to pay such a judgment. *See Rosasen v. Rosasen*, No. CV1910742JFWAFMX, 2020 WL 4353679, at *1 (C.D. Cal. June 5, 2020) (citing *Rath v. Marcoski,* 898 F.3d 1306, 1311 (11th Cir. 2018). Here, Ms. Lazaro testified that she has just $942 in her checking account and no savings, and in 2018 and 2019 her income was $11,878 and $23,116, respectively. 2-ER-44. In view of Ms. Lazaro's inability to pay, the award of fees and costs in this case was

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gov/ip/womeninthecourts/pdfs/DV-Lawyers-Manual-Book.pdf (discussing litigation abuse as a form of domestic violence).

clearly inappropriate. *See Rehder,* 2015 WL 4624030, at *3 (concluding that it is "clearly inappropriate to compel the child's mother to pay any of [respondent's] attorneys' fees" where respondent sought over $100,000 in fees); *Larrategui v. Laborde,* No. 2:13-CV-01175 JAM, 2014 WL 2154477, at *3 (E.D. Cal. May 22, 2014) (exercising the court's discretion to reduce the total awards by 25% where "[r]espondent has provided evidence that she is self-employed with limited income, nominal assets, and significant debt"); *In re Application of Stead v. Menduno,* 77 F. Supp. 3d 1029 (D. Colo. 2014) (awarding father filing fees and deposition costs was inappropriate where father's counsel represented him pro bono, mother had relatively low salary and total savings of only slightly more than $2,000, and mother spent 80% of her income on housing and most of her other expenses related to providing for child.).

This Court should not send the message to other survivors of domestic violence that presenting a grave-risk defense to protect themselves and their child—if they are even allowed to present their grave-risk defense—will mean financial ruin if they cannot surmount the clear and convincing hurdle.

CONCLUSION

For the foregoing reasons and the reasons set forth in Ms. Lazaro's opening brief, the Court should reverse.

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New York, NY

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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