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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

**ELIAN GONZALEZ, a minor, by and
through LAZARO GONZALEZ, as next
friend, or alternatively as temporary legal
custodian of ELIAN GONZALEZ, a minor,**

Petitioners/Plaintiffs,

v.

**JANET RENO, Attorney General of the
United States; DORIS MEISSNER,
Commissioner, Immigration and
Naturalization Service; ROBERT WALLIS,
District Director, Immigration and
Naturalization Service; UNITED STATES
IMMIGRATION AND NATURALIZA-
TION SERVICE; and UNITED STATES
DEPARTMENT OF JUSTICE,**

Respondents/Defendants.

**CASE No. 00-0206-CIV-
HOEVELER**

**RESPONDENTS/DEFENDANTS'
MOTION FOR EXPEDITED
SCHEDULING OF
DEFENDANTS' MOTION TO
DISMISS OR ALTERNATIVE
MOTION FOR SUMMARY
JUDGMENT, AND PLAINTIFFS'
MOTION FOR PRELIMINARY
AND PERMANENT
INJUNCTIVE RELIEF AND
PETITION FOR WRIT OF
MANDAMUS**

Defendants move for expedited scheduling of the proceedings on the government's Motion To Dismiss Or Alternative Motion for Summary Judgment, and plaintiffs' Motion For Preliminary and Permanent Injunctive Relief and Petition for Writ of Mandamus. This Motion is based on matters set forth in the accompanying Motion To Dismiss Or Alternative Motion for Summary Judgment and Opposition To Motion for Preliminary Injunction, as well as on the following events:

1. Elian Gonzalez ("Elian"), a six-year-old native and citizen of Cuba, was one of

three survivors of a failed attempt by fourteen Cuban nationals to traverse the waters between Cuba and the United States on November 22, 1999. Record and Exhibits filed in support of Defendants' Motion To Dismiss Or Alternative Motion for Summary Judgment and Opposition To Motion for Preliminary Injunction ("Record") at 29-30, 36-37.

Among those who perished was Elian's mother. *Id.* at 30-34. Elian was rescued by two fishermen who discovered him floating on an inner tube off the coast of Florida on November 25, 1999. *Id.* at 29-30.

2. On November 25, 1999, the Immigration and Naturalization Service ("INS") paroled Elian into the United States for deferred inspection. *See* 8 C.F.R. § 235.2(e) (1999). *Id.* at 36.

3. Thereafter, the INS conducted a careful investigation of the facts and circumstances surrounding Elian's arrival at the United States, his relationship with his father, Juan Miguel Gonzalez-Quintana ("Juan Gonzalez"), and statements made by plaintiff Lazaro Gonzalez, into whose care the INS placed Elian pending his deferred inspection.

4. On January 5, 2000, the INS Commissioner determined that only Juan Gonzalez may speak for Elian in immigration matters. Based on Juan Gonzalez' statements concerning Elian, the Commissioner of the INS decided to accept Juan Gonzalez' request to withdraw the applications for admission and asylum submitted on behalf of Elian. In addition, the INS Commissioner directed that Elian should be returned to his father in Cuba. Consequently, the INS Executive Associate Commissioner, Office

of Field Operations, Michael A. Pearson, sent letters to plaintiff Lazaro Gonzalez and three attorneys who claim they represent Elian. *Id.* at 1, 3, 5.

5. In the letter to Lazaro Gonzalez, Mr. Pearson explained that the INS Commissioner had determined that Juan Gonzalez has the right and obligation to represent Elian concerning immigration matters. *Id.* at 3-4. Mr. Pearson reminded Lazaro Gonzalez that Elian was released into his care with no intention that he would have the authority to seek immigration benefits on Elian's behalf. *Id.* In addition, Mr. Pearson informed Lazaro Gonzalez that Juan Gonzalez had specifically refused to permit the three attorneys to represent Elian. *Id.* Finally, Mr. Pearson sought Lazaro Gonzalez' cooperation in reuniting Elian with Juan Gonzalez in Cuba as soon as possible. *Id.*

6. Similarly, on January 5, 2000, Mr. Pearson sent an additional letter to Lazaro Gonzalez' attorneys, Spencer Eig and Roger Bernstein, explaining the decision of the INS Commissioner. *Id.* at 5-6. Mr. Pearson informed the attorneys that only Juan Gonzalez could speak for Elian concerning immigration matters. *Id.* In addition, Attorneys Eig, Bernstein, and Osberg-Braun were notified that based on the assertions of Juan Gonzalez, the INS would not recognize their claims to be Elian's legal representatives. *Id.* Finally, Mr. Pearson appealed for their cooperation in effectuating the decision of the INS Commissioner. *Id.*

7. On January 7, 2000, instead of complying with the INS requests, Plaintiff Lazaro Gonzalez, with the assistance of Attorneys Eig, Bernstein, and Osberg-Braun, filed a Verified Petition for Temporary Custody and Other Relief in the Circuit Court for

the 11th Judicial Circuit in and for Miami-Dade County, Florida, Family Division ("family court"). *Id.* at 300-15. Plaintiff sought temporary custody of Elian pending a full evidentiary hearing on the Petition for Temporary Custody.

3. On January 10, 2000, Circuit Court Judge Rosa Rodriguez issued an Order setting an evidentiary hearing on the Petition for Temporary Custody for March 6, 2000.

9. In conjunction with the Order, Judge Rodriguez also issued a Temporary Protective Order which, among other provisions, prohibited Elian's removal from the jurisdiction of the 11th Judicial Circuit, ordered that the status quo be preserved, and granted Lazaro Gonzalez limited legal authority to speak on Elian's behalf in immigration matters. *Id.* at 291-99.

10. On January 19, 2000, plaintiff filed a Complaint For Injunctive Relief and Petition for Writ of Mandamus in this Court.

11. There is need for an expedited scheduling of defendants' Motion To Dismiss Or Alternative Motion for Summary Judgment, and plaintiff's Motion For Preliminary and Permanent Injunctive Relief and Petition for Writ of Mandamus because:

a. Elian lost his mother nine weeks ago, and to compound his tragedy, since then he has yet to see his father.

b. More than three weeks ago, the INS Commissioner decided that Elian should be reunited with his father.

c. Elian faces an uncertain future resulting from a conflict among family members, in particular his father in Cuba, and Lazaro Gonzalez in Miami, Florida. The

longer that conflict continues unresolved, the longer Elian's future remains in doubt.

d. Elian has become the focus of international news media attention, making it difficult if not impossible for Elian to live a normal life.

CONCLUSION

Defendants request that the Court set the following schedule:

- A. That plaintiffs' opposition to defendants' motion to dismiss and plaintiffs' reply in support of the motion for a preliminary injunction be filed no later than February 2, 2000.
- B. That defendants' reply in support of the motion to dismiss be filed no later than February 7, 2000.
- C. That a hearing on defendants' motion to dismiss and plaintiffs' motion for a preliminary injunction be set at the earliest possible opportunity thereafter.

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CERTIFICATE OF SERVICE

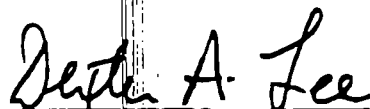
I certify that on this 27th day of January, 2000, I caused one copy of the foregoing Motion for Expedited Scheduling of Defendants' Motion to Dismiss or Alternative Motion For Summary Judgment and Opposition to Motion for Preliminary and Permanent Injunctive Relief to be served upon plaintiffs by same-day delivery addressed as follows:

LINDA OSBERG-BRAUN
ROGER A. BERNSTEIN
Hackley, Bernstein & Osberg-Braun
2875 N.E. 191st Street, PH 1B
Aventura, Florida 33180

BARBARA LAGOA
JUDD J. GOLDBERG
ELIOT PEDROSA
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JOSE GARCIA-PEDROSA
Ruden, McClosky, Smith, Schuster &
Russell, P.A.
701 Brickell Avenue
Miami, Florida 33131



DEXTER A. LEE
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00-0206-CIV-HOEVELER

ELIAN GONZALEZ, a minor,
by and through, LAZARO GONZALEZ,
as next friend, or alternatively,
as temporary legal custodian,

Plaintiffs,

vs.

JANET RENO, Attorney General
of the United States;
DORIS MEISSNER, Commissioner,
United States Immigration and
Naturalization Service;
ROBERT WALLIS, District Director,
United States Immigration and
Naturalization Service; UNITED
STATES IMMIGRATION AND
NATURALIZATION SERVICE; and
UNITED STATES DEPARTMENT OF
JUSTICE,

Defendants.

DEFENDANTS' NOTICE OF FILING RECORD AND EXHIBITS

Defendants, by and through their undersigned counsel, hereby
file the Record and Exhibits in support of their Motion To
Dismiss or Alternative Motion for Summary Judgment, and
Opposition to Plaintiffs' Motion for Preliminary and Permanent

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/ / /

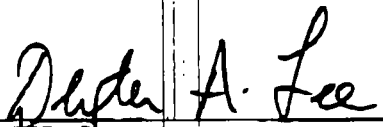
/ / /

Injunction and Petition for Writ of Mandamus.

Respectfully submitted,

THOMAS E. SCOTT
UNITED STATES ATTORNEY

By:


DEXTER A. LEE
Assistant U.S. Attorney
Fla. Bar No. 0936693
99 N.E. 4th Street
Miami, Florida 33132
(305) 961-9320
Fax: (305) 530-7139

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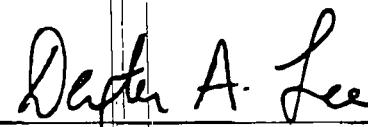
I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered this 27TH day of January, 2000 to:

Linda Osberg-Braun, Esq.
Hackley, Bernstein & Osberg-Braun, P.L.
2875 N.E. 191st Street, Penthouse 1B
Aventura, Florida 33180

Barbara Lagoa, Esq.
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ROBERT WALLIS, District Director,
United States Immigration and
Naturalization Service; UNITED
STATES IMMIGRATION AND
NATURALIZATION SERVICE; and
UNITED STATES DEPARTMENT OF
JUSTICE,

Defendants.

DEFENDANTS' MOTION FOR LEAVE OF COURT
TO FILE DOCUMENT UNDER SEAL

Defendants, by and through their undersigned counsel, file
their Motion for Leave of Court to File Document Under Seal, and
state:

Defendants have submitted various exhibits in support of
their Motion to Dismiss or Alternative Motion for Summary
Judgment, and Opposition to Plaintiffs' Motion for Preliminary
and Permanent Injunctive Relief and Petition for Writ of
Mandamus. Not included in the exhibits are the asylum

applications which Lázaro Gonzalez and his counsel purported to submit on Elian's behalf. Plaintiffs have not included the asylum applications in their exhibits to their complaint or motion. However, at footnotes 22 and 23 of their motion for injunctive relief, they have summarized the contents of the asylum applications. While defendants have not included the applications in their exhibits, they reserve the right to do so in the future should circumstances warrant their disclosure. In the meantime, defendants seek leave of the Court to file the applications under seal. Nothing in INS's regulations precludes their public disclosure. See 8 C.F.R. § 208.6.

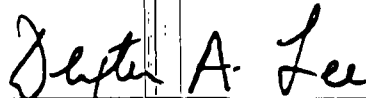
A copy of the document is submitted for *in camera* inspection and review by the Court.

WHEREFORE, defendants respectfully request leave of the Court to file this thirty-five page exhibit under seal.

Respectfully submitted,

THOMAS E. SCOTT
UNITED STATES ATTORNEY

By:



DEXTER A. LEE
Assistant U.S. Attorney
Fla. Bar No. 0936693
99 N.E. 4th Street
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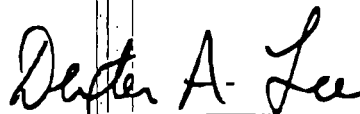
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2875 N.E. 191st Street, Penthouse 1B
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7. On January 7, 2000, instead of complying with the INS requests, Plaintiff Lazaro Gonzalez, with the assistance of Attorneys Eig, Bernstein, and Osberg-Braun, filed a Verified Petition for Temporary Custody and Other Relief in the Circuit Court for

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longer that conflict continues unresolved, the longer Elian's future remains in doubt.

d. Elian has become the focus of international news media attention, making it difficult if not impossible for Elian to live a normal life.

CONCLUSION

Defendants request that the Court set the following schedule:

- A. That plaintiffs' opposition to defendants' motion to dismiss and plaintiffs' reply in support of the motion for a preliminary injunction be filed no later than February 2, 2000.
- B. That defendants' reply in support of the motion to dismiss be filed no later than February 7, 2000.
- C. That a hearing on defendants' motion to dismiss and plaintiffs' motion for a preliminary injunction be set at the earliest possible opportunity thereafter.

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CERTIFICATE OF SERVICE

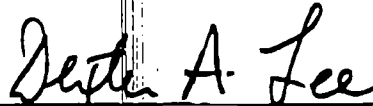
I certify that on this 27th day of January, 2000, I caused one copy of the foregoing Motion for Expedited Scheduling of Defendants' Motion to Dismiss or Alternative Motion For Summary Judgment and Opposition to Motion for Preliminary and Permanent Injunctive Relief to be served upon plaintiffs by same-day delivery addressed as follows:

LINDA OSBERG-BRAUN
ROGER A. BERNSTEIN
Hackley, Bernstein & Osberg-Braun
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BARBARA LAGOA
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701 Brickell Avenue
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DEXTER A. LEE
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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ROBERT WALLIS, District Director,
United States Immigration and
Naturalization Service; UNITED
STATES IMMIGRATION AND
NATURALIZATION SERVICE; and
UNITED STATES DEPARTMENT OF
JUSTICE,

Defendants.

DEFENDANTS' NOTICE OF FILING RECORD AND EXHIBITS

Defendants, by and through their undersigned counsel, hereby
file the Record and Exhibits in support of their Motion To
Dismiss or Alternative Motion for Summary Judgment, and
Opposition to Plaintiffs' Motion for Preliminary and Permanent

/ / /

/ / /

/ / /

Injunction and Petition for Writ of Mandamus.

Respectfully submitted,

THOMAS E. SCOTT
UNITED STATES ATTORNEY

By: Dexter A. Lee

DEXTER A. LEE
Assistant U.S. Attorney
Fla. Bar No. 0936693
99 N.E. 4th Street
Miami, Florida 33132
(305) 961-9320
Fax: (305) 530-7139

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the
foregoing was hand-delivered this 27TH day of January, 2000 to:

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Dexter A. Lee
DEXTER A. LEE
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STATES IMMIGRATION AND
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UNITED STATES DEPARTMENT OF
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Defendants.

DEFENDANTS' MOTION FOR LEAVE OF COURT
TO FILE DOCUMENT UNDER SEAL

Defendants, by and through their undersigned counsel, file
their Motion for Leave of Court to File Document Under Seal, and
state:

Defendants have submitted various exhibits in support of
their Motion to Dismiss or Alternative Motion for Summary
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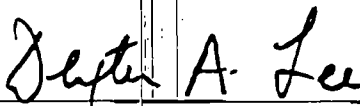
A copy of the document is submitted for *in camera* inspection and review by the Court.

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Respectfully submitted,

THOMAS E. SCOTT
UNITED STATES ATTORNEY

By:


DEXTER A. LEE
Assistant U.S. Attorney
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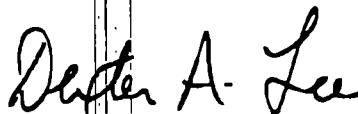
I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered this 27TH day of January, 2000 to:

Linda Osberg-Braun, Esq.
Hackley, Bernstein & Osberg-Braun, P.L.
2875 N.E. 191st Street, Penthouse 1B
Aventura, Florida 33180

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Miami, Florida 33131



DEXTER A. LEE
Assistant U.S. Attorney

01-27-00 THE COURT FAX 305507100

IN THE UNITED STATES DISTRICT COURT
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IMMIGRATION AND NATURALIZA-
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ELIAN GONZALEZ, a minor, by and
through LAZARO GONZALEZ, as next
friend, or alternatively as temporary legal
custodian, of ELIAN GONZALEZ, a minor,

Petitioners/Plaintiffs,

v.

JANET RENO, Attorney General of the
United States; DORIS MEISSNER,
Commissioner, Immigration and
Naturalization Service; ROBERT WALLIS,
District Director, Immigration and
Naturalization Service; UNITED STATES
IMMIGRATION AND NATURALIZA-
TION SERVICE; and UNITED STATES
DEPARTMENT OF JUSTICE,

Respondents/Defendants.

No. 00-0206-CIV-HOEVELER

DEFENDANTS' MOTION TO
DISMISS OR ALTERNATIVE
MOTION FOR SUMMARY
JUDGMENT, AND OPPOSITION
TO PLAINTIFFS' MOTION FOR
PRELIMINARY AND
PERMANENT INJUNCTIVE
RELIEF AND PETITION FOR
WRIT OF MANDAMUS

Defendants Janet Reno, *et al.* ("the United States") by and through their undersigned counsel, hereby move to dismiss plaintiffs' complaint for injunctive and mandamus relief, or, alternatively, move for summary judgment. In addition, the United States hereby opposes plaintiffs' motion for preliminary and permanent injunctive and mandamus relief.

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I. SUMMARY

This case concerns a small boy named Elian Gonzalez who lost his mother nearly eight weeks ago. His father, who has been close to Elian throughout the boy's life, has asked that his son return home to him in Cuba. The United States has concluded that the two should be reunited because it is the father who now speaks for his son. But relatives here, who doubtless mean well, are seeking to have Elian remain in the United States because of their concerns about the repressive government of Cuba. This lawsuit has resulted.

Plaintiffs' complaint ignores the dispositive question the Attorney General posed to counsel in her letter of January 12, 2000: "Who speaks for the child?" Defendants' Exhibits ("Record") at 27. Elian is so young he cannot comprehend the significance of an asylum application. Someone else, therefore, must decide and speak for him. Plaintiffs would have the government be bound by their interpretation of the Immigration and Nationality Act and regulations whereby the only person who *cannot* speak for Elian in immigration matters is his surviving parent. This cannot be. As the Supreme Court has made clear, "our society and this Court's jurisprudence have always presumed [parents] to be the preferred and primary custodians of their minor children," *Reno v. Flores*, 507 U.S. 292, 310 (1993), a presumption clearly reflected in the family unity policy which is embodied in the Immigration and Nationality Act.

When Juan Miguel Gonzalez, Elian's father, came forward to request Elian's return, the INS sent one of its officers to speak with him. The INS learned that Juan

Gonzalez and Elian are very close. Although his parents were divorced, Elian lived a great deal of the time with Juan Gonzalez since he attended school closer to his father's house than to his mother's. Record at 49. "He would sleep and eat here and spent most of his time here. He even slept with me and my present wife in the same bed while visiting because he's very close to me." *Id.* As a matter of fact, he said later, "Elian's name is the construction of parts of our names: 'Eli', for the beginning of [his mother's] name Elisabeth and 'an' for the latter part of my name, Juan." *Id.* at 51. "Elian is my life. He is my first son. Wherever I went, he went with me. I taught him how to swim, do karate, he has a parrot here, dogs, a bicycle and all kinds of toys." *Id.* Juan Gonzalez was very involved with Elian's education and his school. *Id.* The INS summary of the interviews of Juan Gonzalez are submitted as part of the Record. The INS sought assurances that Juan Gonzalez was speaking freely when he asked for Elian's return, and the evidence indicates he was and is.

There are two plaintiffs in this case. One is Elian's great-uncle, Lazaro Gonzalez, either in his capacity as a state family court-appointed temporary guardian or as a "next friend" under Rule 17(c) of the Federal Rules of Civil Procedure. The other is Elian. The complaint's five claims all challenge the government's decision not to adjudicate an asylum application filed on Elian's behalf by Elian's great-uncle against his father's wishes. Plaintiffs' first claim is that Elian has a constitutional right to an asylum adjudication. Plaintiffs' second, third, and fourth claims are that the Immigration and Nationality Act and various Immigration and Naturalization Service ("INS") regulations

require that the government adjudicate the asylum application. Plaintiffs' fifth claim is for mandamus. Based on this complaint, Lazaro Gonzalez has filed a motion, asking the Court to enjoin the government from complying with Juan Gonzalez' wish that Elian return to Cuba and to mandate that the asylum application be fully adjudicated.

The government's motion to dismiss or in the alternative for summary judgment and opposition to plaintiffs' motion for injunctive relief has four main parts. Following a discussion of the factual background of this case, Part I argues that the Court lacks subject matter jurisdiction over plaintiffs' demand that the Attorney General commence proceedings against Elian, and over any challenge to her decision to permit Elian to withdraw his application for admission. *See* pages 31-36. In the alternative, Part II asks that the Court dismiss this case for lack of standing. That argument has two sections. Section II.A explains that Lazaro Gonzalez' designation as "next friend" does not provide standing because such a designation only aids enforcement of a right vested in a minor. *See* pages 36-42. Elian's rights are vested exclusively in his father and thus Lazaro has no authority to make Elian a proper party plaintiff. Section II.B explains that Lazaro Gonzalez' state family court appointment as interim temporary guardian does not solve the standing problem either. *See* pages 43-53. The reason for this is that the Immigration and Nationality Act preempts the family court order to the extent the order regulates immigration and conflicts with the Commissioner's determination. Because the Commissioner has determined that Elian's father speaks for him with respect to federal immigration matters, a state court cannot decide otherwise. The final argument with

respect to standing is more fully developed later in the summary judgment portion of this motion, but the conclusion applies here as well. Elian lacks standing to bring this suit because, inasmuch as his father has withdrawn Elian's admission and asylum applications, Elian has not suffered an "injury in fact."

Section III of this motion is based on Rule 12(b)(6), and, alternatively, on Rule 56(c), of the Federal Rules of Civil Procedure. Plaintiffs have failed to state a claim upon which relief can be granted, or, alternatively, the Court should grant summary judgment to the government. Plaintiffs claim Elian has a constitutional right to apply for asylum, but a long line of Supreme Court cases and Eleventh Circuit precedent have held to the contrary. *See* pages 53-58. Plaintiffs claim the Immigration and Nationality Act and regulations require that the asylum application be adjudicated, but they ignore the fact that parental authority determines whether an application may even be submitted on behalf of a child so young as to lack the capacity to affirm the contents of that application. *See* pages 54-65. Similarly, plaintiffs rely on a mandamus claim to seek enforcement of that statutory right to seek asylum, while again ignoring the parent's authority to speak for his child. *See* pages 65-70.

In the context of the government's motion for summary judgment, the government invites examination of the propriety of the Commissioner's decision, ratified by the Attorney General, to recognize the authority of Elian's father to speak for his son in immigration matters. Under established law, the Commissioner's decision should be upheld if it is "facially legitimate and bona fide." *See* pages 70-82. Alternatively, while

the government does not believe the Administrative Procedure Act applies in this instance, should the Court find that it does, it should uphold the Commissioner's decision to rely on Elian's father's judgment because that decision is neither arbitrary nor capricious. *See* pages 82-83.

Finally, the government asks the Court to deny plaintiffs' motion for injunctive relief. *See* pages 83-87. For the reasons summarized above, plaintiffs have failed to demonstrate a substantial likelihood of success. Plaintiffs have also failed to meet their burden of showing a substantial threat of irreparable harm. The real harm is that six-year-old Elian is being kept from his father and his father from him. Nor have plaintiffs demonstrated that their injury outweighs the injury to the United States, which is substantial. The INS will be harmed if it cannot act upon the immigration decisions parents make on their children's behalf. And, if this country does not honor the wishes of a child's surviving parent, the United States will be harmed from the standpoint of its international standing in protecting parental rights in cases involving American children.

Finally, plaintiffs have not demonstrated that the injunction would serve the public interest. It disserves the public interest to undermine the principle that parents may decide what is best for their children. It disserves the public interest to undermine the ability of immigration inspectors at our ports-of-entry to look to parents to make immigration decisions for their children. And as Ambassador Mary Ryan explains in a declaration made part of the record, it disserves the public interest to undermine the ability of the United States to obtain the return of U.S. citizen children.

II. BACKGROUND

A. ELIAN GONZALEZ' DEFERRED INSPECTION

Six-year-old Elian Gonzalez is a native and citizen of Cuba who was rescued from the Florida Straits a few miles northeast of Fort Lauderdale on November 25, 1999. See Defendants' Exhibits ("Record") at 29-30, 36-37. That morning, two Miami men who were out fishing found him floating on an inner tube, brought him aboard their boat, radioed the Coast Guard, and started toward shore. *Id.* The Coast Guard launched a utility boat to retrieve him from the men who found him. *Id.* at 29. At 9:05 a.m., he was transferred to the utility boat and ten minutes later brought to the Coast Guard station. *Id.* at 38. Suffering from hypothermia and dehydration, Elian was then taken by ambulance to Hollywood Memorial Hospital. *Id.* at 29.

At that time, the Coast Guard notified the United States Border Patrol of Elian's hospitalization. *Id.* at 36, 38. In turn, Border Patrol agents Verne Eastwood and Jose Lopez arranged to meet Immigration and Naturalization Service ("INS") inspector Edward Agundez at the hospital. *Id.* at 36-37, 38-39. When the three arrived, hospital staff advised them that several people in the waiting area claimed to be related to Elian. *Id.* at 36-37, 39. Two of these persons identified themselves as Lazaro Gonzalez and his wife Angela. They explained that they were the child's great uncle and aunt, identified Elian as Elian Monzalvo-Gonzalez, and provided the officers with information about his parents and residence in Cuba. *Id.*

tube; Fernandez and Horta were separated from him on the other. *Id.* at 33. On the morning of Thursday, November 25, 1999, about two and a half days after the boat had capsized, Fernandez and Horta came ashore at Key Biscayne. *Id.* at 29, 33. Elian was rescued a short time later three miles or so from Fort Lauderdale and, based on his urgent need for medical attention, the Coast Guard brought him ashore and arranged for his emergency transfer to Hollywood Hospital. *Id.* at 29-30, 36.

B. JUAN GONZALEZ DEMANDED ELIAN'S RETURN

On November 27, the day after Elian was released to defendant and Angela Gonzalez, Juan Gonzalez dispatched a letter to the Cuban government requesting its assistance in obtaining his son's return. *Id.* at 110, 111. That day, he wrote to Cuban Foreign Minister Felipe Perez Roque and asked him to carry out the necessary procedures. *Id.* Perez in turn forwarded Juan Gonzalez' letter to the U.S. Interests Section in Havana. *Id.* at 112. Perez stated, in part:

The child's father, Juan Manuel Gonzalez Quintana, a citizen of Cuba, has asked this ministry to obtain the immediate return of his son who was taken out of the country by the mother and ex-wife of Gonzalez Quintana without his consent. Given the human connotation of the event and based on sound legal foundation, this Ministry presents this reclama, enclosing the letter of the father of the minor in which he demands the return of his child.

Id. at 113.

Robert A. Wallis, INS' district director for the Miami district, responded by letter to Juan Gonzalez' demand on December 8, 1999. *Id.* at 42. In that letter, Wallis told Juan Gonzalez that the INS needed to meet with him to obtain proof that he was Elian's

01-27-00 TEL 03-27 FAX 0333307133 C380712

father and had lawful authority to exercise parental rights. *Id.* He asked Juan Gonzalez to provide documents such as a birth certificate or baptismal certificate, school or medical records, written statements from persons attesting to their relationship, and a divorce decree and documents such as medical or school records which reflected the exercise of parental rights. *Id.* at 42-45. On December 10, 1999, before the INS was able to gather this information, Lazaro Gonzalez signed and submitted to the INS an asylum application on Elian's behalf.

C. THE INS MET WITH JUAN GONZALEZ TO OBTAIN EVIDENCE OF HIS RELATIONSHIP WITH ELLAN

On December 13, 1999, Silma Dimmel, Officer-in-Charge for the INS in Havana, met with Juan Gonzalez at his residence. *Id.* at 46. Accompanying Dimmel was Jeffrey DeLaurentis, the First Secretary and Chief of the Political/Economic Section of the U.S. Interests Section. *Id.* With Juan Gonzalez were his parents, Elisabeth Brotons' parents, his wife, their son, and other family members. *Id.* at 48. Dimmel asked Juan Gonzalez if she and Mr. DeLaurentis could meet with him in private so he could talk freely and without interruption. *Id.* He led them to another room but asked that his parents accompany them. *Id.* Dimmel agreed to this but obtained his agreement that his parents would not comment until after the two of them were finished. *Id.*

In a written report summarizing her interview of Juan Gonzalez, Dimmel described Juan Gonzalez' assurances that he is Elian's father and that their relationship is a close one. *Id.* Among documents Juan Gonzalez produced was Elian's birth certificate; his

own birth certificate; Elian's school enrollment form indicating that Elian lived with him at an address different from Elisabeth Brotons' address (*id.* at 81); a May 1999 hospital admission form indicating that Elian resided with him and that in the event of an emergency he was the point of contact; and a report from Elian's school indicating that Elian is bright and well-adjusted, and that his parents were involved in his school work. *Id.* at 72-107.

Juan Gonzalez also provided Dimmel with a series of affidavits. *Id.* at 118-99. Included among them are affidavits from a doctor who treated Elian in connection with May 1999 surgery and who spoke of Juan Gonzalez' solicitude for Elian; from a nurse, who on that occasion observed the affection between and among Elian, Juan Gonzalez, and Elisabeth Brotons; from Juan Gonzalez' supervisor who related the suffering Juan has endured since his separation from Elian; from neighbors who described the mutual affection they observed between Juan and Elian; and from Elian's teacher and school principal, who attested to the closeness between Juan and Elian. *Id.* at 119-99.

Asked about the custody arrangement, Juan Miguel said that although Cuban law grants custody of a child to the mother, Elian had been spending more time with him than with Ms. Brotons:

When we got divorced the laws in Cuba grant custody of a child to the mother. However, the boy practically lived with me since he attended school closer to my residence because she lived outside the city limits. She even decided not to register him at the school which he was supposed to attend in order for him to stay here and my mother to take care of him while both of us worked. She (Ms. Brotons) sometimes argued with me because he spent more time with me in this residence than with her. He would sleep

and eat here and spent most of his time here. He even slept with me and my present "wife" in the same bed while visiting because he's very close to me.

Id. at 49. "As a matter of fact," he said later, "Elian's name is the construction of parts of our names: 'Eli', for the beginning of her name Elisabeth and "an" for the latter part of my name, Juan." *Id.* at 51.

Elian is my life. He is my first son. Wherever I went, he went with me. I taught him how to swim, do karate, he has a parrot here, dogs, a bicycle and all kinds of toys. As a matter of fact, I haven't been to the barber because he isn't here since we always went together. I always had a good relationship with Ms. Brotons. She would even bring Elian here and go to buy birthday gifts for my father. Even her present boyfriend would come here and talk to me and eat here. My parents also liked him a lot. I liked him also because he never mistreated my son whom he loved very much and I appreciated that from him. Ms. Brotons also had a good relationship with my present wife.

Id.

Asked how often he saw Elian, Juan Gonzalez answered, "All of the time. He basically lived here, we did everything together and as already mentioned, he spent more time with me and my parents than with his own mother." *Id.* at 52. He went on to say, "We did everything together. I used to take him to the place where I work to use the swimming pool and we played together. He slept with me, that's how close we are." *Id.* Juan Gonzalez reiterated that after his relationship with Elisabeth Brotons ended, Elian slept at his home "all of the time." *Id.* He also said he attended meetings and activities at Elian's school, and that he had seen to it that Elian received needed surgery. *Id.* Asked if

he provided financial support for Elian's upbringing, he explained that he provided more than what the law required of him. *Id.* at 52-53.

Dimmel explained to Juan Gonzalez that under United States law an individual who is seeking admission to the United States may withdraw his application and return to Cuba; remain in the United States and after one year become a lawful permanent resident under the Cuban Adjustment Act; or apply for asylum. *Id.* at 49-50. Asked for his preference as Elian's father, Juan Gonzalez was unequivocal:

Return immediately to Cuba. I was listening to the news and about the laws in the United States. Elian, at the age of six, cannot make a decision on his own. In the first place, he wasn't found on land, he was found at sea. I'm very grateful that he received immediate medical assistance, but he should be returned to me and my family. As for him to get asylum, I am not allowing him to stay or claim any type of petition; he should be returned immediately to me.

Id. at 50.

Juan Gonzalez said that Lazaro Gonzalez is his father's brother and had left Cuba legally over ten years ago. "They lived with us in this house and with family since I was a young child," he said. *Id.* at 53. "Last August, 1998, they visited Cuba for 15 days and that's when they met Elian. They took a liking to Elian because he's such a nice boy, well behaved and well mannered; since he's such a lovable boy, they immediately liked him. Elian is very well educated." *Id.* Juan Gonzalez added that when he initially spoke to Lazaro and his wife, they said Elian should be returned immediately to him:

Then all of a sudden, things changed. We had an argument over the phone because they even offered me money to leave Elian there. I do not want Elian to stay there, I want him back here in Cuba. It appears that Lazaro is

under pressure. I tried to convince him rationally to let Elian return, but he says he is unable to back off because of the circumstances of what could happen.

Id. at 54.

INS Officer Dimmel concluded her report with the following summation:

It was this officer's observation that the residence where Elian lived, until the time he was removed by his mother, is very well kept, clean and that Elian has a very loving set of grandparents and father.

Mr. Gonzalez Quintana appeared very concerned for Elian's return to him as soon as possible without further delays because he misses his "buddy." Mr. Gonzalez Quintana provided for the well being of Elian[,] and his grandparents took good care of Elian after school and during visits to the residence. Mr. Gonzalez Quintana lives with his present common-law wife, baby son, his parents and his brother. Elian's grandparents on his mother's side were also present at Mr. Gonzalez Quintana['s] residence, but were precluded from being present at the interview.

Mr. Gonzalez Quintana was very much involved in Elian's sustenance and care. He taught Elian how to swim, do karate and did many activities together, to the point that Mr. Gonzalez Quintana has not visited the barber shop since Elian's gone because they got their haircuts together.

Elian was taken care of by his paternal grandmother more so than by his mother since [his mother] resided in a very small room and not with her mother. This is one reason why Elian spent so much time with his father, grandparents, stepmother and stepbrother.

Mr. Gonzalez Quintana, his parents and maternal grandparents expressed their request that Elian return to Cuba immediately. His paternal grandparents are greatly distraught that the emptiness that Elian's not being in Cuba has left in the family. The honesty, concern and truthfulness on the part of Mr. Gonzalez Quintana was palpable as well as his caring and wanting his son [to] be returned to Cuba. Elian's paternal grandparents also appear to be confused and distraught. The family was hurt by the death of Ms. Brotons and it was obvious that Elian is deeply missed by the family.

Id. at 55.

D. THE INS MET WITH LAZARO GONZALEZ

On December 17, 1999, Miami INS District Director Wallis wrote to Lazaro Gonzalez and his attorneys to request a meeting to give them the opportunity to respond to Juan Gonzalez' insistence that only he had the authority to speak for Elian. *Id.* at 214. That meeting took place at the INS district office on December 20. *Id.* at 219-24. Present for the INS were Jorge Roig, INS Port Director for the Port of Miami; Miami INS District Counsel Dan Vara; and INS Associate General Counsel Ron Whitney. *Id.* at 217. Present as well were Lazaro Gonzalez; a cousin of Elian's named Marisleysis Gonzalez; and attorneys Spencer Eig, Roger Bernstein, and Linda Osberg-Braun. *Id.*

According to Jorge Roig's written summary of the meeting, Messrs. Eig, Bernstein, and Ms. Osberg-Braun initially met alone with the INS representatives. *Id.* at 219. After a discussion of the meeting's purpose, Mr. Bernstein spoke about the asylum application submitted on Elian's behalf and why it would be in Elian's best interests to remain here. *Id.* Mr. Bernstein said he had interviewed twenty witnesses and ten family members and that there was a consensus that Juan Gonzalez is being coerced and that his true wishes are for the boy to remain in the United States. *Id.* He described changes in the tone of the telephone conversations between Juan Gonzalez and the Miami relatives. *Id.* "[T]he father initially did not ask that Elian be sent back," he said. *Id.* Rather, Mr. Bernstein stated that Juan Gonzalez asked that Elian be taken care of by his Miami relatives. *Id.* He also described Elian's family history, including his step-father's imprisonment for three months. *Id.* And he reiterated concerns that the Castro regime would exploit Elian

politically. *Id.* Mr. Bernstein further stated that the Convention on the Rights of the Child and the International Declaration on Human Rights grant children the right to apply for asylum without parental consent. *Id.* at 220.

Mr. Bernstein stated that a reporter in Cuba had contacted him to say that Juan Gonzalez had previously written letters to the United States Interest Section asking permission to leave Cuba. *Id.* Moreover, Mr. Bernstein reported that persons who had recently arrived here from Cuba had said that Cuban officials were at Juan Gonzalez' home, making freedom of movement impossible. *Id.* Mr. Eig added that Elian's mother's dying wish was for Elian to live in the United States. *Id.* Mr. Eig also claimed that Cuba adheres to the doctrine known as *pater protesta*, whereby the state is the ultimate guardian of all children. *Id.*

At this point, Lazaro and Marisleysis Gonzalez entered the room, and Port Director Roig put a series of questions to Lazaro Gonzalez. Juan Gonzalez is Elian's father, Lazaro said. *Id.* He also said that it was his understanding that Elian's mother received custody of Elian after the divorce. *Id.* at 221. When asked if he had any reason to doubt Juan's assertion of parental rights, Lazaro answered, "The boy left Cuba with his mother. Juan said that if the boy made it to this country safe and sound that we should protect him by whatever means available. I spoke to both the father and the grandfather." *Id.* Asked when this conversation took place, Lazaro said it was on Monday, two to three days before Elian was found. *Id.* Later Lazaro returned to this November 22, 1999 phone call, describing the conversation as one in which Juan Gonzalez told him that Elian

had left with his mother. *Id.* at 223. Juan Gonzalez said nothing to him to indicate that he had consented to Elian's departure. *Id.* Nor did he give him any other information about who was making the trip. *Id.* Lazaro described a second telephone conversation with Juan Gonzalez on Thursday, November 25, 1999, when a doctor at Hollywood Hospital telephoned Juan Gonzalez for Elian's medical history. *Id.* at 223-24. Lazaro told Roig that he himself spoke to Juan Gonzalez on that occasion and that Juan Gonzalez told him to take care of Elian and protect him. *Id.* at 224.

Lazaro Gonzalez described Elian's relationship with his father as a normal relationship but said that Elian was not always with his father because he lived with his mother. *Id.* at 221, 222. When Elian was not with his mother, Lazaro Gonzalez said, he was with his paternal grandparents. *Id.* at 221. He also said he did not think that Elian's life at his house in Cuba was a stable one. *Id.* Asked to explain, he stated that Elian had changed since being released to him and his wife's care, and that Elian's family life in Cuba necessarily was not stable because of his parents' relationship. *Id.* at 221, 222.

As for Mr. Bernstein's claim that Juan Gonzalez was being coerced to demand his son's return, Lazaro said that he and his family believe that the Cuban government is pressuring Juan Gonzalez because he changed his mind. *Id.* at 222. Asked for proof, he asked why more proof was needed when Cuban authorities are at Juan Gonzalez' house and will not let him leave. *Id.* Family members in Cuba have told him that Juan Gonzalez is being guarded, he said. *Id.* Whoever knows about the Castro regime knows this is how it works there. *Id.* He cited a statement of Juan Gonzalez that Elian had not

lost out on anything by virtue of living in Cuba. *Id.* Marisleysis Gonzalez agreed that Juan Gonzalez was being pressured. *Id.* at 224. She said his tone of voice is different, as if people were telling him what to say. *Id.* And she thought his phone was being tapped. *Id.*

At the close of the interview, Mr. Eig asked Marisleysis Gonzalez to say a few words about how Elian is doing in their home. *Id.* at 224. She said that Elian seemed very able to cope with the tragedy he had experienced and to adapt to his new surroundings. *Id.* She also said that Elian had bonded with her the most and that she is concerned about his well-being if he is separated from her. *Id.* Elian does not ask to go back to his father, she added. *Id.* When asked if he wants to go back, she reported that Elian had replied that his father should come and live with them in Miami. *Id.* Finally, she said that when Elian asks her what will happen, she does not know how to answer him because she does not know. *Id.*

E. THE INS CONDUCTED A SECOND INTERVIEW OF JUAN GONZALEZ

On December 31, 1999, the INS conducted a second interview of Juan Gonzalez. *Id.* at 228-43. This time the interview took place at the private residence of the representative for the United Nations International Children's Emergency Fund ("UNICEF") in Havana, a location United States and Cuban representatives had agreed upon as neutral and private. *Id.* at 234. INS Officer-in-Charge Silma Dimmel, accompanied by Jeffrey DeLaurentis, again conducted the interview. *Id.* Juan Gonzalez

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was accompanied by his parents. *Id.* Ms. Dimmel's written summary of that meeting contains the following information.

At the outset of the meeting, Juan Gonzalez told Ms. Dimmel that his meetings with United States representatives were voluntary and that he was not being coerced. *Id.* at 235. He also said that Elisabeth Brotons took Elian out of the country without his consent or knowledge. *Id.* Elian lived with him most of the time and attended school in his own district rather than Ms. Brotons' district. *Id.* That, he said, proves that Elian lived with him and was under his care. *Id.* Ms. Dimmel then asked him to explain an apparent discrepancy between his first interview and Lazaro Gonzalez' interview with respect to the timing of Juan Gonzalez' first call to Lazaro Gonzalez. *Id.* at 236. Juan Gonzalez explained that on Monday, November 22, 1999, his family learned from a friend that Elisabeth Brotons had left for the United States and had taken Elian with her. *Id.* When Juan Gonzalez learned of this that night, he became upset and asked his father to call his brother Lazaro to inquire about it. *Id.* Lazaro denied knowing anything about it. *Id.* The following morning, Lazaro called Juan Gonzalez' father and said that Elisabeth Brotons' relatives in Miami knew nothing about it either. *Id.* Juan Gonzalez said that morning he spoke with authorities about what he would need to do to reclaim Elian in the event that Elian ended up in the U.S. or in Coast Guard custody. *Id.*

On Thursday, November 25, 1999, Juan Gonzalez and his family received word that a child had been rescued and evidently taken to the hospital in Miami. Juan Gonzalez asked his father to call Lazaro Gonzalez' house to find out if the child was

Elian. His father spoke with Lazaro's wife who said she would ask Lazaro to check on this and call him back. *Id.* at 237. When Juan Gonzalez returned home from work, he received a call from Elian's doctor at the hospital in Miami. *Id.* Elian had given the doctor his address and phone number. *Id.* Juan Gonzalez and the doctor spoke before Lazaro Gonzalez arrived at the hospital. *Id.* When Lazaro Gonzalez and Juan Gonzalez' father later spoke, Lazaro assured him that he would take care of Elian. *Id.* According to Ms. Dimmel, Juan Gonzalez told her that, "As family we did not need to tell him to watch over my son." *Id.*

The following day when the hospital released Elian to Lazaro Gonzalez, the Miami relatives — presumably Lazaro and his wife — called Juan Gonzalez' home and spoke about Juan Gonzalez and his family coming to the United States. *Id.* They said that Juan Gonzalez would be given a job, that Elian was fine, and that they would take care of him. *Id.* Subsequently, Lazaro and Juan Gonzalez fought over the phone because, according to Ms. Dimmel's summary, Lazaro continued to insist that Juan Gonzalez and his family come to the United States. *Id.* Juan Gonzalez told Ms. Dimmel that he immediately began arranging to obtain the necessary documents for Elian's return. *Id.* "I want my son back." *Id.* Juan Gonzalez' father reported to Ms. Dimmel that when he told his brother that Elian would have to be returned to Cuba, Lazaro said that would not be a problem and that, "If I have to take a plane to return Elian to Cuba, I will do so." *Id.* at 238.

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Ms. Dimmel summarized her interview, observing that Juan Gonzalez is deeply concerned for Elian's well-being and that he had stressed that the Miami relatives are using his son for their own benefit without concern for his emotional well-being. *Id.* at 243. Both Juan Gonzalez and his parents are distressed and became emotional several times during the interview. *Id.* All appeared to her to be honest and uncoerced:

Mr. Gonzalez met with us voluntarily and spoke truthfully and honestly. He misses and wants his son back and the grandparents cannot mention Elian's name without becoming emotional. This is an honest, genuine and unified family thoroughly engaged in Elian's life, that has been under distress since the taking of the child by his mother. It is obvious to this officer that the mother took the child without Mr. Gonzalez' knowledge, consent and/or permission.

Id.

F. THE COMMISSIONER ISSUED HER DECISION

On January 5, 2000, INS Executive Associate Commissioner Michael Pearson sent letters to Juan Gonzalez, Lazaro Gonzalez, and attorneys Bernstein and Eig notifying them of the Commissioner's decision that she had accepted the withdrawal of Elian's application for admission and had declined to accept the asylum applications that Lazaro Gonzalez and his attorneys had submitted. *Id.* at 1, 3, 5. In his letter to Juan Gonzalez, Mr. Pearson said that the INS had reviewed the information he had provided and had determined that he was indeed Elian's father and lawful guardian. *Id.* at 1. As such, Mr. Pearson said, Juan Gonzalez has "the right and obligation to represent Elian in all legal transactions and acts in which Elian has an interest." *Id.* He further stated:

we recognize your authority to speak on behalf of Elian in immigration matters. Consequently, we are granting your request to withdraw Elian's application for admission to the United States, a key step in reuniting you with your son. Also, consistent with the wishes you expressed at our two interviews with you, we accept your decision not to assert Elian's right to apply for asylum in the United States.

Id. Mr. Pearson then went on to say that the INS was notifying Lazaro Gonzalez and the attorneys of Juan Gonzalez' having expressly declined to permit the attorneys to represent Elian. *Id.* And, he said, the INS had also explained to the others that it was not accepting the asylum applications. *Id.*

Mr. Pearson's letter to Lazaro Gonzalez is similar in content. *Id.* at 3-4. In addition, he advised him that the INS had taken steps to ensure that Elian's father was able to express his true wishes at the two INS interviews and was convinced that he had done so. *Id.* at 3. And so far as legal representation for Elian is concerned, Pearson stated:

Roger Bernstein and several of his associates, attorneys in Miami, have submitted several Forms G-28, Notice of Entry and Appearance as Attorney, for Elian. Some of these Forms G-28 were signed by you on behalf of Elian. On others, Elian himself has printed his first name. After careful consideration, we have determined that we cannot recognize any of the Forms G-28 as authorizing these attorneys to represent Elian in immigration matters. Although the INS has placed Elian in your physical care, such placement does not confer upon you the authority to act on behalf of Elian in immigration matters or authorize representation in direct opposition to the express wishes of the child's custodial parent. Further, we do not believe that Elian, who recently turned six years old, has the legal capacity on his own to authorize representation. Finally, Mr. Gonzalez-Quintana has expressly declined to authorize Mr. Bernstein or his associates to represent Elian. Therefore, the INS cannot recognize them as Elian's representatives.

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Id. at 3.

As for the asylum applications purportedly filed on Elian's behalf, Pearson stated:

In our direct conversations with Mr. Gonzalez-Quintana, he has repeatedly informed us of his decision not to assert Elian's right to apply for asylum. Mr. Bernstein and his associates have prepared and submitted asylum applications on Elian's behalf, one of which was signed by Elian. After careful consideration, we have determined that Elian does not have the capacity to apply for asylum without the assistance of his parent. Further, neither the applications you have submitted nor any other information available indicates that Elian would be at risk of harm in Cuba such that his interests might so diverge from those of his father that his father could not adequately represent him in this matter. Therefore, given Mr. Gonzalez-Quintana's decision not to assert Elian's right to apply for asylum, we cannot accept the asylum applications as having been submitted on Elian's behalf.

Id. at 4.

Mr. Pearson offered Lazaro Gonzalez any assistance that might be needed to effectuate Elian's reunion with his father. He offered to facilitate continued contact between Elian, his father, and Lazaro Gonzalez' family. In addition, he closed by saying, "If Elian and his immediate family wished to apply for tourist visas at some point in the future, the Consular Section at the U.S. Interests Section in Havana would, of course, consider them favorably." *Id.* Mr. Pearson's letter to the attorneys contained the information found in the other two letters. *Id.* at 5-6.

G. LAZARO GONZALEZ AND HIS ATTORNEYS SOUGHT THE ATTORNEY GENERAL'S RECONSIDERATION

In a letter dated January 5, 2000, attorneys Bernstein, Eig, and Osberg-Braun sought the Attorney General's reconsideration of the Commissioner's decision. *Id.* at 24.

The decision stripped Elian of legal representation, they wrote, and also denied him a hearing on his asylum application. *Id.* They insisted that regardless of what Juan Gonzalez might want for his son, Elian "has a constitutionally protected right to apply for political asylum. . . ." *Id.* The Commissioner's decision appeared arbitrary, they also asserted, "based largely on secret interviews conducted with Juan Miguel Gonzalez in Cuba." *Id.* And, they said, it seemed predicated on the untested view that Elian's father is free from duress in Castro's Cuba, and addresses only the father's best interests, not Elian's. *Id.* Moreover, they said, the decision was not in accord with an INS policy on admission withdrawals dated August 21, 1997, which states:

When deciding whether to permit the minor to withdraw his or her application for admission, officers must also make every effort to determine whether the minor has a fear of persecution or return to his or her country. If the minor indicates a fear of persecution or intention to apply for asylum, or if there is any doubt, especially in the case of countries with known human rights abuses or where turmoil exists, the minor should be placed in removal proceedings under section 240 of the Act.

Id.

H. ACTION FILED IN FAMILY COURT

On January 7, Lazaro Gonzalez filed interim and temporary petitions for temporary custody and other relief in a Dade County family court. *Id.* at 300-15. Because, he said, Elian was in danger of being removed to Cuba, he asked the family court to award him temporary custody not only so that he could give legal consent for any medical care Elian might need, but also so that he could apply for Elian's admission and

asylum "and any other relief that may be needed in connection with [Elian's] immigrant status" including bringing litigation. *Id.* at 301-05.

Lazaro Gonzalez asked the family court, in ruling on his petition, to discount Juan Gonzalez' insistence that his son return to Cuba. *Id.* at 306-07. He cannot speak freely while he is there, Lazaro argued. Thus, he said, the family court should not and cannot consider the father's objections "unless he is removed from his coercive environment and appear[s] in this Court so that he may speak openly concerning [Elian's] best interest." *Id.* at 308. Moreover, he said, even if the family court were to accept that Juan Gonzalez' objection to the family court proceeding is uncoerced, it should find that he is unfit to provide for Elian's care and control by finding that he has "abused, abandoned, or neglected" him. *Id.* at 309.

On January 10, 2000, the family court issued an order setting a March 6, 2000, hearing on the petition for temporary custody and instructing that Juan Gonzalez be served with the pleadings. *Id.* at 291-99. It found that it had jurisdiction under Fla. Stat. §§ 61.1308(1)(c) and (d) and, in any event, jurisdiction independent of these sections, under compelling circumstances, to grant temporary judicial relief to protect the best interests of a child. *Id.* at 297. Finding that Lazaro Gonzalez had established a *prima facie* case that Elian might be subject to imminent harm if relief were not granted, the family court issued an order which included the following:

- (1) "[t]he status quo shall be preserved until such time as a full hearing on the Verified Petition for Temporary Custody and Other Relief is held;" (2) "Elian Gonzalez shall not be removed from this jurisdiction pending a full

hearing on the Verified Petition for Temporary Custody and Other Relief;" and (3) Lazaro Gonzalez "is granted such limited legal authority as is necessary to preserve the status quo and prevent the child's removal from this jurisdiction, including but not limited to, the authority to assert and protect such rights as the child may have under United States immigration law and to retain counsel to assert and protect such rights" and (4) "a guardian ad litem for the minor child shall be appointed by separate order, to act as next friend of the child, evaluator and investigator, with such powers, privileges and responsibilities as are necessary to advance the best interest of the child."

Id. at 299.

I. THE ATTORNEY GENERAL RESPONDED TO THE REQUEST FOR RECONSIDERATION

In a letter dated January 12, 2000, the Attorney General responded to Lazaro Gonzalez' request that she overturn the Commissioner's decision. *Id.* at 25-28. "While I am always open to considering new information that might arise," she stated, "I am not currently aware of any basis for reversing Commissioner Meissner's decision that Juan Gonzalez — Elian's father — has the sole authority to speak for his son on immigration matters." *Id.* at 25. Acknowledging that Lazaro's attorneys had obtained the family court order, the Attorney General pointed out that the United States was not a party to that action, nor was it named in the family court's order. *Id.* "Indeed," she said, "the question of who may speak for a six-year-old child in applying for admission or asylum is a matter of federal immigration law." *Id.* Nothing in the order changes that, she said. *Id.*

The Attorney General then referenced a January 7 meeting with Miami representatives including Lazaro Gonzalez' counsel Roger Bernstein. Because on that occasion Mr. Bernstein had said that the INS had originally announced that the dispute

over Elian was properly a family court matter, she thought it appropriate to address that issue in her letter. *Id.* at 25-26. Shortly after Elian's arrival, she said, it was suggested that INS's placement of Elian in Lazaro Gonzalez' care amounted to a grant of custody. *Id.* at 26. The INS responded to this suggestion by pointing out that the INS could not grant custody and that such a request would have to be put before the state courts. *Id.* The situation quickly changed, however, when it became clear that Juan Gonzalez had asserted his parental authority and had adequately expressed his wish, under the immigration laws, that Elian's petition for admission be withdrawn. *Id.* "In these circumstances, INS was obliged to determine whether the father was the appropriate person to speak for Elian on immigration issues. That question, as I have said, remains one of federal, not state, law." *Id.*

The Attorney General reminded Mr. Bernstein that Elian is only six-years-old, and that, as a general matter, when dealing with children that young, the immigration law, like other areas of the law, looks to the wishes of the surviving parent. *Id.* She went on to say that Commissioner Meissner had reached her decision through a careful and thorough process. *Id.* The INS Commissioner had looked to all available information, including information from the three interviews, and had carefully considered the allegation that Juan Gonzalez was being coerced into demanding Elian's return. *Id.* Based on that information, the INS Commissioner was confident of the father's very close relationship with Elian and confident that he truly wanted him to return home. *Id.* at 26-27.

The Attorney General then went on to discuss the attorneys' complaint that the INS had departed from established policy. *Id.* at 27. She pointed out that the paragraph the attorneys had quoted was taken out of context, and that the context made clear that it did not apply to a situation of a six-year-old unaccompanied minor whose return his surviving parent had insisted upon. *Id.* "Nothing in the field guidance suggests that a father's wishes regarding his six-year-old child should be overridden." *Id.* To the contrary, the context makes clear that the INS's first responsibility when dealing with unaccompanied minors is to try to find the parent or legal guardian, even if that person is outside the United States. *Id.*

ARGUMENT

In this case, the INS has sought to follow the statutes and regulations in a sensitive and careful manner that fully respects the rights of this vulnerable young child and his family at a time of great tragedy and crisis in their lives. The Commissioner has been mindful of the policy of family unification that underlies the Immigration and Nationality Act, and consistent with her constitutional, statutory, and regulatory responsibilities, has exercised due regard for the traditional and customary role of parents in the lives of children of tender years. Her determination that Elian's father should speak for him with respect to immigration matters was reached following thorough interviews with Juan Miguel Gonzalez and Lazaro Gonzalez. Under well-established legal principles, the Court should allow that determination to stand, and allow the Commissioner to return Elian to his sole surviving parent.

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' DEMAND THAT THE ATTORNEY GENERAL ACCEPT AN ARRIVING ALIEN'S APPLICATION FOR ADMISSION AND PLACE HIM IN FORMAL PROCEEDINGS TO ADJUDICATE AN ASYLUM APPLICATION

To the extent plaintiffs seek to force the Attorney General to refuse to allow the withdrawal of the application for admission and to put Elian into removal proceedings, the Court lacks jurisdiction. See *Heckler v. Chaney*, 470 U.S. 821 (1985); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S. Ct. 936 (1999); INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii); INA § 242(g), 8 U.S.C. § 1252(g). As the Supreme Court made clear in *American-Arab*, Section 242(g) was enacted to confirm that determinations either to institute proceedings or not to do so are committed to agency discretion.

Count IV of plaintiffs' complaint requests that the Court enjoin the INS from returning Elian to Cuba without adjudicating the asylum applications submitted by Lazaro Gonzalez in removal proceedings. Complaint at 15. This constitutes a demand for the commencement and adjudication of proceedings. The Attorney General has decided that placing Elian in removal proceedings would be inappropriate. Record at 11. *Heckler v. Chaney*, *American-Arab*, INA § 242(a)(2)(B)(ii) and INA § 242(g) preclude judicial review of that decision.

In *Heckler v. Chaney*, the Court recognized the well-established principle that agency decisions to decline to institute enforcement proceedings are generally not subject to judicial review, and that judicial review of such decisions under the Administrative

Procedure Act is unavailable because they are "committed to agency discretion by law. Because the only conceivable basis for a waiver of sovereign immunity and a cause of action against the Attorney General here is the APA, review of the exercise of enforcement discretion is barred here as well. "[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." 470 U.S. at 831 (citations omitted). Reasons for this general principle of judicial nonreviewability include whether the particular enforcement action best fits the agency's overall policies. *Id.* In addition, the Court observed:

[W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict — a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution "to take Care that the Laws be faithfully executed."

Id. at 832 (quoting U.S. Const., Art. II, § 3.)

The general presumption of unreviewability of decisions not to enforce applies to the Attorney General's determination not to commence proceedings against Elian. The INA does not require that proceedings be commenced. The Commissioner determined not to commence proceedings in view of Elian's young age, in view of all that he has been through, and in view of the fact that his father has withdrawn his application for admission. Moreover, apart from the lack of jurisdiction under a *Heckler v. Chaney* analysis, Section 242(g) bars judicial review of "any cause or claim by or on behalf of

Id. (quoting 6 Gordon and Mailman, *Immigration Law and Procedure* § 72.03[2][h] (1998) (emphasis added)). Elian is only six and obviously should be spared the trauma of removal proceedings. The Attorney General determined, as the Commissioner had previously determined, that Juan Gonzalez' wishes that Elian be returned home should be respected. Plaintiffs' request for injunctive relief invites "deconstruction, fragmentation, and hence prolongation," *American-Arab*, 119 S. Ct. at 945, of the government's effort to reunite Elian with his father pursuant to the father's request. The Supreme Court has made clear that this Court has no jurisdiction to do this, and the Court should therefore refuse to review plaintiffs' claims to the extent that they ask the Court to compel the Attorney General to commence removal proceedings against Elian.

As for the Attorney General's decision to grant Elian's request, as expressed by his father, to withdraw his application for admission to the United States, INA § 242(a)(2)(B)(ii) bars review of any claim that this request was improperly granted. Plaintiffs' complaint contains no claim with respect to the propriety of the Attorney General's decision to allow Juan Gonzalez to withdraw Elian's application for admission to the United States, as distinct from the application for asylum purportedly submitted on his behalf. Had they made such a claim, however, INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(2), would bar its review. That Section states:

Notwithstanding any other provision of law, no court shall have jurisdiction to review (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter *to be in the discretion of the Attorney General*, other than the granting of [asylum] relief under section 1158(a) of this title.

(Emphasis added.) One of the many decisions that is subject to the Attorney General's discretion is her decision to permit an alien to withdraw his application for admission to the United States. INA § 235(a)(4) states, "An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States." *See also American-Arab*, 119 S. Ct. at 945 (§ 242(a)(2)(B) is among IIRIRA's many provisions that "are aimed at protecting the Executive's discretion from the courts"); *Van Dinh v. Reno*, 197 F.3d 427, 431 (10th Cir. 1999) (§ 242(a)(2)(B)(ii) bars judicial review of the Attorney General's discretionary determinations related to the custody and detention of deportable aliens); *Naidoo v. INS*, 39 F. Supp. 755, 762 (W.D. La. 1999) (INA § 242(a)(2)(B)(ii) bars judicial review of Attorney General's decision to stay removal). The determination to recognize Elian's wish, expressed by his father, that he does not want to be admitted to the United States, and thus to forego commencement of immigration proceedings against the child is not subject to judicial review.

II. PLAINTIFFS LACK STANDING TO RAISE ANY CLAIM

If the Court does not dismiss plaintiffs' complaint for lack of jurisdiction, it should dismiss the case for lack of standing. Plaintiffs' complaint designates Lazaro Gonzalez and Elian as plaintiffs. Lazaro Gonzalez, who seeks to represent Elian as the interim temporary guardian appointed by the family court, or as next friend under Rule 17(c) of the Federal Rules of Civil Procedure, lacks standing to raise these claims on Elian's behalf in either capacity. To the extent he appears as the family court's interim temporary

guardian, the INA — and the Commissioner's *and the Attorney General's* lawful determinations that Juan Gonzalez speaks for Elian in immigration matters — preempts that appointment. To the extent that he appears as next friend, next friend status does not confer standing. See *Lubbock Feed Lots, Inc. v. Iowa Beef Processors*, 630 F.2d 250, 256 (5th Cir. 1980). In any event, the United States challenges Lazaro Gonzalez' designation as next friend. *Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989). If anyone should represent Elian, it is his father, and his father has asked that Elian return home.

Elian lacks standing because, as shown in Section IV, *infra*, the Commissioner's determination that Juan Gonzalez speaks for Elian is facially legitimate and bona fide, and, in any event, is not arbitrary or capricious. Because Juan withdrew the admission and asylum applications purportedly filed on Elian's behalf, Elian has suffered no "injury in fact." See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Article III of the United States Constitution limits the jurisdiction of federal courts to actual cases or controversies." *Ford v. Haley*, 195 F.3d 603, 624 (11th Cir. 1999) (citing U.S. Const. art. III, § 2, cl. 1; *Whitmore v. Arkansas*, 495 U.S. 149 (1990)). A fundamental case-or-controversy limitation is the requirement that a litigant have standing to invoke the power of a federal court. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). One of the requirements for standing is that the plaintiff have suffered an injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Here Elian's father has spoken for Elian in withdrawing Elian's applications for admission and asylum. Thus, Elian has not suffered an injury in fact, and neither has Lazaro Gonzalez. Accordingly, dismissal is required.

A. BECAUSE HIS FATHER HAS WITHDRAWN ELIAN'S APPLICATION FOR ADMISSION, HAS NOT AUTHORIZED ANYONE TO SEEK ASYLUM ON ELIAN'S BEHALF, AND WISHES HIS RETURN TO CUBA, ELIAN GONZALEZ IS NOT A PROPER PARTY PLAINTIFF

A next friend under Rule 17(c) of the Federal Rules of Civil Procedure does not himself become a party to the action in which he participates, but merely presses the cause of action on behalf of the person allegedly injured, the real party in interest. *Morgan v. Potter*, 157 U.S. 195, 198 (1895). Put differently, the minor does not acquire the right of action from the next friend. The next friend can only aid in the enforcement of a right already vested in the minor (who must himself have standing).

Lazaro Gonzalez recognizes that Elian is the real party in interest, thus fulfilling Rule 17(a)'s requirement that "[e]very action shall be prosecuted in the name of the real party in interest." But to be a real party in interest, Elian must have "the right sought to be enforced." *Lubbock Feed Lots, Inc. v. Iowa Beef Processors*, 630 F.2d 250, 256 (5th Cir. 1980). Therein lies the problem. The complaint asserts rights for Elian under statutes and regulations that do not apply because Elian's father has chosen, on Elian's behalf, to withdraw that application for admission and to decline to apply for asylum. Elian's father told the INS that his son should be returned to him. It is Juan Gonzalez, as Elian's father, not Elian himself or his great uncle, who has "the right sought to be enforced." *Id.* If Elian's father had told the INS that he wanted Elian to remain in the United States to pursue adjustment under the Cuban Adjustment Act, the INS would have

complied with that instruction. But he did not. Juan Gonzalez sought to have his son returned to him.

In addition, Lazaro Gonzalez' status as "next friend" is inappropriate because Elian has a proper representative, his father. Next friend standing is not automatically granted. A next friend must first prove that the real party in interest cannot pursue his own cause due to some disability such as mental incompetence or lack of access to the courts. *Whitmore v. Arkansas*, 495 U.S. 149, 163-65 (1990); see also *Lonchar*, 978 F.2d at 641; *T.W. & M.W. v. Brophy*, 124 F.3d 893, 895 (7th Cir. 1997) ("[A]ppointed or not . . . [the putative next friend] can be challenged as not being a suitable representative, just as a guardian ad litem can be."); accord *Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989). Ultimately, "[t]he burden is on the 'next friend' clearly to establish the propriety of [his] status, and thereby justify the jurisdiction of the court." *Whitmore*, 495 U.S. at 164.

Rule 17(c) allows a "representative" to sue on an infant's behalf, but the infant's parent can be that "representative." See *Devine v. Indian River County School Board*, 121 F.3d 576, 581 (11th Cir. 1997); *Croce v. Bromley Corp.*, 623 F.2d 1084, 1093 (5th Cir. 1980) (same). Indeed, if at all possible the parents should be. The Supreme Court recognized that parents are the natural choice to represent infants in court proceedings more than one hundred fifty years ago in *Bank of United States v. Ritchie*, 33 U.S. 128 (1834). The "proper rule is that the next friend must be an appropriate alter ego for a

plaintiff who is not able to litigate in his own right" *T. Brophy*, 124 F.3d at 897.

Lazaro Gonzalez is not Elian's alter ego; Elian's father is.¹

Moreover, not only is Juan Gonzalez available to assert the interests of Elian, but the Attorney General is charged with exercising legal custody over Elian while he is in the U.S. unaccompanied by a parent. *See Reno v. Flores*, 507 U.S. at 300. In exercising that custody, the Attorney General fulfills the equivalent of a *parens patriae* function while Elian's father is unavailable. *Id.* at 304. The Attorney General is therefore authorized to make decisions in Elian's interest (including setting conditions on Elian's transfer to the temporary care of his relatives in Florida, as she has done). And, in making those decisions, the Attorney General is surely justified in taking into account the presumptive right of Elian's father to make determinations on behalf of his six year old son and to undertake whatever inquiries she determines are appropriate to satisfy herself of the genuineness of the parental relationship and the father's parental judgments.² The primary role of the parent in these circumstances is reflected in the regulations governing

¹ Nor can plaintiffs counsel assert interests on Elian's behalf. Against Juan Gonzalez' insistence that the attorneys do not represent his son, their claim to represent Elian because Lazaro Gonzalez and ostensibly Elian consented to their doing so has no basis. While there is no absolute prohibition against a minor signing a Form G-28, the form designating attorneys or representatives in immigration proceedings, such a designation is effective only if the minor has the capacity to do so. In the State of Florida, a minor under the age of eighteen is not considered competent to enter into contracts. *See* Section 743.07, Florida Stat. (1973). Under INS regulations, a parent or legal guardian may sign the application or petition of a minor under the age of fourteen. 8 C.F.R. 103.2(a)(2). Here, Juan Gonzalez has expressly stated that he did not wish for the attorneys to represent Elian, or authorize them to do so. Record at 57.

² So too is she surely justified in taking into account Elian's interest (indeed, right) in being reunited with his father, his closest living relative.

the custody of unaccompanied juveniles, as well as the background principles of law that regulation reflects. *Id.* at 310.

Given that the Attorney General of the United States is charged by Act of Congress with the custody of children such as Elian -- and given that Elian's father is available to make parental decisions on his behalf and the Attorney General has determined, after conducting an appropriate inquiry, that there is no basis for declining to give effect to the strong presumption in favor of parental authority -- there is substantial reason to question whether a federal court could ever properly recognize "next friend" standing on the part of someone else to challenge the judgment of the Attorney General or of the father. That is especially so in the absence of some showing that the Attorney General or the Commissioner abdicated their responsibilities by declining to make any judgment on the question of parental authority, or acted in bad faith, and there manifestly is no basis for such a claim here.

At the very least, Lazaro Gonzalez would have to bear a particularly heavy burden in establishing his entitlement to next friend status in order to substitute his judgment for that of the Attorney General of the United States within the sphere of her responsibilities and of Elian's father within the sphere of his. Thus, if review is available at all, and if such review extends beyond the question of whether the Attorney General actually made a determination on Elian's behalf, then in order to obtain the court's recognition as Elian's next friend, Lazaro must establish that the Attorney General's conclusion that Juan Gonzalez may properly assert Elian's legal rights was, on the basis of the information

presented to her, arbitrary and capricious. That showing has not been made. As we have explained, Lazaro met with INS officials in an effort to persuade them that Juan Gonzalez's assertions about his capacity to speak for Elian could not be trusted, and INS officials met twice with Juan Gonzalez to determine whether Juan Gonzalez's assertions were creditable. They concluded, based on all the information brought to their attention, that Juan Gonzalez does indeed have Elian's interests at heart, and that his assertion of his parental rights to withdraw Elian's application for admission was genuine. Lazaro can point to nothing in the record of the Attorney General's decision to ratify that conclusion that would justify setting aside that decision, and declaring Lazaro to be Elian's next friend, thus effectively terminating Juan's parental rights and ignoring the Attorney General's legal responsibility to exercise temporary custody over Elian.

B. A STATE FAMILY COURT CANNOT AUTHORIZE PLAINTIFF LAZARO GONZALEZ TO ASSERT IMMIGRATION CLAIMS ON BEHALF OF ELIAN GONZALEZ WHEN THE COMMISSIONER HAS DETERMINED TO THE CONTRARY

Lazaro Gonzalez' interim temporary guardianship does not remedy his lack of standing in this suit because the INA clearly preempts the family court order to the extent that it purports to authorize Lazaro Gonzalez to act on Elian's behalf in immigration matters. The Court should accord deference to the INS, both in its response to Juan Gonzalez' assertion of parental authority and to its decision, a decision ratified by the Attorney General, that the question of who speaks for Elian is a question of federal law. See Record at 25-28 (Attorney General's letter of January 12, 2000, to counsel); *id.* at

317-18 (INS letter of January 13, 2000, to counsel); 8 U.S.C. § 1103(a); *Teper v. Miller*, 82 F.3d 989, 998 (11th Cir. 1996) (according *Chevron* deference to federal agency in its determination that state law preempted); see also *INS v. Aguirre-Aguirre*, 526 U.S. 415, 119 S. Ct. 1439, 1445-49 (1999) (recognizing that INS officials "exercise especially sensitive functions that implicate questions of foreign relations" and that INS decisions are entitled to deference described in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). "In other words, even if a statute is on its face ambiguous, Congress' intent to preempt may be clear when the administrative agency expressly responsible for interpreting and implementing the statute has clarified it." *Teper*, 82 F.3d at 998; see also *City of New York v. FCC*, 486 U.S. 57 (1988) (cautioning that even in the area of preemption, "if the agency's choice to preempt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.").

(1) AN OVERVIEW OF THE PREEMPTION DOCTRINE

"Any state law that conflicts with federal law is preempted by the federal law and is without effect under the Supremacy Clause of the Constitution."³ *Lewis v. Brunswick*,

³ The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or

(continued...)

107 F.3d 1494, 1500 (11th Cir. 1997) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)). Preemption can operate not only as between federal and state statutes, but also as between federal and state decisions based on those statutes. See, e.g., *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) (federal commission's order preempted state commission's inquiry); *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, 474 U.S. 409 (1986) (federal statute preempted order of state oil and gas board); *McCarty v. McCarty*, 453 U.S. 210 (1981) (federal scheme of military retirement benefits preempted state court divorce award under community property laws).

Congressional intent is the "touchstone" of preemption analysis. *Lewis*, 107 F.3d at 1500. That intent is divined in three ways. See *Pacific Gas & Electric Co. v. Energy Resources Conservation and Dev. Com'n*, 461 U.S. 481, 491 (1987). First is "express preemption," where Congress has explicitly defined the extent to which its enactments preempt state law. *Lewis*, 107 F.3d at 1500 (citing *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996) (citations omitted)). Second is "field preemption," where "Congress has regulated a field so pervasively, or federal law touches on a field implicating such a dominant federal interest, that an intent for federal law to occupy the field exclusively may be inferred." *Id.* And third is "conflict preemption," where state and federal law

³ (...continued)

Laws of any State to the Contrary notwithstanding.

actually conflict, such that it is impossible to comply with both or where the state order is of such a nature as to "prevent or hinder the [federal agency] from operating the way Congress intended it to operate." *Lewis v. Brunswick*, 107 F.3d 1494, 1502 (11th Cir. 1997).

In the area of immigration, the Supreme Court has recognized both field and conflict preemption, both of which apply in this case. In the field preemption case of *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941), the question was whether "the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation," preempted a similar state statute. 312 U.S. at 61. The Court found preemption based on its finding that the state statute had intruded into the field of international relations. *Id.* at 67-68. That field demands "broad national authority," it emphasized, because the United States' treatment of aliens in this country can affect how foreign countries treat our citizens when they are abroad.⁴ *Id.* at 62-65.

⁴ The Court observed that

One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment . . . may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government. . . . Among those treaties have been many which not only promised and guaranteed broad rights and privileges to aliens sojourning in our own territory, but secured reciprocal promises and guarantees for our own citizens while in other lands. And apart from treaty obligations, there has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all nations to alien residents — duties which our State Department has often successfully insisted foreign nations must
(continued . . .)

DeCanas v. Bica, 424 U.S. 351 (1976), which dealt with state regulation of the employment of illegal aliens, sets forth the boundaries of the immigration field for field preemption analysis as well as the standard for conflict preemption analysis. The Court described the field of immigration as matters having to do with "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country," *id.* at 360 n.8, or, as it put it elsewhere, matters having to do with "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355. Anything within this field is a *per se*-preempted "regulation of immigration." *Id.*

As for conflict preemption, the Court stated that the question is whether, although the INA contemplates some room for state legislation in the area of aliens' employment, the particular statute was preempted because "it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the INA." *Id.* at 363 (citing *Hines v. Davidowitz*, 312 U.S. at 67; *Florida Lime & Avocado Growers v. Paul*, 373 U.S. at 141). Elsewhere, the Court phrased the conflict preemption question as whether the state statute "can be enforced without impairing the

⁴ (...continued)
recognize as to our nationals abroad.

Id. at 64-65 (footnote omitted).

federal superintendence of the field" covered by the INA. *Id.* (citing *Florida Lime*, 373 U.S. at 142).⁵

In *Toll v. Moreno*, 458 U.S. 1 (1982), the Court considered whether the INA preempted a University of Maryland policy of barring in-state aliens from receiving lower in-state tuition rates if their parents worked for certain international organizations.

Finding field preemption, the Court observed that:

The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.

Id. at 11 (citing *Hines*, 312 U.S. at 66). The federal government's authority over the status of aliens derives from various sources, the Court went on to say. These sources "include the constitutional power '[t]o establish [a] uniform Rule of Naturalization,' U.S. Const., Art. I, § 8, cl. 4, its power '[t]o regulate Commerce with foreign nations,' *id.*, cl. 3, and 'its broad authority over foreign affairs.'" *Id.* at 10 (citing *United States v. Curtiss-Wright Export Corp.* 299 U.S. 304, 318 (1936); *Mathews v. Diaz*, 426 U.S. 67, 81, n.17 (1976); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)). "Our cases have long

⁵ Because the lower court had invalidated the state statute on field preemption grounds and had not reached the conflict preemption question, the Court remanded for consideration of this question. *Id.* at 363-65.

recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders." *Id.* at 10 (collecting cases).

Supreme Court immigration case law is replete with recognition of the federal government's preeminent role. The right to control immigration inheres in national sovereignty. "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominion, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *See also Plyler v. Doe*, 457 U.S. 202, 219, n.19 (1982) (citing *DeCanas*, 424 U.S. 351) (states cannot conduct foreign policy, control access to the United States, or exercise naturalization authority); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Sudomir v. McMahon*, 767 F.2d 1456, 1464 (9th Cir. 1985) ("federal authority in the areas of immigration and naturalization is plenary."); *see generally* K. Manheim, *State Immigration Laws and Federal Supremacy*, 22 Hastings Const. L. Q. 939 (1995). In this case, to the extent that a Miami-Dade County circuit court has purported to authorize Lazaro Gonzalez to act for Elian in immigration matters, that order is preempted by the INS's contrary determination under the Immigration and Nationality Act.

(2) FIELD AND CONFLICT PREEMPTION BAR LAZARO GONZALEZ FROM RELYING ON HIS FAMILY COURT APPOINTMENT AS INTERIM TEMPORARY GUARDIAN TO BRING THIS ACTION

Field and conflict preemption bar Lazaro Gonzalez from relying on his family court appointment as interim temporary guardian to bring this lawsuit. Lazaro's family court petitions reflect that he asked the family court to overturn the Commissioner's decision that Juan Gonzalez speaks for Elian in immigration matters, and to have that right accorded to him instead. *Id.* at 300-15. Lazaro asked the state court to allow him to seek political asylum on Elian's behalf (*id.*); to exercise custody of Elian pending the adjudication of that asylum application (*id.*); to stay Elian's removal from the United States pending an evidentiary hearing (*id.*); and to inquire into whether Juan Gonzalez' request that Elian return to Cuba is genuine and uncoerced (*id.*). He also sought authorization to apply for Elian's admission to the United States. *Id.* He asked the family court to grant him custody of Elian based upon a finding that Juan Gonzalez is an unfit father who has "abused, abandoned or neglected Elian, as defined in Chapter 39 [of the Florida statutes]."⁶ *Id.* And he sought authorization to pursue any other relief that might be needed in connection with Elian's immigration status, including authorization to retain counsel and bring legal proceedings. *Id.* at 305. In response, the family court ordered preservation of the status quo pending further hearing. *Id.* at 299. It also ordered that

⁶ In this regard, Lazaro Gonzalez relied solely on Juan Miguel Gonzalez' desire that Elian be returned to Cuba. Lazaro Gonzalez did not allege specific instances of mistreatment or neglect.

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Elian not be removed from its jurisdiction pending that hearing, and it granted Lazaro Gonzalez the authority necessary to preserve the status quo, prevent Elian's removal, protect any rights Elian may have under the INA, and retain counsel to protect such rights. *Id.*

As a federal matter, however, the Immigration and Naturalization Service had decided, and the Attorney General had ratified the decision, that Juan Gonzalez alone speaks for Elian in immigration matters. *Id.* at 1-23. The Commissioner's decision in this regard underpins the other crucial decisions in this case: the decision to accept Elian's request, as expressed by his father, to withdraw his application for admission; the decision to accept Juan Gonzalez' refusal to authorize attorneys to represent Elian in immigration matters; the decision to effect Elian's reunion with his father as soon as practicable, including, if necessary, the transfer of immigration custody of Elian from Lazaro Gonzalez to the INS or a neutral third party; and the decision not to commence removal proceedings. *See Johns v. United States Department of Justice*, 653 F.2d 884, 889 (5th Cir. 1981) (the discretion to commence removal proceedings is entrusted to the Attorney General).

The family court's appointment of Lazaro Gonzalez for immigration purposes is field preempted. It "falls squarely within the boundaries of the preempted domain," *Teper*, 32 F.3d at 995 (citation omitted), because it purports to regulate immigration by interfering with the Commissioner's lawful determination that Elian, by virtue of his father's requests on his behalf, has withdrawn his application for admission and asked to

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return to Cuba. The preemption inquiry is whether the state action is a "regulation of immigration," *DeCanas*, 424 U.S. at 355, which depends on whether the state action pertains to "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* Under *DeCanas*, the family court order is clearly "a regulation of immigration."⁷

These matters, as the Supreme Court emphasized in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), are exclusively federal matters:

Admission of aliens to the United States is a privilege granted by the sovereign United States government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides. . . . When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

* * * *

Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive.

Conflict preemption also bars the family court order to the extent it purports to authorize Lazaro Gonzalez to speak on Elian's behalf in immigration matters, preserve the status quo, and prohibit Elian's removal. "[I]t is impossible to comply with both" the INS

⁷ The Attorney General has a compelling interest in controlling access to the United States. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). The decision whether to admit an alien is a matter of sovereign prerogative, a "privilege" subject to the exclusive control of the political branches. *Landon v. Plascencia*, 459 U.S. 21, 32 (1982); *Fiallo v. Bell*, 430 U.S. 787 (1977); *United States v. Gordon-Nikkar*, 513 F.2d 972, 977 (5th Cir. 1975); *Pelaez v. INS*, 513 F.2d 303, 305 (5th Cir.), *cert. denied*, 423 U.S. 892 (1975).

decision to return Elian to his father in Cuba and the family court decision to retain him in Miami with Lazaro Gonzalez. The family court decision therefore "stands as an obstacle to the accomplishment of the full purposes and objectives' of federal law." *Boyer v Shell Oil Products*, --- F.3d ---, 2000 WL 3724, *6 (11th Cir. Jan. 4, 2000) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)). Moreover, the family court decision is of such a nature as to "prevent or hinder the [INS] from operating the way Congress intended it to operate." *Lewis v. Brunswick*, 107 F.3d 1494, 1502 (11th Cir. 1997). INS officials should not have to expose themselves to the risk of family court contempt proceedings for performing their lawfully authorized immigration responsibilities.⁸

⁸ Although it is established that "[c]ontrol over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere," *Mauclet*, 432 U.S. at 10, immigration laws and tribunals of course remain free to take account of state law decisions and "legal facts," for example, marriages, divorces, criminal convictions, or guardianship decisions. The immigration laws do so, however, as a matter of convenience and comity, in order to "draw[] upon [state] resources and expertise that are already in place," *Flores*, 507 U.S. at 312 n.7, and not on account of any requirement that they do so. Indeed, the immigration laws can, and frequently do, depart from state law criteria for parallel determinations. See, e.g., INA § 101(a)(27)(J) (defining "special immigrant juveniles" only in part based on state court determination, and providing that "no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction"); 101(a)(48) (defining "conviction" for immigration purposes to encompass what in many cases would not constitute a conviction under state law); 8 C.F.R. § 292.3(a) (1999) (authorizing suspension from practice before immigration administrative tribunals persons authorized to practice under state law). "Given that the States' power to regulate in [the immigration] area is so limited, and that this is an area of such peculiarly strong federal authority, the necessity of federal leadership seems evident." *Plyler*, 457 U.S. at 238 n.1. In this instance, both the Commissioner and the Attorney General determined that the question of whether only Juan Gonzalez could speak for Elian on immigration issues is a question of federal, not state, law. See Record at 25-28, 317-18.

III. THE COURT SHOULD DISMISS THIS CASE FOR FAILURE TO STATE A CLAIM OR, IN THE ALTERNATIVE, GRANT DEFENDANTS SUMMARY JUDGMENT

In the alternative, even were there jurisdiction to hear this matter, the Court should dismiss the complaint for failure to state a claim or grant summary judgment to the government. Under Rule 12(b)(6), dismissal is appropriate when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action. *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1539 (11th Cir. 1991). Summary judgment is in order, on the other hand, where there is "no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). There is no "genuine issue for trial" where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A. ARRIVING ALIENS HAVE NO CONSTITUTIONAL RIGHT TO APPLY FOR ADMISSION OR ASYLUM

Count I of the complaint alleges that by denying Elian a right to petition for asylum the United States has violated the Fifth Amendment Due Process Clause. See Complaint at 7-9. Because the Supreme Court and Eleventh Circuit precedent establish that applicants for admission cannot assert immigration rights based on the Due Process Clause, and because the government's motion to dismiss pursuant to Rule 12(b)(6) does not rely on extra-pleading materials, the Court should dismiss this count for failure to state a claim.

Applicants for admission such as Elian are viewed as standing outside the border seeking entry. See, e.g., *Leng May Ma v. Barber*, 357 U.S. 185, 186 (1958) (although physically present within this country's borders, unadmitted and excludable alien not "within the United States"); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 215 (1953) (inadmissible aliens are "treated as if stopped at the border" and as being merely "on the threshold of initial entry"). Of course, in this case the INS has determined that Elian does not wish to be admitted and in fact seeks to go home. Plaintiffs contend to the contrary and argue that the INS's failure to accept and adjudicate the asylum applications they have submitted on Elian's behalf violates his constitutional rights. Even if plaintiffs were authorized to speak on Elian's behalf, their constitutional arguments are without merit.

Aliens "on the threshold of initial entry" have no more constitutional rights in connection with their applications for admission than would an alien physically located in another country. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (An alien on the threshold of entry "has no constitutional rights regarding his application [for admission], for the power to admit or exclude aliens is a sovereign prerogative."); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (Bill of Rights a futile authority for applicant for admission); *Knauff*, 338 U.S. at 544 ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"); *id.* at 600 (denial of

⁹ The Court further stated.

(continued...)

removal hearing "raises no constitutional conflict if limited to 'excludable' aliens who," again by virtue of their status, "are not within the protection of the Fifth Amendment."); *Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984) (*en banc*) ("As to [applicants for admission], the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law") (collecting cases); *Cuban American Bar Ass'n v. Christopher*, 43 F.3d 1412, 1427-29 (11th Cir.) (Cuban and Haitian asylum-seekers detained in "safe haven" at American military base had no "protectable liberty or property interest against being wrongly repatriated", nor any other cognizable constitutional rights regarding their immigration status), *cert. denied*, 516 U.S. 913 (1995);¹⁰ *Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1442 (5th Cir. 1993) (excludable aliens entitled only to those due process rights as are provided by law); *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987) ("'entry fiction' that excludable aliens

⁹ (... continued)

[A]n alien who seeks admission to this country may not do so under any claim of right. . . . Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides. . . . [I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the government to exclude a given alien.

Knauff, 338 U.S. at 542.

¹⁰ The Eleventh Circuit has made clear, however, that "aliens can raise constitutional challenges to deprivations of liberty or property outside the context of entry or admission, when the plenary authority of the political branches is not implicated." *Jean*, 727 F.2d at 972 (*en banc*). See also *Amanullah v. Nelson*, 811 F.2d 1, 9 (1st Cir. 1987) ("outside the context of admission and exclusion procedures, excludable aliens do have due process rights.") (emphasis added).

are to be treated as if detained at the border . . . determines the aliens' rights with regard to immigration and deportation proceedings").

In *Jean*, *supra*, the *en banc* Eleventh Circuit held that "excludable [non-resident] aliens . . . have no constitutional rights with respect to their applications for . . . asylum . . ." 727 F.2d at 984. Rejecting an argument that the Refugee Act created a constitutionally protected "liberty" or "property" interest in asylum, the Eleventh Circuit found it "clear that the Refugee Act does not create an entitlement to asylum" but only provides that asylum may be granted in the Attorney General's discretion. *Id.* Therefore, the Eleventh Circuit concluded, "[t]he grant of asylum does not . . . create an interest protected by the due process clause." *Id.* at 981-82.¹¹ Other Circuits also have found that the INA's asylum provisions do not create a constitutionally protected liberty or property interest. See, e.g., *Garcia v. INS*, 7 F.3d 1320, 1326 (7th Cir. 1993); *Ramirez-Osorio v. INS*, 745 F.2d 937, 942-43 (5th Cir. 1984).

Plaintiffs base their first count on an assertion that Elian's parole entitles him to the constitutional protections afforded "all persons within the territorial jurisdiction of the United States." Complaint at ¶ 36. The Eleventh Circuit in *Jean* expressly rejected this contention, saying, "The Supreme Court has consistently rejected claims that the parole

¹¹ Upon affirming the *en banc* decision in *Jean*, the Supreme Court stated that the Eleventh Circuit should not have reached constitutional issues because the issues on appeal could have been resolved on statutory and regulatory grounds. *Jean*, 472 U.S. at 854-55. Nevertheless, the Eleventh Circuit later found that "our *en banc* holding in [*Jean*] regarding the constitutional issue remains viable as the Supreme Court did not vacate the opinion but affirmed and remanded on alternative grounds." *Cuban American Bar Ass'n v. Christopher*, 43 F.3d at 1428 n.20.

or detention of an excludable alien has an effect on his status under the law." 727 F.2d at 969 (citing *Leng May Ma*, 357 U.S. at 188; *Mezei*, 345 U.S. at 215; *Kaplan*, 267 U.S. 228, 230-31 (1925); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905); *Nishimura Ekiu*, 142 U.S. at 661; *Ahrens v. Rojas*, 292 F.2d 406, 410-11 (5th Cir. 1961)). "The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status." *Id.* (quoting *Leng May Ma*, 357 U.S. at 190). Thus, since "no construction of the factual allegations will support the cause of action," *Executive 100, Inc.*, 922 F.2d at 1539, grounded in the Due Process Clause, the Court should dismiss Count I for failure to state a claim.

In any event, even if the Due Process Clause were applicable, the Attorney General has afforded more than whatever process could be due with respect to the application for asylum or admission. The Attorney General did not arbitrarily deny or extinguish any interest or ability to submit such applications. The Attorney General gave effect to Juan Gonzalez' decision to withdraw those applications only after providing for two interviews of him in Cuba and after affording Lazaro Gonzalez an opportunity to be heard.

**B. ARRIVING ALIENS LACKING CAPACITY AND AN
OBJECTIVE BASIS FOR SEEKING ASYLUM HAVE NO
ENFORCEABLE STATUTORY RIGHT TO APPLY FOR
ADMISSION OR ASYLUM**

Counts II, III, and IV of the complaint allege that the INS violated 8 U.S.C. § 1103(a), 8 U.S.C. § 1158(a), 8 C.F.R. § 208.9 and 8 C.F.R. § 208.14(b) by not adjudicating the asylum applications or commencing removal proceedings against Elian. Complaint at 10-15. Accepting the complaint's allegations as true and reading them in the light most favorable to plaintiffs, *Linder v. Portocarrero*, 963 F.2d 332, 334 (11th Cir. 1992), dismissal of these counts is required because, on the basis of "a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993).

Because in this instance the dispositive issue of law involves construction of the statute and regulations which the INS administers, the Court must apply the principles of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). See *Aguirre-Aguirre*, 119 S. Ct. at 1445. Thus, the Court should determine whether "the statute is silent or ambiguous with respect to the specific issue" before it; if so, "the question for the court [is] whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; see also *Cardoza-Fonseca*, 480 U.S. at 448-49. The INS's construction of its regulations is

"especially due that respect." *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555, 566 (1980) (citations omitted).

Under normal circumstances, minors arrive at United States ports-of-entry in the company of their parents. Again, under normal circumstances, children generally do not file asylum applications independent of their parents. Rather, one or both of their parents seek asylum. The remaining members of the family are eligible for asylum derivatively. See 8 C.F.R. § 208.14(e) and § 208.20. That same is true for aliens who seek refugee status from outside the United States. See 8 C.F.R. § 207.7. Elian, however, arrived at a U.S. port-of-entry as an unaccompanied minor. It is undisputed that when he sought entry at age five, he lacked valid entry documents and, therefore, was subject to removal. The *INS Field Manual*,¹² which the Attorney General discussed in the context of this case in her letter to counsel of January 12, 2000 (Record at 25-28), indicates that the INS's first responsibility under these circumstances is to find the child's parent or legal guardian so that they are informed of the child's situation. Record at 254 ("Officers must attempt to contact a relative or guardian either in the United States or in another country regarding the minor's inadmissibility whenever possible."); see 8 C.F.R. § 236.3(a)(1) (listing "[a] parent" as the first preference for custody release); *Reno v. Flores*, 507 U.S. 292, 310 (1993) (discussing this regulation and commenting that "[t]he list begins with

¹² The *INS Field Manual*, like the *INS Children's Asylum Guidelines*, "are for the administrative convenience of the INS only," and do not have the force and effect of substantive law. *Pasquini v. Morris*, 700 F.2d 658, 662 (11th Cir. 1983).

parents, whom our society and this Court's jurisprudence have always presumed to be the preferred and primary custodians of their minor children") (citation omitted). *See also* Record at 285 (Declaration of Michael D. Cronin, Acting Associate Commissioner for Programs) ("Where the unaccompanied minor is very young and lacks sufficient capacity to understand the withdrawal process, it would be standard practice for the inspecting officer to make all attempts to locate a parent or, if the parents are unknown or unavailable, another adult relative.").

In this case, Juan Gonzalez was in Cuba and, when contacted, expressed in plain terms that he wanted his son "returned immediately" to him. Record at 50 ("I am not allowing him to stay in the United States. As for him to get asylum, I am not allowing him to stay or claim any type of petition; he should be returned immediately to me."). After considering all of the available information in this case, including the closeness of the father's relationship with Elian, and the question whether any threat to Elian upon his return could create a conflict of interest for his father, the Commissioner concluded that Elian lacked the capacity to apply for asylum and that his father's wishes regarding his return should be respected. Record at 7-23; 25-28.

Underlying the Commissioner's conclusion is a memorandum by the INS General Counsel bearing the Commissioner's written approval. *Id.* at 7-23. That memorandum reflects that the INS engaged in a careful effort to determine whether there was any reason it should not adhere to the presumption regarding the right of a parent to speak for his or her child. In making that determination, the INS drew support from the Seventh

Circuit's *Polovchak* decision for its conclusion that Elian, at age six, was "well below the lower end of necessary maturity described" and lacked the necessary capacity for affirming the contents of his asylum application. *Id.* at 16. It then looked at the asylum application to see whether there was anything in it to suggest that the INS should not rely on the father's judgment. Based upon that evaluation, it concluded that the father's request should be honored and did not accept the application for adjudication. *Id.* at 17.

The question before the Court is whether the INS' approach to the question of who speaks for a child so young as to not understand the contents of an asylum application rests on a permissible interpretation of the INA. *Chevron*, 467 U.S. at 843. Recent Eleventh Circuit decisions have addressed *Chevron* deference. "Unless Congress, in enacting [the statute at issue,] demonstrated clearly its intent with regard to the questions before us, we must defer to the [agency head's] official interpretations of [the statute] if they are reasonable." *Herman v. NationsBank Trust Company*, 126 F.3d 1354, 1363 (11th Cir. 1997). If the agency head has taken an official position, the court's role "is quite limited":

Under *Chevron* a court is not to search for what in the court's view is the best possible construction of the statute Realizing that administrators and judges might well disagree about the wisdom of a policy behind an agency's construction of a statutory provision, the Supreme Court admonished courts not to forget to whom the authority and responsibility for such policy making is entrusted.

Id. (quoting *Jaramillo v. INS*, 1 F.3d 1149, 1152 (11th Cir. 1993) (*en banc*)); see also *Stamm v. Paul*, 121 F.3d 635, 641 (11th Cir. 1997) (accepting "permissible" agency

reading of the statute although that reading "is far from the most natural reading"); *Acosta-Montero v. INS*, 62 F.3d 1347, 1349 (11th Cir. 1995) (agency interpretation entitled to deference assuming it is "reasonable").

The Commissioner's approach is reasonable and should be upheld. Nowhere does the INA require that the INS adjudicate an asylum application tendered on behalf of a child so young as to lack any understanding of its contents when the child's parent does not wish the child to remain in the United States. The INS did not rule out the possibility of adjudicating the application. It considered the application, examined it for evidence that would suggest that the father's judgment could not be relied upon, and, finding none, declined to delay the reunion of Elian and his father.

Without doubt, this is a rare case. But in applying the statute and regulations to this case, the INS was guided by policies of broad application, including the family unity policy embodied in the INA. Record at 284 at ¶ 6. (Cronin declaration). Another policy is that in dealing with children at ports of entry who lack sufficient capacity to understand the immigration process, immigration inspectors defer to the accompanying parent on nearly all decisions regarding their immigration status. *Id.* at ¶ 6. It is also INS policy that "if an unaccompanied minor has sufficient capacity to indicate a fear of persecution in his or her home country, the INS will place the child in Section 240 removal proceedings rather than permitting him or her to withdraw the application for admission." *Id.* at ¶ 7. In addition, if "an unaccompanied minor lacks the capacity to understand the immigration process and has no parent to speak for him or her," the *INS Field Manual*

instructs the inspecting officer to "make every effort to determine whether the child's safety would be threatened in his or her homeland." *Id.* at ¶ 9. Only if "there is an objective basis to support a claim for asylum" must that child be placed in removal proceedings. *Id.* at ¶ 9. As the Attorney General explained in her letter, however, this policy does not apply where there is no objective basis and the child has a parent to speak for him or her. Record at 25-28.

Plaintiffs assert that the statute and regulations required that the INS fully adjudicate the asylum application. *See* Complaint at 10-15. But they ignore the dispositive question the Attorney General posed to counsel in her letter of January 12, 2000: "Who speaks for the child?" *Id.* at 27. An asylum application filed on behalf of a child that the child cannot comprehend *requires that someone speak for that child.* Plaintiffs would have the INS be bound by an interpretation of its statute and regulations whereby the child's father could not speak for his child. But "our society and this Court's jurisprudence have always presumed [parents] to be the preferred and primary custodians of their minor children."¹³ *Kenn v. Flores*, 507 U.S. 292, 310, (1993) (citing *Parham v.*

¹³ The Court in *Flores* also stated:

"The best interests of the child," a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion — much less the sole constitutional criterion — for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would best provide for the child's welfare, the child would nonetheless not be removed from the custody of its

(continued...)

J.R., 442 U.S. 584, 602-03 (1979). "Categorical distinctions between relatives and nonrelatives, and between relatives of varying degree of affinity, have always played a predominant role in determining child custody and in innumerable other aspects of domestic relations." *Id.* at 310 n.5. There is no reason to ignore that role here.

INS inspectors deal with children every day. Last year, they inspected 345,000,000 nonimmigrants at United States ports-of-entry, vast numbers of them children. *Record* at 283, ¶ 3. In order to carry out its statutory mandate to regulate admission to the United States, the INS must be accorded deference to the interpretation of its statute regarding who speaks for these children consistent with customary views of parental authority. The Supreme Court's statement in *Reno v. Flores*, 507 U.S. at 303, about an INS policy of permitting detained juvenile aliens to be released only to their parents, close relatives, or legal guardians except in unusual and compelling circumstances applies no less here: "We think the INS policy now in place is a reasonable response to the difficult problems presented when the Service arrests

¹³ (... continued)

parents so long as they were providing for the child adequately. *See Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 555, 54 L.Ed.2d 511 (1978). Similarly, "the best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves. *See, e.g., R.C.N. v. State*, 141 Ga.App. 490, 491, 233 S.E.2d 866, 867 (1977).

Id. at 303.

unaccompanied alien juveniles. It may be that other policies would be even better, but 'we are not a legislature charged with formulating public policy.'" *Id.* (citation omitted). Accordingly, for the foregoing reasons, the Court should dismiss counts II, III, and IV for failure to state a claim upon which relief can be granted. Alternatively, it should grant summary judgment for defendants.

C. MANDAMUS IS NOT AVAILABLE TO PLAINTIFFS

Plaintiffs also seek the issuance of a writ of mandamus to compel the defendants to "nullify" their refusal to accept the three prior applications for asylum submitted on behalf of Elian and adjudicate the applications. See Complaint, ¶¶ 68-74. Mandamus is an extraordinary remedy that should be granted sparingly and only in the most drastic situations. See *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997). The Court should dismiss this claim because plaintiffs have not shown that the INS has a duty to accept the applications or that plaintiffs have an indisputable right to the relief sought, particularly where, as here, the child is only six years old and the Commissioner has determined that there is no basis for overcoming the strong presumption that effect should be given to the judgment of the parent.

To demonstrate entitlement to mandamus, plaintiffs must demonstrate that they have a clear and indisputable right to the issuance of the writ, and that there is no alternative remedy available. See 28 U.S.C. § 1361 ("the district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a *duty* owed to the plaintiff");

Jackson, 130 F.3d at 1004; *In re Lopez-Lukus*, 113 F.3d 1187, 1188 (11th Cir. 1997); *Rush v. Macy's New York, Inc.*, 775 F.2d 1554, 1558 (11th Cir. 1985). Mandamus is available "only where government officials clearly have failed to perform nondiscretionary duties." *Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, 112 F.3d 1283, 1288 (5th Cir. 1997). A plaintiff seeking mandamus must show that a government officer owes him a legal duty that is a "specific ministerial act, devoid of the exercise of judgment or discretion." *Id.*; see *Einhorn v. DeWitt*, 618 F.2d 347, 349 (5th Cir. 1980) (mandamus cannot compel a discretionary action). The legal duty must be set forth in the Constitution or by statute, "and its performance must be positively commanded and so plainly prescribed as to be free from doubt." *Id.*

The INS's decision to honor Juan Gonzalez' request that the asylum application not be accepted is consistent with the INA and with the common-law principle that parents have a right to speak on behalf of their children: See *Hodgson*, 497 U.S. at 483. Further, the determination is a sound one, made pursuant to a rigorous inquiry into Elian's relationship with his father; an investigation into, and ultimate rejection of, allegations of coercion relating to the father's expression of his true wishes for his son; and a well-substantiated premise that Elian and his father have a close relationship.

Neither the statute nor the applicable regulations give rise to a duty to adjudicate an asylum application submitted by unauthorized persons against the father's wishes on behalf of a child so young he cannot understand it. In general, INA § 208(d) authorizes the Attorney General to establish a procedure for the consideration of asylum

applications. This provision reflects that the Attorney General has the discretion to limit her consideration of an asylum application, so long as any decision to do so does not violate the INA. Also, INA § 208(d)(7) provides that "nothing in [subsection (d)] shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." Under this provision, the plaintiffs have absolutely no legally enforceable right, entitlement, or interest in the procedures promulgated under section 208 governing the agency's consideration of asylum applications.

Likewise, INS's *Guidelines For Children's Asylum Claims* or *INS Field Manual* do not give rise to a legally enforceable duty on behalf of INS to adjudicate the asylum applications. See *Kirkland Masonry, Inc. v. Commissioner of Internal Revenue*, 614 F.2d 532, 534 (5th Cir. 1980) ("[A] simple administrative directive to agency employees does not suffice to create a duty to the public."). The *Guidelines* acknowledge that juveniles may apply for asylum independently of their parents, and they set forth procedures suggesting how best to elicit information from juvenile applicants. Where there is some possibility that the "will of the parents and that of the child are in conflict," the INS has to decide whether the juvenile's fear is well-founded based on all the known circumstances. *Guidelines* at 20. In this instance, the INS complied with the *Guidelines* because Elian is so young that there can be no conflict. In any event, however, the INS examined the application to assure itself that there was nothing in it that would call into question Juan Gonzalez' judgment such that the presumption of parental authority should not be

followed. In any event, nothing in the language of the *Guidelines* imposes any legally enforceable duty or obligation on the agency to consider or adjudicate a particular juvenile's asylum application.

In addition to the lack of mandatory language, mandamus relief is not warranted here because of the nature of the action the plaintiffs seek to compel. Mandamus relief is available to compel the performance of nondiscretionary, ministerial acts. Here, the decision to withdraw Elian's asylum applications did not involve a merely ministerial act, but instead entailed the express exercise of the Commissioner's judgment, later ratified by the Attorney General, that Elian, as a child of tender years, is not competent to speak for himself in immigration matters; that for this same reason, Elian cannot possibly appreciate the consequences of seeking asylum in the United States rather than returning to Cuba; and that his father has the legal authority to speak for him in immigration matters. Because Elian's father is the sole individual with the authority to speak for his son in immigration matters, plaintiffs have absolutely no legally enforceable right to the relief they seek here.

Nor do INS's *Guidelines* relating to children's asylum claims give rise to a constitutionally protected or otherwise enforceable right that warrants mandamus relief. First, the Eleventh Circuit has recognized that INS's internal operating procedures "are for the administrative convenience of the INS only," and do not have the force and effect of substantive law. *Pasquini v. Morris*, 700 F.2d 658, 662 (11th Cir. 1983) ("The internal operating procedures of the INS are for the administrative convenience of the INS only.").

The language and the stated purpose of the *Guidelines* is consistent with this recognition: "This memorandum is written to provide [asylum officers] with background and guidance on adjudicating children's asylum claims." *See Guidelines for Children's Asylum Claims* (Plaintiffs' Complaint, Exh. C). Nothing in the language of the *Guidelines* mandates the adjudication of a juvenile applicant's application for asylum. *See Jean*, 727 F.2d at 982.

Under the foregoing analysis, the plaintiffs have failed to demonstrate that Elian has a clear right to the relief that is sought on his behalf — the nullification of INS's refusal to accept and adjudicate the asylum applications. For this reason alone, they have failed to state a claim for mandamus relief, and the request for relief should be dismissed. In the alternative, the Court should grant the government summary judgment on this claim.

D. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON WHETHER THE COMMISSIONER PROPERLY ACCEPTED JUAN GONZALEZ' WITHDRAWAL OF THE ADMISSION AND ASYLUM APPLICATIONS PURPORTEDLY PROFFERED ON ELIAN'S BEHALF

(1) THE COMMISSIONER'S DECISION IS "FACIALLY LEGITIMATE AND BONA FIDE"

As mentioned at the beginning of this Section, the test for granting summary judgment is whether there is "no genuine issue as to any material fact . . . [such that] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Plaintiffs' action challenges the Commissioner's decision to recognize Juan Gonzalez' parental authority to speak for six-year-old Elian in withdrawing the asylum applications that

others purported to file on Elian's behalf. Because in reviewing that decision, the Court looks to what was before the Commissioner when she rendered her decision and there is no dispute "as to any material fact" in that record, this case is ripe for summary judgment. In assessing that decision, moreover, the Court should determine only whether the Commissioner has advanced "a facially legitimate and bona fide reason" for her decision. *See Cuban American Bar Association v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) (reviewing Attorney General's parole decisions for "facially legitimate and bona fide" reason); *Perez-Perez v. Hanberry*, 781 F.2d 1477, 1482 (11th Cir. 1986) (same). The Supreme Court first articulated this standard in *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), where it held that "when the Executive exercises [the power to make policies and rules for the exclusion of aliens] negatively on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion."

When Elian was brought ashore on November 25, he was, as a matter of law, deemed to be an applicant for admission to the United States. The source of that classification is INA § 235(a)(1), 8 U.S.C. § 1225(a)(1), which reads:

Aliens treated as applicants for admission. An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

See also INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13) (defining admission as lawful entry after immigration inspection and authorization by immigration officer). Like any alien seeking to enter the United States, Elian had to be inspected by an immigration

officer to confirm his admissibility.¹⁴ See 8 U.S.C. § 1225(a)(3); 8 C.F.R. § 235.1(d).

"[T]he inspection process is critical to the integrity of the immigration system. . . . The purpose of these procedures is 'in addition to making a closer examination of [an alien's] right to enter in the first place, [to] require and obtain information and a variety of records that enable [immigration officials] to keep track of the alien after his entry.'"

Leal-Rodriguez v. INS, 990 F.2d 939, 946 (7th Cir. 1993) (citation omitted).

The day Elian arrived at Hollywood Hospital, Supervisory Immigration Inspector Edward Agundez deferred his immigration inspection until December 23. Record at 22. Elian's inspection was deferred because he was receiving emergency medical treatment and adequate information about his parents was unavailable. *Id.* Under this deferred inspection procedure, Elian was granted a limited parole into the United States pending his inspection. *Id.* at 22; see 8 C.F.R. § 235.2(e) (allowing parole for deferral of inspection on account of medical disability). "The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status, and to hold that petitioner's parole placed her legally 'within the United States' is inconsistent with the congressional mandate, the administrative concept of parole, and the decisions of this Court." *Leng May Ma v. Barber*, 357 U.S. 185, 188-90 (1957).

¹⁴ Under the statutory scheme, an alien (a person not a citizen or national of the United States) is deemed to be seeking "entry" or "admission" into the United States if he "arrives" at a port of entry (such as an airport) and has not yet been admitted by an immigration officer. INA § 235(a)(1), 8 U.S.C. § 1225(a)(1), as added by IIRIRA § 302(a); 8 C.F.R. § 1.1(q).

Elian has, by virtue of his father's having spoken on his behalf, asked to withdraw his application for admission, and the INS has indicated that it would grant that request. Record at 1-2. Section 235(a)(4) of the Act expressly allows this. "An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart . . . from the United States." 8 U.S.C. § 1225(a)(4). This is not rare. For fiscal year 1997, the INS reported permitting more than half a million aliens, 556,966 to be exact, to withdraw from seeking admission. See U.S. Immigration and Naturalization Service, *1997 Statistical Yearbook of the Immigration and Naturalization Service* 166 (1999).

The *INS Immigration Inspector's Field Manual* provides guidance for the use of this authority. Where unaccompanied minors are concerned, the *Manual* instructs immigration inspectors to allow withdrawal whenever appropriate. But before doing so, it further states, "the INS officer must be satisfied either that the minor is capable of understanding the withdrawal process, or that a responsible adult (relative, guardian, or in cases where a relative or guardian is not available, a consular officer) is aware of the actions taken and the minor's impending return." Record at 277 (*Inspector's Field Manual*, Chapter 17.15(f)). This is what happened here. The INS determined that Elian is of such a tender age that he lacks the capacity to make immigration decisions. It apprised Elian's father of the situation, and his father withdrew Elian's application for admission and declined to assert an asylum claim, as a result of which Elian will be returned.

The *Manual* also instructs immigration inspectors to make every effort to ascertain whether the safety of an unaccompanied minor lacking the capacity to make immigration decisions would be threatened if he returned home. *Id.* If there is an objective basis to support a claim for asylum, the minor would be placed in removal proceedings. *Id.*; see also *id.* at 285. The Attorney General explained how this section of the *Field Manual* applied to Elian's case in her letter to counsel of January 12, 2000. Record at 25-28. In that same letter, she made clear that the question of whether Juan Gonzalez was the appropriate person to speak for Elian in immigration matters was one of federal, not state law. *Id.* at 26. Section 103(a) of the INA provides that the Attorney General's determinations and rulings "with respect to all questions of law" under the INA "shall be controlling." 8 U.S.C. § 1103(a). Her determinations and rulings with respect to Juan Gonzalez' authority to speak for Elian are entitled to *Chevron* deference.

No one disputes the authenticity of the birth certificate Juan Gonzalez provided to the INS. Nor should there be any dispute that he possesses parental authority. In immigration matters, a legal relationship is generally assessed under the law of the jurisdiction where the relationship arose. See, e.g., *Matter of Hosseinian*, Int. Dec. 3030 (BIA 1987). Under Cuban law, on the death of one parent, parental authority remains with the surviving parent. Record at 202. That authority, under Article 85 of the Family Code of Cuba, includes the authority "to represent their children in all legal transactions and acts in which they have an interest. . . ." *Id.* That authority is precisely what Juan Gonzalez is seeking to exercise. Florida law is similar. See Fla. Stat. § 744.301 ("The

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mother and father jointly are natural guardians of their own children and of their adopted children, during minority. If one parent dies, the natural guardianship shall pass to the surviving parent, and the right shall continue even though the surviving parent remarries.").

Lazaro Gonzalez and his attorneys are claiming that Juan Gonzalez's assertion of parental authority cannot be relied upon because he is saying only what Cuban officials demand he say. *Id.* at 266-68. The INS, however, expended great effort to assess that allegation through two interviews of Juan Gonzalez conducted by Officer-in-Charge Silma Dimmel, witnessed by State Department Official Jeffrey DeLaurentis, at Juan Gonzalez' home and at a neutral site. The INS carefully examined the issue of coercion. Neither Dimmel nor Jeffrey DeLaurentis believes Juan was coerced. *Id.* at 228-29, 235, 245. Dimmel's summations of her two interviews describe a father who is speaking from his heart. *Id.* at 55, 235. Elian was taken from Cuba without Juan Gonzalez' consent, and he wants him back:

It is this officer's observation that Mr. Juan Miguel Gonzalez Quintana is deeply concerned for the well being of his child. . . . He as well as his parents are emotionally distressed and became emotional several times during the interview. Mr. Gonzalez did not appear to be forced or coerced to speak with us and claim[ed] he wants his son. Both he and his parents appeared honest and concerned for the well being of the child in wanting the child with them in Cuba immediately. The longer the child remains in the U.S., the more they will continue to suffer. Their emotional stress and pressure is the reason for their not returning to work. Mr. Gonzalez met with us voluntarily and spoke truthfully and honestly. He misses and wants his son back and the grandparents cannot mention Elian's name without becoming emotional. This is an honest, genuine and unified family

thoroughly engaged in Elian's life, that has been under distress since the taking of the child by his mother.

Id. at 243. The INS asked questions in written form to overcome the possibility of listening devices. It also took into account the circumstances — that Juan Miguel and Elian had a close, loving relationship, and the tragic death of Elian's mother, and concluded that Juan Miguel's request for Elian's return to him represented his true wishes.

Moreover, the INS properly concluded that Juan Gonzalez' parental authority extends to the question of whether it should accept the asylum applications purportedly filed on Elian's behalf. As with the application for admission, to adjudicate an asylum application ostensibly submitted by a six-year-old without cognizance of the father's parental authority contradicts the principle that primary responsibility for the care of children rests with their parents. See *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). With this role as primary caregiver and protector comes the "common law . . . recognition to the right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf." *Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990) (Stevens, J., concurring) (citing J. Schouler, *Law of Domestic Relations* 337 (3d. ed. 1882); 1 W. Blackstone, *Commentaries* 452-453; 2 J. Kent, *Commentaries on American Law* 203-206; G. Field, *Legal Relations of Infants* 63-80 (1888)). As Justice White explained in *Stanley v. Illinois*, 405 U.S. 645 (1972):

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing

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interest, protection. . . . The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

405 U.S. at 650 (parallel citations omitted).¹⁵

Moreover, the government's position that only Juan Gonzalez can speak for Elian in immigration matters does not rest only on their parent-child relationship. A parent's interest in controlling the upbringing of his child is "a counterpart of the responsibilities they have assumed." *Lehr v. Robertson*, 463 U.S. 248, 257 (1983); accord *Parham*, 442 U.S. at 602. Biological parentage simply offers a person "an opportunity . . . to develop a relationship with his offspring." *Lehr*, 463 U.S., at 262; see also *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting). It is the "demonstration of commitment to the child through the assumption of personal, financial, or custodial

¹⁵ See *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) (outlining a "presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."); *Gramegna v. Parole Commission*, 666 So.2d 135, 136 (Fla. 1996) (Florida legislature has determined that consent of the victim is not defense to the crime of lewd conduct with minor because a child is incapable of understanding the full consequences of acts enumerated in statute); *Orange Motors of Miami, Inc. v. Miami Nat'l Bank*, 227 So. 2d 717, 718 (Fla. 3d DCA 1969) (finding agreements entered into by minors are voidable because minors do not have capacity to contract); *Liberty Mut. Ins. Co. v. Conley*, 152 So.2d 521, 523 (Fla.App. 1 Dist. 1963) (same); see also *Elkins v. Vanden Bosch*, 433 So.2d 1251, 1252 (Fla.App. 3 Dist. 1983) (holding that 12 and 15-year-old children possess sufficient intelligence, understanding, and experience to make mature choice between parents in a custody battle); *Berlin v. Berlin*, 386 So.2d 577 (Fla. 3d D.C.A. 1980), rev. denied, 394 So.2d 1151 (Fla.1981) (same).

responsibility" that gives the natural parent the authority to speak for the child and triggers an interest warranting the protection of the courts. See *Hodgson*, 497 U.S. at 445; *Stanley*, 405 U.S. at 651; *Lehr*, 463 U.S. at 261.

The INS assured itself not only that Juan Gonzalez is Elian's father but that the relationship between the two is very close. Juan Gonzalez remained a central part of Elian's life despite his divorce from Elian's mother, Elisabeth. During the first INS interview in Cardenas, he explained that Elian spent more time at his residence than at Ms. Brotons' residence. *Id.* at 49, 52. "He would sleep and eat here and spent most of his time here." *Id.* at 49. Elian attended school near his father's home, ate most of his meals with his father, and shared the same bed as his father and step-mother. *Id.* His father participated in Elian's school activities and attended meetings with Elian's teachers. *Id.* at 52, 76. He saw to it that Elian received necessary medical care when he needed surgery. *Id.* at 51, 88. He met Elian's emotional needs and provided him with food and shelter. *Id.* at 52-53. The evidence is that Juan Gonzalez is committed to Elian "through the assumption of personal, financial . . . [and] custodial responsibility." *Hodgson*, 497 U.S. at 445.

Among cases the INS relied upon in its deliberations is *Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985). There, against his parents' wishes, twelve-year-old Walter Polovchak had filed an asylum application claiming Soviet authorities would persecute him on account of his conversion to the Baptist faith. 774 F.2d at 733. The INS granted the application because it deemed him sufficiently mature to apply, later granted him

lawful permanent residence, and subsequently issued a departure control order.

Litigation ensued in both state and federal court. In the state litigation, the Illinois Supreme Court eventually held that the trial court had erred in making Walter a ward of the court, thereby removing him from his parents' custody. *Id.*

Meanwhile Walter's parents filed suit in federal court asserting that the INS' failure to give them notice and an opportunity to be heard before it granted Walter asylum and issued a departure control order violated their procedural due process rights. *Id.* The district court granted them summary judgment against the INS on their claim that the INS had not followed its procedures in issuing the departure control order and enjoined the order's enforcement. *Id.* at 734. The government appealed, and the Seventh Circuit affirmed. The primary question before it, the court of appeals observed, "concerns what action the government must take to ensure that both parties, the parents and the child, receive an adequate opportunity to assert their interests." *Id.* at 734. It sided with the parents, observing that "[f]ree personal choice in matters involving family life is a fundamental liberty interest of a parent because 'the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.'" *Id.*

The significance of the *Polovchak* case lies in its recognition of the importance of parental authority and in its recognition that some children are too young to assert certain rights that override that authority. The INS had accepted and adjudicated twelve-year-old Walter Polovchak's asylum application because it deemed him sufficiently mature to

apply. At that age, the Seventh Circuit noted, Walter "was presumably near the lower end of an age range in which a minor may be mature enough to assert certain individual rights that equal or override those of his parents." *Id.* at 736. By the time Walter's case reached the Seventh Circuit, he was on the eve of his eighteenth birthday. *Id.* That placed him at the high end of the range:

at age seventeen (indeed, on the eve of his eighteenth birthday), Walter is certainly at the high end of such a scale, and the question whether he should have to subordinate his own political commitments to his parents' wishes looks very different. The minor's rights grow more compelling with age, particularly in the factual context of this case.

The ability of a young person to decide to which political system he professes allegiance necessarily increases with age. We do not suggest that every twelve year old entertains serious political views (although some may); we would, however, suggest that many seventeen year olds do. Similarly, as the child grows, his parents' influence over him weakens, and the time his parents have in which to guide him grows shorter.

Id. at 736-37.

Deference to the INS is particularly important here because this case implicates questions of foreign relations. *See Aguirre-Aguirre*, 119 S. Ct. at 1445 (INS officials "exercise especially sensitive functions that implicate questions of foreign relations"). A declaration by Ambassador Mary A. Ryan discusses at length how the decision reached by the INS in Elian's case is consistent with the principles that the Department of State expects to be followed in similar cases involving American children. Record at 286-90. The INS decision to respect Juan Gonzalez' parental authority is consistent with the principles that inform the Department of State's consular work on behalf of American

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citizen children in foreign countries. *Id.* at 288, ¶ 9. That consular work is based on the assumption that the parents of American citizen children, not the Department of State or the United States Government, should decide what is best for their children. *Id.* at 287, ¶ 6.

If a U.S. citizen minor child were found overseas and subject to a dispute concerning possible return to the United States, the Department of State explains, "we would expect the government of that country immediately to seek the child's surviving parent, if any, and to contact U.S. consular officials for assistance in doing so if necessary." *Id.* at 288, ¶ 8. The Department of State would not expect the surviving parent to be required to participate in a foreign court's custody proceedings to establish his or her right to assume responsibility for the child as against distant relatives or outright strangers. *Id.* Thus, what the United States does in Elian's case may have implications far beyond this case.

Elian is well below the low end of the range the court in *Polovchak* referred to. Given Elian's extreme youth and the absence of any reliable evidence that Juan Gonzalez is not being candid in insisting that Elian return home, the Commissioner's decision to recognize Juan Gonzalez' parental authority is facially legitimate and bona fide and must be upheld.

(2) **REVIEWED UNDER THE ADMINISTRATIVE PROCEDURE ACT,
THE COMMISSIONER'S DECISION WAS AN APPROPRIATE
EXERCISE OF DISCRETION**

In the event the Court finds the "facially legitimate and bona fide" standard not applicable and chooses to apply the more exacting (but still highly deferential) standard of review that is generally applicable under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, 701-706,¹⁶ the Commissioner's decision easily withstands that review also. Under the APA, the Court will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Legal Environmental Assistance Foundation, Inc. v. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997) (citing APA § 706(2)). "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."¹⁷ *Florida Power & Light Company v. Lorion*, 470 U.S. 729, 743-44 (1985). The

¹⁶ The government maintains that the APA is not applicable. See *Ardestani v. INS*, 502 U.S. 129 (1991) (holding that attorneys not entitled to attorney fees under the Equal Access to Justice Act because deportation proceedings not "adversary adjudications" under APA § 554); *Marcello v. Bonds*, 349 U.S. 302 (1955) (holding that the INA supplants the APA). However, even under the more rigorous APA standard, the Commissioner's decision withstands scrutiny.

¹⁷ In this instance, the exhibits that are pertinent to the Court's review are the documents containing the information on which the Commissioner relied in rendering her decision on the applications for admission and asylum. That information is found at pages 1 through 285 of the record, with the exception of the correspondence between the Attorney General and counsel at pages 24-28, and the declarations by INS Officer Dimmel (*id.* at 47-46), Port Inspector Roig (*id.* at 217-18) and State Department official DeLaurentis (*id.* at 244-45). "The APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred." *Id.* at 744 (citing 5 U.S.C. §§ 551(13), 704, 706).

Commissioner's decision, as explained above in the context of review for a facially legitimate and bona fide reason, easily withstands scrutiny under the APA standard of review.

IV. THE COURT SHOULD DENY PLAINTIFFS' MOTION FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

Moreover, the Court should deny plaintiffs' motion for preliminary and permanent injunctive relief. The Supreme Court recently reiterated that preliminary injunctive relief is "an extraordinary and drastic remedy" which requires the movant to put forth "substantial proof" in support of his motion and to carry "by a clear showing, . . . the burden of persuasion" on the separate legal elements.¹⁸ See *Mazurek v. Armstrong*, 520 U.S. 968, 117 S. Ct. 1865, 1867 (1997) (quoting C. Wright et al., *Federal Practice and Procedure* § 2948, at 129-30 (2d ed. 1995)). To obtain a preliminary injunction, the moving party must demonstrate "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) [that] its own injury outweighs the injury to the nonmovant; and (4) the injunction would not disserve the public interest." *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991) (per curiam).

¹⁸ Thus, where "a plaintiff seeks a mandatory injunction that goes beyond maintaining the status quo *pendente lite*, 'courts should be extremely cautious' about issuing a preliminary injunction and should not grant such relief unless the facts and law clearly favor the plaintiff." *Committee of Central American Refugees v. INS*, 795 F.2d 1434, 1441 (9th Cir. 1986) (citations omitted); *Dahl v. HEM Pharmaceuticals*, 7 F.3d 1399, 1403 (9th Cir. 1993).

A. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A SUBSTANTIAL LIKELIHOOD OF SUCCESS

In view of the foregoing demonstration that plaintiffs have failed to state a claim with respect to each of their five counts, it necessarily follows that they have failed to demonstrate a substantial likelihood of success for injunctive relief. The movant's failure to demonstrate a "substantial likelihood of success on the merits" may defeat the party's claim, without regard to its ability to establish any of the other elements. *See Church v. City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir. 1994). The Court should therefore deny plaintiffs' motion on this basis alone.

B. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A SUBSTANTIAL THREAT OF IRREPARABLE INJURY

The Court should also find that plaintiffs failed to demonstrate a substantial threat of irreparable injury. They cannot possibly have demonstrated injury because, as previously discussed, they lack standing based on their inability to demonstrate an "injury in fact." Moreover, plaintiffs' motion is based on the presumption that the asylum application they purported to submit on Elian's behalf is meritorious and demonstrates that Elian will suffer persecution if he is returned to Cuba. They summarize the applications in their motion for injunctive relief. *See* P.I. Motion at n.22 & 23. That summary reflects that the applications have no merit as a basis for a finding of future persecution on account of one of the grounds enumerated in the Immigration and Nationality Act, race, religion, nationality, membership in a particular social group, or political opinion. *See* INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (defining "refugee"). It

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was plaintiffs' burden to establish this prong of the required analysis for injunctive relief.

They have not met their burden.

C. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEIR OWN INJURY OUTWEIGHS THE INJURY TO THE UNITED STATES

Plaintiffs have made no showing that their own injury outweighs the injury to the United States. To the extent they attempt a showing, they merely state, with respect to both this element and the next, that "[t]he government cannot allege any harm and cannot show adverse implications to the public interest. Rather using a regulation that is designed and intended to protect refugees who flee persecution can only serve the public interest." Motion at 23.

To the contrary, the government will be harmed should the Court grant injunctive relief. Elian would suffer further harm from not being reunited with his father and grandparents. The Immigration and Naturalization Service would suffer harm from the standpoint of not being able to give effect to immigration decisions made by parents on their children's behalf. Moreover, the United States would suffer harm from the standpoint of its international standing in protecting parental rights in cases involving American children wrongfully removed from this country. According to the State Department, "A failure to enforce the INS decision would, conversely, be inconsistent with the principles we advocate on behalf of the United States and could have potentially lasting negative implications for left-behind parents in the United States and for U.S. citizen children taken to foreign countries." Record at 290.

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***D. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THE
INJUNCTION WOULD NOT DISSERVE THE PUBLIC INTEREST***

Plaintiffs' statement that "using a regulation that is designed and intended to protect refugees who flee persecution can only serve the public interest," P.I. Motion at 23, by no means satisfies their burden of demonstrating that the injunction would not disserve the public interest. It disserves the public interest to undermine the principle that parents of children should decide what is best for their children. It disserves the public interest to undermine the ability of immigration inspectors at our various ports-of-entry to look to parents or other responsible adults to make immigration decisions for minors. It disserves the public interest to undermine the effectiveness of the United States in working with other countries for the return of abducted U.S. citizen children. And it disserves the public interest to ignore accepted international practice in cases involving a sole surviving parent located in the United States, where we would expect the foreign country to immediately return the child to the surviving American parent.

CONCLUSION

The Court should dismiss this case for lack of subject matter jurisdiction pursuant to INA § 242(g) or, alternatively, for lack of standing. Should the Court reject these arguments, it should grant the government's Rule 12(b)(6) motion with respect to plaintiffs' five counts or, alternatively, grant summary judgment on these counts. The Court should also deny plaintiffs' motion for preliminary and permanent injunctive relief and for a writ of mandamus.

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CERTIFICATE OF SERVICE

I certify that on this 27th day of January, 2000, I caused one copy of the foregoing Motion to Dismiss or Alternative Motion For Summary Judgment and Opposition to Motion for Preliminary and Permanent Injunctive Relief to be served upon plaintiffs by next-day delivery addressed as follows:

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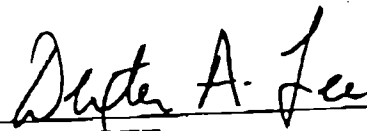

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525 U.S. 471(1999)	31, 33, 34, 36
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5 U.S.C. §§ 551-559, 701-706	82, 83
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8 C.F.R. § 1.1(q)	72
8 C.F.R. § 103.2(a)(2)	40
8 C.F.R. § 207.7	59
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8 C.F.R. § 208.14(b)	58
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8 C.F.R. § 235.1(d)	72
8 C.F.R. § 235.2(e)	72
8 C.F.R. § 292.3(a)	53

MISCELLANEOUS

<i>K. Manheim, State Immigration Laws and Federal Supremacy,</i> 22 Hastings Const. L.Q. 939 (1995)	49, 50
INS, Children's Asylum Guidelines	59
INS, Inspector's Field Manual, Chapter 17.15(f)	<i>passim</i>

any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute orders against any alien." 8 U.S.C. § 1252(g).

The Supreme Court in *American-Arab*, 119 S. Ct. 936, dealt with the reach of Section 242(g) where the issue was whether it barred judicial review of a claim by members of the Popular Front for the Liberation of Palestine (PFLP) that the INS had unfairly targeted them for deportation proceedings. In holding that the section indeed applied, the Court found that it "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" *Id.* at 943. In so ruling, the Court made it abundantly clear that judicial review of the Attorney General's decision *not* to commence proceedings, adjudicate cases, or execute removal orders is similarly barred.

Observing that these three actions "represent the initiation or prosecution of various stages in the deportation process," the Court went on to say that at each of these stages, "the Executive has discretion *to abandon* the endeavor. . . ." *Id.* (emphasis added). In support of this, the Court quoted from an immigration treatise:

To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated as deferred action. A case may be selected for deferred action treatment at any stage of the administrative process. Approval of deferred action status means that, for the humanitarian reasons described below, no action will thereafter be taken to proceed against an apparently deportable alien, even on grounds normally regarded as aggravated.

Ms. Dimmel then asked Juan Gonzalez about his statement during their first meeting that the Cuban community in Miami was exerting pressure on Lazaro Gonzalez to insist that Elian remain in the United States. *Id.* at 239. Juan Gonzalez repeated his earlier statement that Lazaro Gonzalez told his father that he would return Elian except that he would look bad. *Id.* Ms. Dimmel reported that Juan told her:

People are saying that I am being coerced by the Cuban government. However, you can see that they are the ones being coerced by the Cuban community in Miami. I am not being coerced to meet with you, I want to do so and am doing it voluntarily. He (Lazaro) is being pressed by the Cuban community. He has five (5) attorneys, I don't. What bothers me the most is that I must prove paternity of my son and what have they (INS) asked the relatives in the U.S. to present as proof of relationship? They just showed up at the hospital and stated that they were relatives without any proof or evidence and INS grants them custody of my son. I, on the other hand, have to prove my relationship.

They have neither my consent nor my permission to be taking the child here or there. Imagine their insensitivity, in taking that child to Disney world and putting him on a boat ride when he already suffered such an ordeal. They forced him on the ride while he was crying and screaming; not wanting to do so. My son is suffering, my son needs me and needs his grandparents; and I need him. They don't even let him speak to us. When we call and Elian starts saying "Grandma I want to be with you" or "Daddy I want to go with you," they immediately make him cry, or give him a candy or start tapping on the lines saying that the lines are getting bad and hang up the phone. They don't let him talk to us and always have an excuse for not letting him speak to us. In the background you can hear them telling Elian to say he wants to stay in the United States, whereas the child is saying the opposite to us over the phone. It's abusive what they are doing to Elian. The boy needs me. He already experienced the worst, he's only six years old and needs his father and they (relatives in Miami) are not taking that into consideration and INS is still making me wait for my son; it's been a month. . . .

Id.

Inspector Agundez telephoned an INS supervisor in Miami and told him that he was convinced that Lazaro Gonzalez was Elian's uncle and that at that time, in view of Elian's medical condition, an immigration inspection was not possible. *Id.* at 36. The supervisor therefore instructed Agundez to defer Elian's inspection for thirty days. *Id.* Agundez completed the documents which deferred Elian's inspection until December 23, 1999, and served those documents on Lazaro Gonzalez. *Id.* at 40-41 (Forms I-94 and I-546). Before leaving the hospital, Agundez instructed hospital staff to release Elian into Lazaro Gonzalez' care when he was ready to be discharged. *Id.* at 37, 40-41. The next day, November 26, the hospital did so. *Id.* at 37.

Subsequent inquiries by the INS revealed that Elian and thirteen others had left Cuba aboard a sixteen-foot motor boat about 4:30 Monday morning, November 22, 1999. *Id.* at 30. With Elian was his mother Elisabeth Brotons; her common law husband, Lazaro Munero; Lazaro Munero's parents and two brothers; five members of the Nelson Rodriguez family, who were distant relatives of Elisabeth Brotons; and Arianne Horta and Nivaldo Fernandez. *Id.* at 31-34. Late Monday, the group ran into five-foot waves and their motor quit. *Id.* at 32. Drifting north, they bailed water until the boat capsized sometime around 2:30 a.m. on the morning of Tuesday, November 23, 1999. *Id.* 30, 32-33. They took to two inner tubes that had been tied to the boat. *Id.* at 30, 32. By late Wednesday, however, only Elian, Fernandez, and Horta had survived. *Id.* at 33. The others evidently had become hypothermic and drifted away from the inner tubes. *Id.* at 32-33. On the night of Wednesday, November 24, 1999, Elian was alone on one inner



**U.S. DEPARTMENT OF
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Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

JAN 5 2000

Juan Miguel Gonzalez-Quintana
Calle Cossio #170
Cardenas, Cuba

Dear Mr. Gonzalez-Quintana,

Thank you for meeting with United States representatives from the Immigration and Naturalization Service (INS) and the Department of State (DOS) on December 13th and 31st. We have reviewed the information and documents you have provided to establish your relationship to Elian Gonzalez. We have determined that you are Elian's biological father and lawful guardian and, as such, you have the right and obligation to represent Elian in all legal transactions and acts in which Elian has an interest. Therefore, we recognize your authority to speak on behalf of your son Elian in immigration matters. Consequently, we are granting your request to withdraw Elian's application for admission to the United States, a key step in reuniting you with your son. Also, consistent with the wishes you expressed at our two interviews with you, we accept your decision not to assert Elian's right to apply for asylum in the United States.

We are contacting your relatives in Miami, who have been caring for Elian since his rescue at sea, and Roger Bernstein, the attorney who has asserted that he and his associates represent Elian in immigration matters, to advise them of our decision. We have explained to them that you have expressly declined to authorize Mr. Bernstein and his associates to represent Elian in immigration matters, and that we therefore cannot recognize them as Elian's representatives. We have also explained that we have determined that, according to your wishes, Elian is not asserting his right to apply for asylum in the United States. Therefore, we are not accepting the asylum applications prepared and submitted by Mr. Bernstein and his associates and signed by Elian or Lazaro Gonzalez.

As you are aware from our meeting, the process of returning your son to Cuba is complicated and although we hope to receive cooperation from your family in Miami, there may be delays or challenges to our decision. It is our hope that you and your relatives in Miami will be able to work together as a family to ensure that Elian is returned to you as quickly as possible. We have asked them to work out an arrangement for returning Elian to you by the end of next week. Should you wish to come to the United States to pick up Elian or should your relatives in Miami want to escort him back to Cuba, the Immigration and Naturalization Service would be pleased to provide whatever assistance would be appropriate. We are also aware that neutral

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third parties have offered to facilitate Elian's return to you. Should you wish to seek the assistance of such a third party, we are ready to work with them as arrangements are sought to reunite you and your son.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Pearson", written over a horizontal line.

Michael Pearson
Executive Associate Commissioner
for Field Operations

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Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

JAN - 5 2000

Mr. Lazaro Gonzalez
2319 N.W. 2nd Street
Miami, Florida 33125-5207

Dear Mr. Gonzalez,

We appreciate your cooperation during our consideration of immigration matters relating to Elian Gonzalez and your meeting with us in Miami on December 20th. After careful consideration and consultation with her legal advisors, the INS Commissioner has made several determinations in this case, of which I am now prepared to inform you.

The INS has been in direct contact with Juan Miguel Gonzalez-Quintana. Mr. Gonzalez-Quintana has provided reliable documentation that he is Elian's biological father and that he now has legal custody of the child under Cuban law. As such, he has the right and obligation to represent Elian in all legal transactions and acts in which Elian has an interest. Therefore, we have determined that Mr. Gonzalez-Quintana has the authority to speak for his son in immigration matters. After carefully considering all relevant factors, we have determined that there is no conflict of interest between Mr. Gonzalez-Quintana and his son, or any other reason, that would warrant our declining to recognize the authority of this father to speak on behalf of his son in immigration matters. Further, we took steps to ensure that Mr. Gonzalez-Quintana could express his true wishes at our interviews with him, and after carefully reviewing the results of the interviews, we are convinced that he did so.

Roger Bernstein and several of his associates, attorneys in Miami, have submitted several Forms G-28, Notice of Entry and Appearance as Attorney, for Elian. Some of these Forms G-28 were signed by you on behalf of Elian. On others, Elian himself has printed his first name. After careful consideration, we have determined that we cannot recognize any of the Forms G-28 as authorizing these attorneys to represent Elian in immigration matters. Although the INS has placed Elian in your physical care, such placement does not confer upon you the authority to act on behalf of Elian in immigration matters or authorize representation in direct opposition to the express wishes of the child's custodial parent. Further, we do not believe that Elian, who recently turned six years old, has the legal capacity on his own to authorize representation. Finally, Mr. Gonzalez-Quintana has expressly declined to authorize Mr. Bernstein or his associates to represent Elian. Therefore, the INS cannot recognize them as Elian's representatives.

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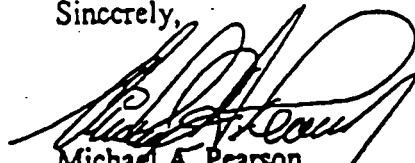
In our direct conversations with Mr. Gonzalez-Quintana, he has repeatedly informed us of his decision not to assert Elian's right to apply for asylum. Mr. Bernstein and his associates have prepared and submitted asylum applications on Elian's behalf, one of which was signed by Elian. After careful consideration, we have determined that Elian does not have the capacity to apply for asylum without the assistance of his parent. Further, neither the applications you have submitted nor any other information available indicates that Elian would be at risk of harm in Cuba such that his interests might so diverge from those of his father that his father could not adequately represent him in this matter. Therefore, given Mr. Gonzalez-Quintana's decision not to assert Elian's right to apply for asylum, we cannot accept the asylum applications as having been submitted on Elian's behalf.

Mr. Gonzalez-Quintana has also repeatedly requested that Elian be returned immediately to his custody in Cuba. We consider this to be a request to withdraw Elian's application for admission to the United States, made by Elian's custodial parent with authority to speak for Elian in immigration matters. Therefore, we have granted Mr. Gonzalez-Quintana's request to withdraw Elian's application for admission to the United States.

Upon his arrival, Elian was temporarily paroled into the United States. Arrangements should now be made within the next nine days for Elian's reunion with his father. It is our hope that you will be able to make arrangements with your nephew to ensure that Elian is returned to him and his immediate family as soon as possible. The INS is prepared to provide whatever assistance would be appropriate. We are also aware that neutral third parties have offered to facilitate Elian's return to Cuba and we are ready to work with them as arrangements are sought.

We appreciate your family's immediate willingness to care for and comfort Elian after the tragic loss of his mother and stepfather and his ordeal on the high seas. Please be assured that we would be happy to facilitate continuing contact between Elian, his father, and your family. If Elian and his immediate family wished to apply for tourist visas at some point in the future, the Consular Section at the U.S. Interests Section in Havana would, of course, consider them very favorably.

Sincerely,



Michael A. Pearson
Executive Associate Commissioner
for Field Operations

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U.S. Department of Justice
Immigration and Naturalization Service

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

JAN 5 2000

Roger Bernstein
Hackley, Bernstein & Osberg-Braun, Attorneys at Law
Turnberry Plaza
2875 191st Street, Penthouse 1B
Aventura, FL 33180

Spencer Eig
420 Lincoln Road, Suite 379
Miami Beach, FL 33139

Dear Messrs. Bernstein and Eig,

We have received the letters you have sent regarding your claim to represent Elian Gonzalez and appreciate your meeting with us in Miami on December 20th to discuss this matter. We understand that you continue to assert that, through his direct consent and the consent of Lazaro Gonzalez, you represent Elian Gonzalez. After consulting with her legal advisors and carefully considering this matter, the Commissioner of the INS has made several determinations, of which I am now prepared to inform you.

The INS has been in direct contact with Juan Miguel Gonzalez-Quintana. Mr. Gonzalez-Quintana has provided reliable documentation that he is Elian's biological father and that he now has legal custody of the child under Cuban law. As such, he has the right and obligation to represent Elian in all legal transactions and acts in which Elian has an interest. Therefore we have determined that Mr. Gonzalez-Quintana has the authority to speak for his son in immigration matters. After carefully considering all relevant factors, we have determined that there is no conflict of interest between Mr. Gonzalez-Quintana and his son, or any other reason, that would warrant our declining to recognize the authority of this father to speak on behalf of his son in immigration matters. Further, we took steps to ensure that Mr. Gonzalez-Quintana could express his true wishes at our interviews with him, and after carefully reviewing the results of the interviews, we are convinced that he did so.

You and your associates have submitted several Forms G-28, Notice of Entry and Appearance as Attorney, for Elian. Some of these Forms G-28 were signed by Lazaro Gonzalez on behalf of Elian. On others, Elian himself has printed his first name. After careful consideration, we have determined that we cannot recognize any of the Forms G-28 as authorizing you to represent Elian in immigration matters. Although the INS has placed Elian

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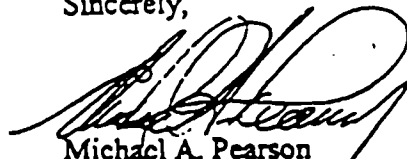
in the physical care of Lazaro Gonzalez, such placement does not confer upon Lazaro Gonzalez the authority to act on behalf of Elian in immigration matters or authorize representation in direct opposition to the express wishes of the child's custodial parent. Further, we do not believe that Elian Gonzalez, who recently turned six years old, has the legal capacity on his own to authorize you to represent him. Finally, Mr. Gonzalez-Quintana has expressly declined to authorize you or your firms to represent Elian. Therefore, the INS cannot recognize you as Elian's representatives.

In our direct conversations with Mr. Gonzalez-Quintana, he has repeatedly informed us of his decision not to assert Elian's right to apply for asylum. You have prepared and submitted asylum applications on Elian's behalf, one of which was signed by Elian. After careful consideration, we have determined that Elian does not have the capacity to apply for asylum without the assistance of his parent. Further, neither the applications you have submitted nor any other information available indicates that Elian would be at risk of harm in Cuba such that his interests might so diverge from those of his father that his father could not adequately represent him in this matter. Therefore, given Mr. Gonzalez-Quintana's decision not to assert Elian's right to apply for asylum, we cannot accept the asylum applications you have submitted on Elian's behalf.

Mr. Gonzalez-Quintana has also repeatedly requested that Elian be returned immediately to his custody in Cuba. We consider this to be a request to withdraw Elian's application for admission to the United States, made by Elian's custodial parent with authority to speak for Elian in immigration matters. Therefore, we have granted Mr. Gonzalez-Quintana's request to withdraw Elian's application for admission to the United States.

We appreciate your cooperation as we considered your claims to represent Elian.

Sincerely,



Michael A. Pearson
Executive Associate Commissioner
for Field Operations

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Office of the General Counsel

425 I Street NW
Washington, DC 20536

JAN 3 2000

MEMORANDUM FOR DORIS MEISSNER
COMMISSIONER

FROM:

Bo Cooper
Bo Cooper
General CounselSUBJECT: Eliau GonzalezQUESTIONS PRESENTED

1. Who has the legal authority to speak on behalf of the six-year old Cuban national, Elian Gonzalez - his father, his great uncle, or the attorneys claiming to represent Elian?
2. Given Elian's father's apparent legal authority to speak for the child on immigration matters, under what circumstances should the child's interests be considered apart from the expressed wishes of the parent regarding disposition of the child's application for admission and his asylum application?
 - A. Is the father able to represent adequately the immigration interests of the child?
 - B. May Elian apply for asylum in direct opposition to the expressed wishes of his father?

SUMMARY ANSWERS

1. The documents and other submitted material indicate that Juan Miguel Gonzalez-Quintana has the legal authority to speak for his son Elian.
2. The INS must determine whether the father has an interest that conflicts with his ability to represent the immigration interests of the child. Specifically, the INS must consider whether the possibility of coercion precludes Elian's father from making his true

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intentions known and speaking on behalf of Elian and whether Elian's asylum application represents a divergence of interests between the father and child.

- A. After evaluating the testimony of the father and the uncle, we believe the father is able to convey to the INS his true intentions regarding Elian and to represent adequately the immigration interests of the child.
- B. At his tender age, Elian does not have the capacity to seek asylum on his own behalf. Since there is no objective basis to believe that Elian is at risk of persecution or torture, the INS should not accept his asylum application against the expressed wishes of his father.

DISCUSSION

1. Who has the legal authority to speak on behalf of the child – his father, his great uncle, or the attorneys claiming to represent him?

Juan Miguel Gonzalez-Quintana has submitted numerous documents establishing that he is the father of Elian Gonzalez. Elian's great uncle, Lazaro Gonzalez, does not dispute this claim. Because the child was born out-of-wedlock, some have questioned whether this fact affects the father's legal rights. Under Cuban law, however, parental rights are unaffected by questions of legitimacy. Constitution of Cuba, Article 37.

In immigration matters, relationships are generally assessed under the law of the jurisdiction where the relationship arose. See e.g., Matter of Hosseinian, Int. Dec. 3030 (BIA 1987). Cuban law also reinforces the right of both parents to exercise parental authority. Articles 82 and 83 of the Family Code of Cuba provide that minor children shall be under the authority of their parents and that parental authority is shared jointly by both parents. Should one parent die, as in this case, the surviving parent becomes the sole individual authorized to speak for the child. The specific rights and duties of a parent, enumerated in Article 85 of the Family Code, include the obligation to represent the child in all legal transactions and acts in which they have an interest (Article 85, clause 5). While a person may lose the right to exercise such authority, the absence of any evidence showing that a court has deprived or suspended such authority would indicate that the parent's rights continue in force. (See attached Opinion from Library of Congress.)

Without the consent of the surviving parent, the great-uncle, Lazaro Gonzalez, has no legal basis to act on behalf of Elian in immigration matters. Although attorneys in this case have characterized him as Elian's legal guardian, he has submitted no evidence and made no claim that he is actually a court-appointed guardian. While INS has placed the child into Lazaro Gonzalez's care, the fact that Elian has been released to him does not authorize him to speak for the child in immigration matters. Instead, he has agreed to care for the child and ensure that he appears at all immigration proceedings. 8 CFR 236.3(b)(4). Given these factors, Lazaro Gonzalez has no legal basis at this time to represent Elian in immigration matters.

Three attorneys have submitted Form G-28, Notice of Entry and Appearance as Attorney or Representative, with Elian's signature. They assert that they represent Elian, and not Lazaro, though they have conceded that this representation is through the consent of Lazaro Gonzalez, as well as by the apparent direct consent of Elian. The attorneys have also indicated that Elian wishes to pursue his application for admission in the United States. Although the attorneys claim to have the authority to speak on Elian's behalf, the law does not appear to support this claim. While there is no absolute prohibition against a minor signing a Form G-28, the ability to do so must be evaluated against general questions of capacity. In the state of Florida, for instance, a minor under the age of 18 is not considered competent to enter into contracts. See Section 743.07, Florida Statutes (1973). Under INS regulations, the parent or legal guardian may sign the application or petition of someone under the age of fourteen. 8 CFR 103.2(a)(2). Thus, while it appears that Elian may sign the Form G-28, the INS generally assumes that someone under the age of 14 will not make representation or other immigration decisions without the assistance of a parent or legal guardian. Here, the father has expressly stated that he does not authorize the attorneys to represent Elian, and that he does not want Elian to seek asylum. Unless the INS has direct evidence of Elian's capacity, Elian's signature on the Forms G-28 does not bear much weight.

Further, the attorneys appear to have a potential conflict of interest. In their letter of December 15, 1999, they stated that they represent Elian, "by direct consent, as well as through the consent of Lazaro Gonzalez, Elian's custodian, who is currently his legal guardian in the United States." As stated above, Lazaro Gonzalez has no legal basis to represent the immigration interests of Elian. Thus, his personal interests in this matter are separate and apart from Elian's immigration interests. Since Lazaro Gonzalez appears to have retained the services of the attorneys on Elian's behalf, any fiduciary duty they owe to Lazaro presents a potential conflict of interest.

The INS has no basis to reject the father's parental authority. Therefore, we presume that he has the legal authority to speak on behalf of the child in immigration matters.

2. Given the father's apparent legal authority to speak for the child on immigration matters, under what circumstances should the child's interests be considered apart from the expressed wishes of the parent regarding disposition of the child's application for admission and his claim for asylum?

On December 14, 1999, attorneys retained on behalf of Elian Gonzalez by Lazaro Gonzalez submitted an asylum application, under Elian's signature, claiming that Elian would be persecuted on the basis of his social group if he were returned to Cuba. The attorneys assert that the child is raising the asylum claim independently, rather than through a guardian or representative. The father has expressly stated that he does not want Elian to seek asylum. The attorneys have also indicated that Elian wishes to pursue his application for admission in the United States while Elian's father has stated he wants Elian returned to Cuba.

The attorneys have asserted that Elian's father cannot speak for him in immigration matters because he is under the control and jurisdiction of the country from which Elian fears

persecution. Because the father outwardly supports the regime, the attorneys claim that he cannot represent the child's best interests. They also claim that the Cuban government has prevented the father from expressing his actual wishes for his son.

While we do not regard the attorneys as authorized to represent the immigration interests of Elian, their assertions call into question the father's ability to represent adequately the immigration interests of the child. The underlying question goes to whether the father's personal interests conflict with his representation of the immigration interests of the child to a degree sufficient to justify interference with his parental authority. In this case, the possibility of a conflict has been raised based on allegations that the father is not free to express his wishes and the assertion that the child is free to raise an asylum claim regardless of the father's wishes.

A. Father's ability to represent the immigration interests of the child

Immigration law presents little guidance on the resolution of a parent's ability to adequately represent the interest of the child. In Johns v. DOJ, 624 F.2d 522 (5th Cir. 1980), the Fifth Circuit held that the government violated the due process rights of a five-year old Mexican national when it issued a deportation order against her, because the attorney retained to represent her spoke for her alleged parents, rather than the child. In that case, the court found a clear divergence between the interests of the child and those of the "parents," who had no legal authority over the child. The court further found that the Mexican birth mother, who claimed her child had been kidnapped, did not necessarily represent the interests of the child given that she had not seen the child since the day she was born. In making its finding, the court noted that the child had been raised in a different culture, spoke a different language, and would, if deported, be returned to her natural mother's home to reside with two older siblings who had never seen her and with whom she could not communicate. Id., at p. 524. The Fifth Circuit remanded the case to the district court with instructions to appoint a *guardian ad litem* to represent the child in all further proceedings. Id.

In this case, the alleged inability of the father to adequately represent the interests of the child rests not on any estrangement between father and child or the father's inability to adequately assess the best interests of his child. To the contrary, evidence in the record, including the interview of the father and the numerous affidavits he provided, establish that the father and child share a close relationship, and that the father has exercised parental responsibility and control for example, in the education and health care of the child. Instead, the alleged inability of the father to adequately represent the interests of the child is based on the possibility that the father has been coerced. If coerced, the father's representation of the immigration interests of the child may conflict with the father's interest in his own personal safety, rendering him unable to adequately represent the child in immigration matters. Following Johns, this inability would require the appointment of a *guardian ad litem* to represent Elian's immigration interests. Accordingly, it is necessary to evaluate the possibility of coercion and to determine whether the father's ability to adequately represent the interests of the child in immigration matters is impeded to such a degree as to justify an interference with the father's assertion of parental authority.

On December 13, 1999, the Officer in Charge for the INS Havana sub office (accompanied by the First Secretary and Chief of the Political/Economic Section of the US Interests Section) interviewed Juan Miguel Gonzalez-Quintana at his home. Mr. Gonzalez-Quintana described in great detail his close relationship with his son. He submitted affidavits from several neighbors, family friends, physicians, and Elian's teacher attesting to the affection between the father and son as well as the responsibility the father has taken in his son's life. He expressed his wishes that Elian be returned to him, that Elian not be allowed to apply for asylum, and that Elian not be represented by the attorneys purporting to represent him in the United States. Mr. Gonzalez-Quintana was also asked to express his wishes without speaking (in writing) in order to protect against the possibility of auditory monitoring of the interview by Cuban officials. Mr. Gonzalez-Quintana again expressed, in writing, his wish for the child to return to Cuba. The Officer in Charge found that "the honesty, concern and truthfulness on the part of Mr. Gonzalez-Quintana was palpable . . ." Thus, Mr. Gonzalez-Quintana's demeanor, as assessed in person by the Officer in Charge, supports the conclusion that the father's expressed wishes are not motivated by outside influences. The numerous affidavits attesting to the close relationship between the father and son lend further credence to the father's request that his son be returned to him.

On December 20, Elian's great uncle, Lazaro Gonzalez, was interviewed at the INS District Office in Miami. Lazaro Gonzalez expressed his opinion that the father's statements were coerced. He based this conclusion on four factors. First, Lazaro Gonzalez stated that Mr. Gonzalez-Quintana, in two phone calls, asked that Lazaro Gonzalez and his family take care of Elian. The first of these conversations occurred prior to Elian's arrival in the United States¹, and the second occurred on the day Elian was found at sea and brought to a hospital in Ft. Lauderdale. In subsequent conversations, Elian's father demanded the boy's return. The father never mentioned to INS a conversation prior to Elian's arrival in the United States and never acknowledged that he had ever asked his uncle to care for the child. Next, Lazaro Gonzalez, as well as his daughter, noted the tone of the subsequent telephone conversations with the father, and opined that he did not appear to be speaking freely. Third, Lazaro Gonzalez stated that, according to family members living in Cuba with whom he has spoken, Cuban officials are present at the father's home and have prevented him from leaving. Fourth, one of the attorneys stated that he was told by a reporter in Cuba that, according to sources in Mr. Gonzalez Quintana's neighborhood, the father had applied with the U.S. Interest Section for the lottery program to come to the United States. Because of the manner in which the DOS and the INS record applications for various immigration programs, it would be impossible to use government records to rule out completely that possibility.

In order to ensure that we have examined fully the question of coercion, the INS sought a second interview with Juan Miguel Gonzalez-Quintana. At the request of both the US and Cuban governments, a neutral site was selected, the home of the representative of the United Nations International Children's Emergency Fund (UNICEF). The INS officer in charge who had conducted the first interview also conducted this interview which was held on December 31, 1999. As was the case at the December 13, 1999 interview, Mr. Gonzalez was accompanied by his parents who were present for the interview, was asked a number of questions by the OIC, and

¹ It should be noted here that we have found no evidence that the father consented to Elian's travel to the United States prior to his departure.

was also given a set of written questions. The OIC concluded that Mr. Gonzalez "spoke truthfully." The OIC was convinced that Mr. Gonzalez "appeared honest and concerned for the well being of the child and in wanting the child with them [the Gonzalez family] in Cuba immediately."

The statements of Lazaro Gonzalez, as well as a general understanding of the practices of the Castro regime, make it essential that the INS closely examine the voluntariness of the father's statements. The evidence of coercion, however, is far from compelling when weighed against the personal interviews of the father and the interpretation of those interviews by the INS officer. Equally important, the existence of political pressure does not necessarily mean that the father's expression of his wishes is not genuine. If the father's statements truly reflect his belief as to the best interests of his child, then there is no divergence of interests. His statements would reflect his assessment of his child's best interests and should generally be given effect, notwithstanding any political pressure he may feel. Accordingly, it is important to evaluate all available evidence with an eye toward determining not merely whether the father is subject to political pressure or even coercion, but whether he is acting against his true belief as to the best interests of his child.

First, the opinions of Lazaro Gonzalez and his daughter, based on the tone of telephone conversations, conflict with the INS officer's interpretation of her interview with the father. Because the INS officer interviewed the father in person and was convinced that the father is speaking truthfully and freely, we believe that her interpretation carries more weight than the opinions of Lazaro Gonzalez and his daughter.

Second, the telephone conversations, recounted by Lazaro Gonzalez, wherein the father asked him to take care of the child do not establish a belief on the part of the father that the child should remain in the United States permanently. If true, the first of these conversations occurred prior to Elian's arrival in the United States and prior to any knowledge on the part of the father that Elian's mother had perished at sea. Her tragic death fundamentally changed the circumstances such that any prior statements of the father create no inference as to his true beliefs after the event. The second conversation with the father occurred while Elian was being examined and treated at a hospital in Ft. Lauderdale. The father's alleged request that Lazaro Gonzalez take care of the child is subject to varying interpretations. At the second interview, the OIC asked the father to discuss his earlier conversations with Lazaro Gonzalez. He disputed Lazaro's version. Elian's father stated "At all times I asked that Elian be returned to me." Elian's grandfather interjected and the OIC summarized his view "At no time during his conversation with his brother did he ask him to take care of Elian. As a family they did not have to say such a thing. It's humane and as family, it is an obligation." Assuming Elian's father made the statement, we believe the most reasonable interpretation is that it was a normal reaction of a father to the circumstances of his five year-old son's lone arrival and medical treatment in a foreign country following the tragic death of his mother, rather than a request that the child remain with Lazaro Gonzalez indefinitely.

Third, the statements of the attorney concerning the father's alleged applications under the United States lottery program carry little weight. We asked Elian's father in the written questions whether he had applied either in person or by mail to the US Interests Section for permission to go to the United States. He indicated in writing that he had not. The statements

that he had applied for an immigrant visa are based on hearsay and cannot be confirmed or denied by the U.S. Interests Section or the INS. Even if we assume the father had applied under the lottery program, there is no information concerning the circumstances of those applications, including his intentions concerning Elian.² Moreover, the circumstances faced by the father and his child have drastically changed from the time of any such application.

Fourth, Elian's great uncle and the attorneys argued that father's freedom of movement has been restricted by his government. We questioned Mr. Gonzalez-Quintana at the second written submission about this allegation and he indicated that his movements are not restricted by the Cuban government. We recognize that Cubans do not enjoy the freedom of movement we have in our own country and that Mr. Gonzalez-Quintana is certainly under a lot of scrutiny by the press and by the Cuban government. We have not, however, found evidence that he is unable to move as freely as other Cuban citizens or that his movements are restricted in order to punish or intimidate him or to influence his parental decisions. We have assumed for purposes of the recommendation that there are limitations on the father's freedom and that he is being monitored both by the Cuban government and by the Cuban press, but we do not believe that leads to an inference that the father's request for his child's return is not genuine.

Finally, the father's loving and active relationship with his child, as established by his interview and numerous affidavits, coupled with the circumstances under which he now finds his six year-old son, separated from his only surviving parent in a foreign country immediately following the tragic death of his mother, strongly suggests that the father's request for his child's return is genuine. After considering the totality of the information currently before the INS, we believe that the most reasonable inference is that the father is able to represent adequately the child's interests in immigration matters.

After weighing the information we have gathered, we believe the father is able to represent adequately the child's immigration interests. Accordingly, we believe the INS should give effect to the father's request for the return of his child by treating it as a request for a withdrawal of Elian's application for admission. Since we believe Elian's father is able to speak on behalf of his son, we should add that were Elian's father to come to the United States to assert his parental authority, we believe that the INS would be required to recognize Elian's father's interests with respect to all immigration matters involving Elian. Elian's father's arrival would necessarily change the custody arrangement we sought with his uncle in his absence. Under the INS regulations, a child is released in order of preference to 1) a parent; 2) legal guardian; or 3) an adult relative. 8 CFR 236.3 In the December 13th interview, our officer in charge indicated to Mr. Gonzalez-Quintana that visas to visit the United States are generally granted for persons in his situation. Mr. Gonzalez-Quintana indicated he was uninterested in applying for such a visa.

² No one has claimed and we have no indication in INS records that Elian's father ever applied under the refugee program. Therefore we must assume that the father did not base any such immigration application on a fear of persecution for himself or his family.

B. Elian's asylum application

While an application for asylum and a request for withdrawal of an application for admission are inherently contradictory requests, the acceptance of a parent's request for the withdrawal of his child's application for admission does not necessarily preclude a child from applying for asylum independent of his parent. INS must determine whether it will accept an asylum application prepared by one of the attorneys claiming to represent Elian and filed under Elian's signature. The INS has instructed its Texas Service Center to hold the application until this determination is made.

A child's right to seek asylum independent of his parents is well established. Section 208(a)(1) of the INA permits any individual physically present in the United States or who arrives in the United States—including any alien who has been brought to the United States after having been interdicted in international or United States waters—to apply for asylum. While Section 208(a)(2) of the INA describes certain exceptions to this right, those exceptions are not applicable to this case. There are no age-based restrictions on applying for asylum. Because the statute does not place any age restrictions on the ability to seek asylum, it must be taken as a given that under some circumstances even a very young child may be considered for a grant of asylum. The INS need not, however, process such applications if they reflect that the purported applicants are so young that they necessarily lack the capacity to understand what they are applying for or, failing that, that the applications do not present an objective basis for ignoring the parents' wishes. Further, the United Nations Convention on the Rights of the Child requires state parties to:

take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights.

United Nations Convention on the Rights of the Child, Article 22, 28 L.L.M. 1448, 1464 (1989).³

Neither section 208 of the INA, nor the Convention on the Rights of the Child, however, addresses whether a child may assert a claim for asylum contrary to the express wishes of a parent. We believe, in keeping with the United States' obligation of *nonrefoulement* under the 1967 Protocol Relating to the Status of Refugees, certain circumstances require the United States to accept and adjudicate a child's asylum application, and provide necessary protection, despite the express opposition of the child's parents.

The Seventh Circuit helped define those circumstances in Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985). The Court held that the significant rights of parents to direct the life of their child did not preclude the child from raising an asylum claim, despite the parents' opposition. The parents' significant interests entitled them, however, to participate in all immigration matters regarding their child. In that case, the INS accepted an asylum application by a twelve-year old

³ The United States is a signatory to the United Nations Convention on the Rights of the Child, not a party.

boy and granted asylum without notice to the parents. The Seventh Circuit held that the government had erred because it failed to ensure that both parties received an adequate opportunity to assert their interests. The Court found it persuasive that the boy, who was twelve, was sufficiently mature to articulate a desire for asylum apart from his parents' wishes.

In assessing the parents' rights, the Court applied the balancing test established by Matthews v. Eldridge, 424 U.S. 319 (1976), which provides a mechanism for assessing the level of procedural due process necessary in a given proceeding. Under that test, the government must assess the private interest affected by the proceeding, the risk of error inherent in the chosen proceeding, and the interest of the government in using a particular proceeding. Based on that analysis, the Polovchak court found that the involvement of the parents must be weighed against any competing procedural interests, ultimately concluding that the parents' risk -- the loss of their ability to direct their child's interests -- significantly outweighed the burdens imposed on the government by providing the parents with notice and opportunity to participate in the procedure.

The Supreme Court has applied the same balancing test in assessing the standard of proof necessary to permit the termination of parental rights. Recognizing "that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment," the Court held that parental rights could not be severed absent clear and convincing evidence of a basis to terminate. Santosky v. Kramer, 455 U.S. 745, 753 (1982). The Court noted that the child and the parents "share a vital interest in preventing erroneous termination of their natural relationship." Id. at 760. Consequently, applying the Eldridge factors, the Court determined that the private interest affected by proceedings to terminate parental rights is commanding, the risk of error in using a preponderance of the evidence standard is substantial, and the countervailing government interest in using the preponderance of the evidence standard, rather than the clear and convincing evidence standard, was slight.

The issue here -- whether the INS should accept and adjudicate Elian's asylum application in direct opposition to his surviving parent and legal guardian -- does not result in the termination of parental rights. It carries the potential, however, of significantly prolonging, perhaps indefinitely, Elian's separation from his father, resulting in a substantial interference with the father's parental rights. So, while Santosky is not directly applicable to this case, the INS must keep in mind the potential interference with the father's parental rights when determining whether to accept and adjudicate Elian's application for asylum. In Polovchak, the Seventh Circuit addressed the competing interests of the twelve-year old boy who had clearly expressed his desire to apply for asylum and of the parents in asserting their parental rights by requiring the government to allow the parents to participate in their child's immigration matters. Here, the father may not have an opportunity, in a meaningful way, to participate in the adjudication of Elian's asylum application because his residence in Cuba may preclude him from travelling to the United States or because he is unwilling to do so. In order to respect the parental rights of the father, the INS must first determine whether a true divergence of interests exists with respect to Elian's asylum application. Is Elian truly seeking asylum? If not, would his return violate United States' international obligations? If the answer to either question is yes, the INS must adjudicate the application, but in a way that provides the father with a meaningful opportunity to participate.

(i) Elian's capacity to assert a claim for asylum on his own behalf

While the asylum statute clearly invests a child with the right to seek asylum, the question of capacity to assert that right is unresolved. The Polovchak case recognized that a twelve-year-old boy was sufficiently mature to be able to articulate a claim in express contradiction to the wishes of his parents. It did not specifically reach issues relating to the capacity of a younger child, but opined that a twelve-year old was probably at the low-end of maturity necessary to sufficiently distinguish his asylum interests from those of his parents. Elian's tender age is clearly one of the factors that must be considered in assessing whether he can assert an asylum claim. At age six, well below the lower end of necessary maturity described by the Seventh Circuit in Polovchak, we have serious doubts as to Elian's capacity to possess or articulate a subjective fear of persecution on account of a protected ground. There is no indication from the information INS has received that Elian possesses or has articulated a subjective fear of persecution on a protected ground, or that he has the ability to do so. Moreover, we do not believe that Elian, at age six, is competent to affirm that the contents of his asylum application accurately reflect his fear of returning to Cuba, if any. We believe, therefore, that despite his signature on his application for asylum, Elian lacks the capacity to raise an asylum claim. Thus, we do not consider Elian to be seeking asylum or refugee status on his own behalf.

(ii) Objective basis for a valid asylum claim

Capacity is only one of the issues that must be assessed, however. In cases involving unaccompanied minors who may be eligible for asylum, the INS Children's Guidelines, following the recommendations of the UNHCR, advise adjudicators to assess an asylum claim keeping in mind that very young children may be incapable of expressing fear to the degree of an adult. In recommending a course of action for evaluating a child's fear, the Children's Guidelines note that the adjudicator must take the child's statements into account, but it is far more likely that the adjudicator will have to evaluate the claim based on all objective evidence available. The UNHCR notes that the need for objective evidence is particularly compelling where there appears to be a conflict of interest between the child and the parent. UNHCR Guidelines, para. 219.

Thus, while Elian appears to be too young to raise an asylum claim on his own behalf, if objective information demonstrates that there is an independent basis for asylum, notwithstanding the father's stated interests, the INS would be obliged to consider the claim. In evaluating whether such information exists, the INS should first consider the allegations contained in his asylum application.

/ Elian's application for asylum bases his claim on two grounds. First, the application describes past persecution to members of Elian's family, including detention of Elian's stepfather, imprisonment of his great-uncle, and harassment of his mother by the communist party. Second, the application describes the potential for political exploitation of Elian, based on a political opinion imputed to him by the Castro regime, resulting in severe mental anguish and suffering tantamount to torture. The application includes a request for protection under the

Convention Against Torture. When attorney Roger Bernstein first submitted the application on December 10, he reserved the right, in his cover letter, to supplement the application with supporting documentation. In a meeting prior to the interview of Lazaro Gonzalez, Mr. Bernstein stated that he has spoken to witnesses who could attest to the allegations of past persecution and the likelihood of political exploitation.

None of the information provides an objective basis to conclude that any of the experiences of Elian's relatives in Cuba bear upon the possibility that Elian would be persecuted on account of a protected ground. Further, while we are troubled about the possibility of political exploitation and resulting mental anguish, it does not appear to form the basis of a valid claim for asylum. There is no objective basis to conclude that the Castro regime would impute to this six-year old boy a political opinion (or any other protected characteristic), which it seeks to overcome through persecution. See INS v. Elias-Zacarías, 502 U.S. 478, 112 S.Ct. 812 (1992) (holding that an applicant for asylum based on political opinion must show that the alleged persecutors are motivated by the applicant's political opinion).

Finally, the allegation that any political exploitation of Elian requires protection under the Convention Against Torture is without objective basis. The assertion that the mental anguish Elian might face would be sufficiently severe to constitute torture under the Convention is purely speculative. Additionally, to merit protection under the Convention, the applicant must demonstrate that the torture would be inflicted intentionally. Even if the Castro regime seeks to exploit Elian for political gain, there is no reason to believe that it has any intention of inflicting severe mental anguish or any other form of harm recognized by the United States as torture upon Elian. Further, under U.S. law, the definition of mental suffering that can constitute torture is very narrow: it must be prolonged mental harm caused by the intentional infliction of severe physical pain or suffering, the administration or threatened administration of mind altering substances, or the threat of imminent death to the victim or another person. 8 CFR 208.18(a). Again, there is no indication that any political exploitation of Elian by the Castro regime would involve such tactics.

We do not believe Elian has the capacity to form a subjective fear of persecution on account of a protected ground. Further, there appears to be no objective basis for a valid claim for asylum or protection under the Convention Against Torture. Therefore, we believe that there is no divergence of interest between the father and child with respect to Elian's asylum application which warrants interference with the father's parental authority. Elian's return to Cuba would not violate the United States' obligations under the 1967 Protocol Relating to the Status of Refugees, the Convention Against Torture, or the Convention on the Rights of the Child. The INS may give effect to the father's request for the return of his child by not accepting or adjudicating the application for asylum submitted under Elian's signature.

Disapproved _____

Approved for the reasons stated in the memorandum _____

Luis Murrin

1/5/2000



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LOC # 012-00
LL File No. 99-8098
December 17, 1999

Dear Ms. Podolny:

In response to your request for information on the Cuban laws relating to custody and legitimation of children, enclosed please find a report we have prepared for you entitled "Parental Authority in Cuba."

We hope this information is helpful. If we may be of further assistance, please let us know.

Sincerely,

Norma C. Gutiérrez
Senior Legal Specialist

Enclosure

Janice Podolny
Chief, Examination Officer
Immigration and Naturalization Services
425 I St., N.W.
Washington, D.C. 20536

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PARENTAL AUTHORITY IN CUBA

The requester, the Immigration and Naturalization Services (INS), asks for an opinion on provisions of Cuban family law relating to custody and legitimation. Briefly, the facts of the case are as follows: A child was born out of wedlock and, when his mother died, the minor was under her *de facto* custodianship. According to the requester, the child's custody was not assigned by the court, but the parents had a friendly, informal shared custody arrangement. The requester states that the child used to spend at least 50% of his time with his father.¹

Specifically, INS seeks to ascertain the following: (1) if the custodial parent dies, whether the non-custodial parent automatically gets custody; (2) whether it matters that the parents were not married when the child was born.

The INS has not furnished the Law Library with the birth certificate of the child nor with any other legal document pertaining to the minor.

The inquiry raises the following issues under the laws of Cuba:

- Paternity and filiation
- Parental authority

Paternity and filiation

The INS asks for an opinion on the law pertaining to legitimation. The Constitution of Cuba² provides as follows:

Article 37. All children have equal rights, whether they were born in or out of wedlock. Any classification of the nature of the relationship is abolished.

No statement shall be put on record making any distinction regarding births, or the civil status of parents, in the certificates registering children, nor in any other document pertaining to the relationship.

¹ Telephone interview with Janice Podolny, Chief Examination Officer at the Immigration and Naturalization Services (Dec. 16, 1999).

² CONSTITUTION OF CUBA, as amended, Gaceta Oficial (G.O.), August 1, 1992, translated by Foreign Broadcast Information Service, FBIS-LAT-92-226-S.

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The State guarantees the determination and recognition of paternity through suitable legal procedures.¹

In view of the above article and based on the principle of constitutional supremacy, the old categories of legitimacy and illegitimacy are no longer operative and, therefore, have no effect in the reciprocal rights and obligations between parents and children.

The registration in the Office of the Civil Registry of acts concerning the civil status of individuals—i.e., birth, marriage, death, acquisition and loss of Cuban nationality—is governed by the Law on the Civil Registry.²

Article 55 of the Law on the Civil Registry provides as follows:

Article 55. Parentage of children shall be proved with the certification of the birth registration issued with the formalities established by law.³

The lack of a birth certificate limits the Law Library's ability to ascertain the parentage relationship of the father and child in the case at hand. The INS states, however, that it has the child's birth certificate wherein the alleged father is named as the child's father.⁴

Parental Authority

Parental authority in Cuba is governed by the Family Code of Cuba.⁵ The provisions of the Code relevant to this inquiry provide the following:

Article 82. Minor children shall be under the parental authority of their parents.⁶

Article 83. The parental authority belongs to both parents jointly.

¹ *Id.* art. 37.

² Ley No. 51 de Julio 15, 1925, Del Registro del Estado Civil (G.O. Aug. 22, 1925), art. 3.

³ *Id.* art. 82.

⁴ *Supra* note 1.

⁵ Código de la Familia, Anotado y Concordado (Divulgación Ministerio de Justicia, Cuba, 1927).

⁶ *Id.* art. 82.

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[Parental authority] belongs to only one parent on the death of the other, or due to the fact that the exercise of such right has been suspended or deprived from him/her [by the pertinent authority].⁹

Article 85. The parental authority comprises the following rights and duties of the parents:

- 1) to have their children under their custody and care; to make an effort to provide them a stable dwelling and adequate nourishment; to care for their health and personal hygiene;...
- 2) to care for the education of their children;...
- 3) to direct the formation of their children for social life;....
- 4) to administer and care for the personal and real property [*bienes*] of their children in the most industrious way;....
- 5) to represent their children in all legal transactions and acts in which they have an interest;...¹⁰

Extinction and suspension of the parental authority

Article 92. The parental authority is extinguished:

- 3) due to the death of the parents or the child;
- 4) due to the child's arrival at legal age;
- 5) due to the marriage of the child who has not arrived at the legal age;
- 6) due to the adoption of the child.¹¹

Article 93. Both parents, or one of them, shall lose the paternal authority over their children

⁹ *Id.* art. 83.

¹⁰ *Id.* art. 85.

¹¹ *Id.* art. 92.

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- 1) when it is imposed as a sanction upon them by a final court decision in a criminal process;
- 2) when it is assigned to one of them or when both are deprived of the paternal authority by a final court decision issued in a divorce or nullity of marriage proceeding.¹²

Article 94. Parental authority is suspended by incapacity or absence of the parents when declared by the court.¹³

Article 95. The courts, taking in consideration the circumstances of the case, may deprive both parents, or one of them, of parental authority, or suspend them from its exercise in the cases of articles 93 and 94, or by a judgment issued in a trial brought about by the other [parent] or the government attorney [*fiscal*], when one or both parents:

- 1) gravely fail[s] to comply with the duties provided in article 85;
- 2) induce[s] the child to perform an act which constitutes a crime;
- 3) abandon[s] the national territory and, thus, their children;
- 4) engage[s] in a behavior which is antisocial [*conducta viciosa*], corruptive, criminal or dangerous, which is not compatible with the exercise of parental authority;
- 5) commit[s] a crime against the person of the child.¹⁴

Conclusion:

- Articles 82 and 83 of the Family Code of Cuba grant the parental authority of children to both parents jointly.
- Article 83 grants parental authority to only one parent on the death of the other, or when such right has been suspended or deprived to one of the parents by the pertinent authority.
- In the case at hand, as stated above, the Law Library does not have the birth certificate of the minor. Assuming that the parentage relationship between the father and child has been legally

¹² *Id.* art. 93.

¹³ *Id.* art. 94.

¹⁴ *Id.* art. 95.

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established, and assuming that no prior ruling has been issued by a Cuban court under Articles 94 and 95 of the Family Code depriving or suspending the right of the child's father to exercise the parental authority granted to him by articles 82 and 83 of the Code, the father has never lost it. Furthermore, if the above two assumptions are correct, under article 83 of the Family Code, such parental authority right belongs entirely to the father from the moment that the child's mother died.

Prepared by Norma C. Gutiérrez
Senior Legal Specialist
Law Library of Congress
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December 1999

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The Honorable Janet Reno
Attorney General of the United States
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

January 5, 2000

Dear Attorney General Reno:

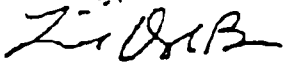
We write to you on Elian Gonzalez' behalf, to ask you to review and reverse the decision announced today by INS Commissioner Doris Meissner. That decision strips Elian of legal representation, and denies him a hearing on his request for political asylum. It is unfair and unconstitutional, and was reached without according Elian any due process of law. This leaves him alone and unprotected by the laws of our nation.

Elian Gonzalez has a constitutionally protected right to apply for political asylum regardless of his age or his father's statements. The decision appears to be an arbitrary one, based largely on secret interviews conducted with Juan Miguel Gonzalez in Cuba. It seems to be predicated on the untested view that Gonzalez is free from duress in Fidel Castro's Cuba, and addresses only Elian's father's best interests, not Elian's. It also contradicts the Commissioner's own policy, directives and regular practices.¹

A decision of this importance should be reached by the highest officials of this country, not by a lower official, even one as distinguished as Commissioner Meissner, and in accordance with due process of law. We ask that you review the process and merits of this decision, and that you consult with the President of the United States.

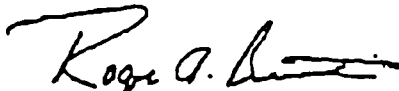
We look forward to working with you to assure Elian due process of law.

Sincerely,

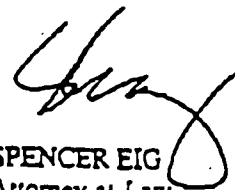


LINDA OSBERG-BRAUN

Hackley, Bernstein & Osberg-Braun, P.L.



ROGER A. BERNSTEIN



SPENCER EIG
Attorney-at-Law

cc: The Counsel to the President of the United States

¹ HQINS 505.12 96 Act054 of August 21, 1997 states: "When deciding whether to permit the minor to withdraw his or her application for admission, officers must also make every effort to determine whether the minor has a fear of persecution or return to his or her country. If the minor indicates a fear of persecution or intention to apply for asylum, or if there is any doubt, especially in the case of countries with known human rights abuses or where turmoil exists, the minor should be placed in removal proceedings under section 240 of the Act....

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