Case Number: 2012-0371-F

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11424-D

D. C. Docket No. 00-206-CV-KMM

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

Plaintiff,

v.

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.

Appeal from the United States District Court
for the Southern District of Florida

Before EDMONDSON, DUBINA and WILSON, Circuit Judges.

BY THE COURT:

Elian Gonzalez ("Plaintiff"), a six-year-old child from Cuba, has made his way to the United States. Plaintiff, as an alien, submitted an application for asylum, pursuant to 8 U.S.C. § 1158(a), to the Immigration and Naturalization Service ("INS").[1] His father asked, in effect, that the application be withdrawn. After an investigation, the INS -- deciding that Plaintiff could not apply for asylum himself and that, under the circumstances, only his father could seek asylum on Plaintiff's behalf -- concluded that there was no reason not to honor the father's request and, accordingly, refused to consider Plaintiff's application. Plaintiff then brought suit in federal district court challenging on several grounds the INS's refusal to consider his application.[2] The district court rejected Plaintiff's claims.

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[1] Several applications for asylum were actually submitted on Plaintiff's behalf. One was signed by Plaintiff himself. The others were signed by Plaintiff's great uncle and temporary custodian (selected by the INS), Lazaro Gonzalez.

[2] Plaintiff is a minor; Plaintiff's suit was brought by and through Lazaro Gonzalez as next friend. See generally Fed. R. Civ. P. 17(c).

Plaintiff has appealed the district court's decision to this Court.[3] His appeal is scheduled to be argued orally next month. Plaintiff, however, now moves for an injunction "to preclude [Plaintiff's] physical removal from the jurisdiction of the United States during the pendency of this appeal."[4] We conclude that Plaintiff is entitled to such an injunction and grant the motion.

In considering a motion for injunction pending appeal, we examine four factors: (1) whether the movant is likely to prevail on the merits of his appeal; (2) whether, if we do not issue an injunction, the movant will suffer irreparable harm; (3) whether, if we issue an injunction, any other party will suffer

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[3] This Court, on 27 March 2000, expedited Plaintiff's appeal and scheduled oral argument for the week of 8 May 2000.

[4] A party must ordinarily first move in the district court for an injunction pending appeal. In this case, Plaintiff came directly to the appellate court. A motion for an injunction pending appeal may be made directly to the court of appeals when a party shows that moving first in the district court would be impracticable. <u>See</u> Fed. R. App. P. 8(a)(2). In this case, we are satisfied that Plaintiff has sufficiently shown that it would have been impracticable to move first in the district court: the time-sensitive nature of the proceedings and the possibility that we could have lost jurisdiction in the absence of an injunction support our exercise of discretion in this case. <u>See also</u> <u>Michael v. INS</u>, 48 F.3d 657, 663 (2d Cir. 1995).

On 13 April 2000, a single-judge emergency order, enjoining Plaintiff's removal from the United States, was issued until a three-judge panel had considered fully Plaintiff's motion for injunction pending appeal. We now have considered fully Plaintiff's motion, and the single-judge emergency order has served its purpose. The single-judge order, accordingly, is replaced by this Order.

substantial harm; and (4) whether an injunction would serve the public interest. See In re Grand Jury Proceedings, 975 F.2d 1488, 1492 (11th Cir. 1992). Although the first factor is generally the most important, the movant need not always show that he probably will succeed on the merits of his appeal. Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986). Instead, where the "balance of the equities weighs heavily in favor of granting the [injunction]," the movant need only show a "substantial case on the merits." Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981); see also Hilton v. Braunskill, 107 S. Ct. 2113, 2120 (1987); United States v. Hamilton, 963 F.2d 322, 323 (11th Cir. 1992); Garcia-Mir, 781 F.2d at 1453.

In this case, the balance of the equities weighs heavily in favor of enjoining the removal of Plaintiff from the United States pending appeal. And Plaintiff has made a "substantial case on the merits" of his appeal.

1. "Balance of the Equities"

The equities, in this case, weigh heavily in favor of issuing an injunction pending appeal. Apart from concerns about what might happen to this child if he is returned to Cuba (which we do not address), if Plaintiff leaves the United

States during the pendency of his appeal, his case will likely become moot. Our failure to issue an injunction pending appeal, therefore, could strip the Court of jurisdiction over this case and deprive Plaintiff forever of something of great value: his day in a court of law. That circumstance alone presents a significant risk of irreparable harm to Plaintiff. See Michael v. INS, 48 F.3d 657, 664 (2d Cir. 1995).

In addition, we doubt that an injunction would harm the INS.[5] Plaintiff has been in the United States for nearly five months. The INS refused to consider Plaintiff's application for asylum more than three months ago. The INS, however, has not sought to remove Plaintiff in the meantime from the United States. The suggestion that an injunction pending appeal, prohibiting the removal of Plaintiff from the United States until Plaintiff's expedited appeal is decided on the merits, will harm the INS is not compelling.

Nor do we believe that an injunction pending appeal in this case would offend the public interest. The INS, in opposition to Plaintiff's motion, invokes the well-established authority of the political branches of government in immigration affairs. We fully recognize the plenary power of Congress over

[5]Multiple Defendants are in this case. But we refer to Defendants collectively as the "INS."

immigration matters. See Jean v. Nelson, 727 F.2d 957, 965 (11th Cir. 1984) (en banc). But we fail to see how an injunction in this case infringes upon the congressional power; after all, the heart of Plaintiff's appeal is that the INS – by refusing to consider Plaintiff's asylum application -- has disregarded the command of Congress. And we doubt that protecting a party's day in court, when he has an appeal of arguable merit, is contrary to the public interest. We, therefore, conclude that the equities weigh heavily in favor of granting an injunction pending appeal.[6]

[6]The INS also asserts that, under the equitable doctrine of "unclean hands," Plaintiff is unentitled to seek the equitable remedy of an injunction pending appeal. The INS urges that Lazaro Gonzalez's alleged failure to comply with an INS order, directing that he surrender Elian Gonzalez to the INS at a Miami airport, renders Plaintiff's hands unclean. Whether Lazaro Gonzalez failed to comply with a lawful order of the INS and whether such failure would justify invocation of the unclean hands doctrine in some cases are issues that we need not decide today. Lazaro Gonzalez is not the plaintiff in this case; Plaintiff is Elian Gonzalez. However unclean Lazaro Gonzalez's hands may be, the INS has suggested no misconduct on the part of Plaintiff, Elian Gonzalez, that would justify application of the unclean hands doctrine in this case to him.

2. "Substantial Case on the Merits"

This case is mainly about statutory construction and the proper exercise of executive discretion. Among other things, we must ultimately decide what Congress meant when it said:

> Any alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1). Plaintiff argues that the INS's refusal even to consider his application violates 8 U.S.C § 1158(a). The INS contends that, because Plaintiff is a six-year-old child, he is incompetent to submit an application on his own behalf and that, on the facts of this case, he must have his father submit the application for him.[7] Because his father did not do so, the INS contends that Plaintiff never actually applied for asylum and that, therefore, no application exists for its consideration. Even accepting as we do the principles of deference set out in <u>Chevron v. Natural Resources Defense</u>

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[7]Although the INS determined that Plaintiff was incompetent to make immigration decisions, it bears repeating that the INS made this determination without having met with Plaintiff or having any evaluations done on his capacity.

Council, Inc., 104 S. Ct. 2778 (1984), we at this time have doubt, in the light of the record and Plaintiff's arguments on appeal, about the correctness of the INS's interpretation of section 1158.

In considering an agency's interpretation of a statute, we first must examine the plain meaning of the pertinent statutory language: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 104 S. Ct. at 2781 (1984). The statute in this case seems pretty clear. Section 1158(a)(1) provides that "[a]ny alien . . . irrespective of such alien's status, may apply for asylum." Plaintiff appears to come within the meaning of "[a]ny alien."[8] See 8 U.S.C. § 1101(a)(3). And the statute plainly says that such an alien "may apply for asylum." We, therefore, question the proposition that, as a matter of law, Plaintiff (unless his father consents) cannot exercise the statutory right to apply for asylum.

Congress's provision for "any alien" is not uncertain in meaning just because it is broad. See Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S.

[8]Congress specifically and expressly excluded three groups of aliens from the meaning of "[a]ny alien." See 8 U.S.C. § 1158(a)(2). School-age children are not among the excluded groups, however. See id.

206, 211 (1998). If Congress had meant to include only some aliens, perhaps Congress would not have used the words "any alien."[9] In addition, although the INS has the authority to issue regulations and procedures governing the submission of asylum applications, see 8 U.S.C. § 1158(d), the INS cannot properly infringe on the plain language of the statute or the clear congressional purpose underlying it. See Shoemaker v. Bowen, 853 F.2d 858, 861 (11th Cir. 1988). Nor can the INS properly narrow the scope of a statute through regulation. See Ellis v. General Motors Acceptance Corp., 160 F.3d 703, 708-09 & n.5 (11th Cir. 1998). At this time, we cannot say that "any alien" excludes Plaintiff: given the plain language of the statute, he might be entitled to apply personally for asylum. Furthermore, it seems unclear that an INS decision to treat Plaintiff's application as a nullity without an adjudication on the merits is a "procedure for the consideration of [Plaintiff's] asylum application." See 8 U.S.C. § 1158(d)(1).

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[9]To some people, the idea that a six-year-old child may file for asylum in the United States, contrary to the express wishes of his parents, may seem a strange or even foolish policy. But this Court does not make immigration policy, and we cannot review the wisdom of statutes duly enacted by Congress. If Congress intended -- as evidenced by the plain meaning of section 1158 -- that a school-age child (such as Plaintiff) be able to file personally an application for asylum, this Court and the INS are bound to honor the policy-decision made by Congress.

Not only does the plain language of the statute seem to support Plaintiff's argument that he, despite his age, is entitled to apply personally for asylum, the present regulatory scheme created by the INS also seems to strengthen Plaintiff's position. The existing INS regulations do envision situations where a minor may act on his own behalf in immigration matters.[10] Moreover, the regulations contemplate that a minor, under some circumstances, may seek asylum against the express wishes of his parents.[11] Also, the INS Guidelines for Children's Asylum Claims (Dept. of Justice, December 1998)

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[10]See 8 C.F.R. § 103.2(a)(2)("An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old.") (emphasis added); 8 C.F.R. § 236.3(h)("When a juvenile alien is apprehended, he or she must be given a [Notice of Rights and Disposition Form]. If the juvenile is less than 14 years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language he or she understands. In the event a juvenile who has requested a hearing pursuant to the notice subsequently decides to accept voluntary departure or is allowed to withdraw his or her application for admission, a new [form] shall be given to and signed by the juvenile.").

[11]See 8 C.F.R. § 236.3(f) ("If a juvenile seeks...any form of relief from removal, where it appears that the grant of such relief may effectively terminate some interest inherent in the parent-child relationship and/or the juvenile's rights and interests are adverse with those of the parent, and the parent is presently residing in the United States, the parent shall be given notice of the juvenile's application for relief"); Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985); cf. Johns v. Dept. of Justice, 624 F.2d 522 (5th Cir. 1980).

("Guidelines") envision that young children will be active and independent participants in the asylum adjudication process.[12]

[12]The Guidelines provide asylum officers with information about how to talk to and interview a young child about his asylum application. The Guidelines repeatedly stress that the kind of questions which should be asked and the kind of answers which should be expected varies according to the age of the applicant and that special care should be taken when interviewing young children. The Guidelines also say that "Asylum Officers should not assume that a child cannot have an asylum claim independent of the parents," and that "[w]hen a parent or parents do not appear to have an approvable claim, an Asylum Officer should routinely make an inquiry into the child's case even though the child may be listed merely as a derivative on a parent's application and may not have filed a separate [ ] asylum application." See Guidelines at 15. The Guidelines also say that "the age, relative maturity, ability to recall events, and psychological make-up of the child will affect the quality of the answers an Asylum Officer is able to elicit from that child. While the burden of proof remains on the child to establish his or her claim for asylum, an Asylum Officer must take these and other factors into account when assessing the credibility of a claim and must also attempt to gather as much objective evidence as possible to evaluate the child's claim." See Guidelines at 17. Above all, the INS Guidelines say that "[w]hen...it appears that the will of the parents and that of the child are in conflict, the adjudicator 'will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt.'" See Guidelines at 20 (citations omitted).

An additional point of interest is that the INS Asylum Officer Corps Training Guidelines for Children's Asylum Claims (INS January 1999) discuss the three age-based developmental stages of children (0-5, 6-12, 13-18 years old) and provide guidance for asylum officers in dealing with children in each category. Notably, the training guidelines provide an example of a statement from a six-year-old child and provide information which can be used to assess statements by children of that age. See id. at 10-18.

The INS has not pointed to (nor have we found) statutory, regulatory or guideline provisions which place an age-based restriction on an alien's ability to apply for asylum. And we have found no preexisting requirement that a minor, in submitting an asylum application, must act through the representative selected by the INS.[13]

Not only does it appear that Plaintiff might be entitled to apply personally for asylum, it appears that he did so. According to the record, Plaintiff -- although a young child -- has expressed a wish that he not be returned to Cuba.[14] He personally signed an application for asylum.[15]

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[13]The INS Guidelines cite to a number of studies and articles dealing with the ability of children to testify as witnesses in judicial proceedings. See Guidelines, at 13 n.21. At the least, this reference supports the inference that the INS envisioned that the kind of competency required for a minor to apply for asylum is competency to testify, see Maryland v. Craig, 497 U.S. 836 (1990), not legal competency to contract and so on, which is a much different standard.

Caselaw supports the inference that complete legal competency has not been the determinative circumstance for whether a minor may apply for asylum. See Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985)(allowing a 12-year-old minor to apply for asylum).

[14]We do not now suggest that the stated intentions of a six-year-old child are dispositive or even entitled to substantial weight in deciding whether the child ultimately receives a grant of asylum. Still, a colorable argument exists that a school-age child's expressed wishes about where he wants to live can trigger the requirement that Plaintiff's claim for asylum be given full and fair consideration. This conclusion may be particularly true where, as here, Plaintiff has indicated to mental health professionals that he does not want to

Plaintiff's cousin, Marisleysis Gonzalez, notified the INS that Plaintiff said he did not want to go back to Cuba. And it appears that never have INS officials attempted to interview Plaintiff about his own wishes.

Even if the INS is correct that Plaintiff needs an adult, legal representative for his asylum application, it is not clear that the INS, in finding Plaintiff's father to be the only proper representative, considered all of the relevant factors -- particularly the child's separate and independent interests in seeking asylum. Cf. Polovchak v. Meese, 774 F.2d 731, 736-7 (7th Cir. 1985); Johns v. Dept. of Justice, 624 F.2d 522, 524 (5th Cir. 1980) (recognizing in the context of a deportation hearing that the mother's interests are not necessarily the same as her four-year-old child's). It does not appear that the INS ever spoke to or interviewed Plaintiff before making this determination. And Lazaro Gonzalez, Plaintiff's great uncle, is no stranger to Plaintiff. The

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return to Cuba, and where those mental health professionals have said that he understands what he is saying. These statements might ultimately not be of great weight in determining Plaintiff's application for asylum, but we are not sure that they can be summarily dismissed as having no weight at all.

[15]Plaintiff's application was complete. To date, none of Plaintiff's applications were returned by the INS for being incomplete. According to its own regulations, the INS "shall adjudicate the claim of each asylum applicant whose application is complete within the meaning of § 208.3(c)(3)." 8 C.F.R. § 208.9(a) (emphasis added).

INS placed Plaintiff in Lazaro's care upon Plaintiff's arrival in this country, and Lazaro is a blood relative. When Lazaro submitted applications for asylum on Plaintiff's behalf, Lazaro was the INS's designated representative to take care of Plaintiff and to ensure his well-being. See 8 C.F.R. § 236.3(b)(4) (stating that where a minor is paroled to someone other than the parent or legal guardian, "such person must execute an agreement to care for the juvenile"). Lazaro's interests, to say the least, are not obviously hostile to Plaintiff's interests. So, for now, we remain unconvinced that the asylum application submitted by Lazaro on behalf of Plaintiff necessarily was ineffectual under the law.

For these reasons and in these circumstances, we believe that Plaintiff has presented a substantial case on the merits.

CONCLUSION

By its nature, this Order sets out more questions than answers. We have not attempted to address every point advanced by both sides, but we have attempted to explain our decision to grant the injunction. No one should feel confident in predicting the eventual result in this case.

The true legal merits of this case will be finally decided in the future. More briefing is expected. We intend to hear oral argument. We need to think more and hard about this case for which no sure and clear answers shine out today. Still, because of the arguments presented as well as the potential inconsistencies of the INS's present position with the plain language of the statute and with the INS's own earlier interpretations of the statute in INS regulations and guidelines, and because of the equities in this case, we conclude that Plaintiff is entitled to an injunction pending appeal.[16]

Therefore, it is ordered that:

(1) Plaintiff, Elian Gonzalez, is ENJOINED from departing or attempting to depart from the United States;

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[16]The INS, in its response to Plaintiff's motion, said it would consent to an injunction requiring the INS to bar Plaintiff's departure from the United States if this Court also entered an order directing Lazaro Gonzalez to present Plaintiff to the INS, as directed by the INS, for transfer of care to Plaintiff's father. We decline to proceed in that manner.

To decide Plaintiff's motion and to preserve his right to a day in court, we need only address the issue of Plaintiff's removal from the country. We need not decide where or in whose custody Plaintiff should remain while this appeal is pending. This Order only prevents Plaintiff's removal from this country.

(2) Any and all persons acting for, on behalf of, or in concert with Plaintiff, Elian Gonzalez, are ENJOINED from aiding or assisting, or attempting to aid or assist, in the removal of Plaintiff from the United States;

(3) All officers, agents, and employees of the United States, including but not limited to officers, agents, and employees of the United States Department of Justice, are ENJOINED to take such reasonable and lawful measures as necessary to prevent the removal of Plaintiff, Elian Gonzalez, from the United States.[17]

MOTION GRANTED.

IT IS SO ORDERED.

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[17]Plaintiff, in his reply brief, requested that this Court order mediation in this case. Although we may direct the parties to participate in mediation, see Fed. R. App. P. 33, we choose not to do so at this time. Nevertheless, we encourage the parties to avail themselves voluntarily of this Court's mediation services.

Office of the Deputy Attorney General
U. S. Department of Justice

Washington, D.C. 20530

FAX COVER SHEET

DATE: 4/19

TO: Beth Nolan

PHONE NO. 456-2632

FAX NO. 456-6279

FROM: JAMES CASTELLO

Associate Deputy Attorney General

PHONE NO. 514-3392

FAX NO. 514-6897

NO. OF PAGES: ______ (EXCLUDING COVER)

COMMENTS:

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Intervenor.

Appeal from the United States District Court
for the Southern District of Florida

(June 23, 2000)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion ___ 11th Cir. 2000, ___ F.3d ___).

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Before EDMONDSON, DUBINA and WILSON, Circuit judges.

PER CURIAM:

Our decision of 1 June hung largely on two ideas: (1) that the policy adopted by the INS in this case -- a policy developed in what we called "informal adjudication" -- was due "some deference" because 8 U.S.C. § 1158(a) was silent on the precise question at issue and because the INS had the duty to set how the statute was to be applied when the statute was silent, and (2) that the level of deference due the INS policy was strengthened -- becoming "considerable" -- when we also took into account the foreign policy implications of the administrative decisions dealing with immigration. Among other things, our opinion spoke of Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778 (1984).

When our opinion was written, we knew of Christensen v. Harris County, 120 S. Ct. 1655 (1 May 2000), a Fair Labor Standards Act (FLSA) decision. But no lawyer in this case had cited or argued Christensen to us. More important, we thought that Christensen -- which involved no immigration law, no foreign policy considerations, and no kind of agency adjudication -- was noncrucial to this case. So, we never mentioned Christensen.

Now in the petition for rehearing, Plaintiff stresses Christensen. Therefore, we will write briefly about it.

First, Christensen involved an opinion letter from the Department of Labor giving advice to Harris County, Texas. The letter, in itself, did not decide Harris County's rights; it did not stop and did not purport to be able to stop Harris County from acting against the advice given. The letter was in no way binding on Harris County. And later when Christensen arose as active litigation, Harris County was not sued by the Department of Labor, but by private citizens: county employees who contended that Harris County was misconstruing the FLSA. The Supreme Court said that the administrative position taken in the opinion letter was not due Chevron deference. As we read it, the Supreme Court's opinion also indicated that the view of the pertinent statute taken in the opinion letter was wrong and unreasonable: "this view is exactly backwards." Id. at 1663.

In our case, the INS did directly decide Plaintiff's specific right to file certain asylum applications under the pertinent statute and did so after receiving and weighing some evidence. The INS acted in the context of an actual and concrete dispute with and before that agency. The INS decision[1] was final and binding on Plaintiff unless he, in effect, appealed it to a court. The sovereign power of the United States -- per the INS and the Attorney General -- had determined that neither Plaintiff himself nor Lazaro Gonzalez could file for asylum on Plaintiff's behalf over the objections of Plaintiff's father. This kind of administrative decisionmaking -- which we think no one can seriously question was the deliberate and official position of the pertinent agencies of the executive branch of our government -- is substantially different from and more than the opinion letter in Christensen. We considered the administrative decisionmaking in this case to be adjudication[2] and to be outside Christensen's scope.[3] In our view, to apply

[1]By "the INS decision," we mean the decision of the INS Commissioner, as affirmed by the Attorney General.

[2]See 5 U.S.C. § 551(6)-(7).

[3]The Supreme Court opinion gives some examples of the kinds of agency acts that are due Chevron deference. In setting out some examples, "formal adjudication" is mentioned. We have described what happened before the INS in our case as informal adjudication. We understand the listing in Christensen to be illustrative and not to be an exhaustive or complete list of agency acts due deference. And, see Pension Benefit Guar. Corp. v. LTV Corp., 110 S. Ct. 2668, 2678-79,

Christensen to this case would not be following Christensen but would be an extension of Christensen.

Second, we thought, even when Christensen does apply, administrative decisions of agencies are still due some deference. And we believed that under Chevron or Christensen, when the foreign-policy impact of immigration law was added as a separate source of judicial deference, we were justified in exercising the judicial restraint that marked our opinion. In addition, we did conclude that the executive branch decisions under section 1158 were reasoned and reasonable.

2681 (1990).

The petition for rehearing[4] is DENIED; and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition for Rehearing En Banc is DENIED.

The mandate of this court will issue on Wednesday, 28 June 2000, at 4:00 in the afternoon (Atlanta time). A filing of a motion to stay the issuance of the mandate will **not** extend the time for the issuance of the mandate. Expect no motions to stay the issuance of the mandate to be granted. All injunctions in this case will dissolve on Wednesday, 28 June 2000, at 4:00 in the afternoon (Atlanta time). All further requests for stays or for injunctive relief should be directed to the Supreme Court of the United States.

Entered for the Court:

/s/ J.L. EDMONDSON
UNITED STATES CIRCUIT JUDGE

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[4] Plaintiff, in his petition for rehearing, also argues that we should not have rejected his constitutional claim. We, however, feel bound by the decision in Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd on other grounds, 105 S. Ct. 2992 (1985), to reject Plaintiff's constitutional claim.

Mary- F41 - Caroline

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Second, we thought, even when Christensen does apply, administrative decisions of agencies are still due some deference. And we believed that under

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[1]By "the INS decision," we mean the decision of the INS Commissioner, as affirmed by the Attorney General.

[2]See 5 U.S.C. § 551(6)-(7).

[3]The Supreme Court opinion gives some examples of the kinds of agency acts that are due Chevron deference. In setting out some examples, "formal adjudication" is mentioned. We have described what happened before the INS in our case as informal adjudication. We understand the listing in Christensen to be illustrative and not to be an exhaustive or complete list of agency acts due deference. And, see Pension Benefit Guar. Corp. v. LTV Corp., 110 S. Ct. 2668, 2678-79, 2681 (1990).

Chevron or Christensen, when the foreign-policy impact of immigration law was added as a separate source of judicial deference, we were justified in exercising the judicial restraint that marked our opinion. In addition, we did conclude that the executive branch decisions under section 1158 were reasoned and reasonable.

The petition for rehearing[4] is DENIED; and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition for Rehearing En Banc is DENIED.

The mandate of this court will issue on Wednesday, 28 June 2000, at 4:00 in the afternoon (Atlanta time). A filing of a motion to stay the issuance of the mandate will **not** extend the time for the issuance of the mandate. Expect no motions to stay the issuance of the mandate to be granted. All injunctions in this case will dissolve on Wednesday, 28 June 2000, at 4:00 in the afternoon (Atlanta time). All further requests for stays or for injunctive relief should be directed to the Supreme Court of the United States.

Entered for the Court:

/s/ J.L. EDMONDSON
UNITED STATES CIRCUIT JUDGE

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[4] Plaintiff, in his petition for rehearing, also argues that we should not have rejected his constitutional claim. We, however, feel bound by the decision in Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd on other grounds, 105 S. Ct. 2992 (1985), to reject Plaintiff's constitutional claim.

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-11424

D. C. Docket No. 00-00206-CV-KMM

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

Plaintiffs-Appellants,

versus

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-Appellees,

JUAN MIGUEL GONZALEZ,

Intervenor.

Appeal from the United States District Court
for the Southern District of Florida

(June 1, 2000)

Before EDMONDSON, DUBINA and WILSON, Circuit Judges.

EDMONDSON, Circuit Judge:

This case, at first sight, seems to be about little more than a child and his father. But, for this Court, the case is mainly about the separation of powers under our constitutional system of government: a statute enacted by Congress, the permissible scope of executive discretion under that statute, and the limits on judicial review of the exercise of that executive discretion.

Elian Gonzalez ("Plaintiff"), a six-year-old Cuban child, arrived in the United States alone. His father in Cuba demanded that Plaintiff be returned to Cuba. Plaintiff, however, asked to stay in the United States; and asylum applications were submitted on his behalf. The Immigration and Naturalization Service ("INS") -- after, among other things, consulting with Plaintiff's father and considering Plaintiff's age -- decided that Plaintiff's asylum applications were legally void and refused to consider their merit.

Plaintiff then filed this suit in federal district court, seeking on several grounds to compel the INS to consider and to determine the merit of his asylum applications. The district court dismissed Plaintiff's suit. Gonzalez ex rel.

Gonzalez v. Reno, 86 F. Supp.2d 1167, 1194 (S.D. Fla. 2000). Plaintiff appeals,[1] and we affirm.

I.

In December 1993, Plaintiff was born in Cuba to Juan Miguel Gonzalez and Elizabeth Gonzalez. When Plaintiff was about three years old, Juan Miguel and Elizabeth separated. Elizabeth retained custody of Plaintiff after the separation. Juan Miguel, however, continued to have regular and significant contact with his son. Plaintiff, in fact, attended school in the district where his father lived and often stayed at Juan Miguel's home.

[1] Several defendant-appellees are involved in this appeal. All these defendants are part of the executive branch of our government. For the sake of simplicity, we refer to the defendants collectively as the "INS."

In November 1999, Elizabeth decided to leave Cuba and to take her son to the United States. In the pre-dawn hours of 22 November, Plaintiff and Elizabeth, along with twelve other Cuban nationals, left Cuba aboard a small boat. The next day, the boat capsized in strong winds and rough seas off the coast of Florida. Eleven of the passengers, including Elizabeth, died. Plaintiff, clinging to an inner tube, endured and survived.

Two days later, Plaintiff was rescued at sea by Florida fishermen and was taken to a hospital in Miami for medical treatment. While Plaintiff was receiving medical treatment, the INS was contacted by Plaintiff's great-uncle: Miami resident Lazaro Gonzalez. INS officials decided, upon Plaintiff's release from the hospital, not to remove Plaintiff immediately to Cuba. Instead, the INS deferred Plaintiff's immigration inspection and paroled Plaintiff into Lazaro's custody and care.

Soon thereafter, Lazaro filed an application for asylum on Plaintiff's behalf with the INS. This application was followed shortly by a second application signed by Plaintiff himself. A third asylum application was filed by Lazaro on Plaintiff's behalf in January 2000, after a state court awarded temporary custody of Plaintiff to Lazaro.[2] The applications were prepared by a Miami lawyer.

The three applications were substantially identical in content. The applications stated that Plaintiff "is afraid to return to Cuba." The applications claimed that Plaintiff had a well-founded fear of persecution because many members of Plaintiff's family had been persecuted by the Castro government in Cuba. In particular, according to the applications, Plaintiff's stepfather had been imprisoned for several months because of opposition to the Cuban government. Two of Plaintiff's great-uncles also had been imprisoned for their political acts. Plaintiff's mother had also been harassed and intimidated by communist authorities in Cuba. The applications also alleged that, if Plaintiff were returned to Cuba, he would be used as a propaganda tool for the Castro government and would be subjected to involuntary indoctrination in the tenets of communism.

[2] A Florida state court since has dismissed Lazaro's petition for custody of Plaintiff. See In re the Matter of Lazaro Gonzalez, No. 00-00479-FC-28 (Fla. 11th Cir. Ct. 2000).

Plaintiff's father, however, apparently did not agree that Plaintiff should remain in the United States. Soon after Plaintiff was rescued at sea, Juan Miguel sent to Cuban officials a letter, asking for Plaintiff's return to Cuba. The Cuban government forwarded this letter to the INS.

Because of the conflicting requests about whether Plaintiff should remain in the United States, INS officials interviewed both Juan Miguel and Lazaro. An INS official, on 13 December, met with Juan Miguel at his home in Cuba. At that meeting, Juan Miguel made this comment:

> [Plaintiff], at the age of six, cannot make a decision on his own . . . . 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.

Juan Miguel denied that Lazaro was authorized to seek asylum for Plaintiff; Juan Miguel also refused to consent to any lawyer representing Plaintiff. Juan Miguel assured the INS official that his desire for Plaintiff's return to Cuba was genuine and was not coerced by the Cuban government.

One week later, INS officials in Miami met with Lazaro, Marisleysis Gonzalez (Plaintiff's cousin), and several lawyers representing Plaintiff. At that meeting, the parties discussed Juan Miguel's request. Lazaro contended that Juan Miguel's request for Plaintiff's return to Cuba was coerced by the Cuban government.[3] INS officials also inquired about the legal basis for Plaintiff's asylum applications; Lazaro replied this way: "During the time he's been here, everything he has, if he goes back, it's all changed. His activities here are different from those that he would have over there."

Plaintiff's lawyers told the INS again of the persecution of Plaintiff's relatives in Cuba because of their political opposition to the Castro government.

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[3] As proof of this contention, Lazaro told INS officials that, before Plaintiff was discovered at sea, Juan Miguel telephoned Lazaro and asked Lazaro to take care of Plaintiff if Plaintiff made it to the United States. Lazaro stated that, after Plaintiff's rescue, Juan Miguel's demeanor had changed noticeably and that, according to Juan Miguel's neighbors in Cuba, Juan Miguel was "[g]etting extra protection" from Cuban authorities.

On 31 December, an INS official again met with Juan Miguel in Cuba to investigate further Lazaro's claim that Juan Miguel's request had been coerced.[4] At that meeting, Juan Miguel repeated that he desired Plaintiff's return to Cuba. Juan Miguel also reasserted that he was under no undue influence from any individual or government. The INS official -- taking Juan Miguel's demeanor into account -- determined that Juan Miguel, in fact, genuinely desired his son's return to Cuba.

The INS Commissioner, on 5 January 2000, rejected Plaintiff's asylum applications as legally void. The Commissioner -- concluding that six-year-old children lack the capacity to file personally for asylum against the wishes of their parents -- determined that Plaintiff could not file his own asylum applications. Instead, according to the Commissioner, Plaintiff needed an adult representative to file for asylum on his behalf. The Commissioner -- citing the custom that parents

[4] To reduce third parties' opportunities to eavesdrop upon the meeting, this interview was held at the residence of a United Nations official near Havana. Also, some of the interview was conducted in writing to prevent eavesdropping.

generally speak for their children and finding that no circumstance in this case warranted a departure from that custom -- concluded that the asylum applications submitted by Plaintiff and Lazaro were legally void and required no further consideration. Plaintiff asked the Attorney General to overrule the Commissioner's decision; the Attorney General declined to do so.

Plaintiff then, by and through Lazaro as his next friend, filed a complaint in federal district court seeking to compel the INS to consider the merits of his asylum applications. In his complaint, Plaintiff alleged, among other things, that the refusal to consider his applications violated 8 U.S.C. § 1158 and the Fifth Amendment Due Process Clause. The district court rejected both claims and dismissed Plaintiff's complaint. Plaintiff appeals.[5]

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[5] During the pendency of this appeal, the INS revoked Plaintiff's parole and removed Plaintiff from Lazaro's custody. The INS then paroled Plaintiff into the custody of Juan Miguel, who had traveled to the United States to reclaim his son. After Juan Miguel came to the United States, we permitted Juan Miguel to intervene in this case.

To ensure that Plaintiff would not be returned to Cuba, depriving Plaintiff of a day in

II.

court and depriving this Court of jurisdiction over Plaintiff's appeal, we enjoined Plaintiff's removal from the United States pending appeal. Considering that we affirm the judgment of the district court, the injunction will dissolve (without a further order) when the Court's mandate is issued.

On appeal, Plaintiff argues that the district court erred (1) by dismissing Plaintiff's claim under 8 U.S.C. § 1158, (2) by dismissing Plaintiff's due process claim, and (3) by failing to appoint a guardian ad litem to represent Plaintiff's interests.[6] We have reviewed carefully the record and the briefs filed by all parties. We conclude that Plaintiff's due process claim lacks merit and does not warrant extended discussion. See Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1984) (en banc) ("Aliens seeking admission to the United States . . . have no constitutional rights with regard to their applications . . . ."), aff'd on other grounds, 105 S. Ct. 2992 (1985). Plaintiff's guardian ad litem claim, because Plaintiff was ably represented in district court by his next friend, also lacks merit and similarly does not warrant extended discussion. See Fed. R. Civ. P. 17(c) (providing for appointment of guardian ad litem in discretion of district court); see also Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35, 39 (5th Cir. 1958) (noting that guardian ad litem may be unnecessary where child already represented adequately by next friend). We, accordingly, affirm the district court's

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[6] The INS contended in district court that the district court lacked subject-matter jurisdiction over Plaintiff's suit. The district court, however, rejected this argument and concluded that subject-matter jurisdiction did exist. The INS has not renewed its jurisdictional contention on appeal.

We, however, are mindful of our own jurisdictional limits. So, we have considered our subject-matter jurisdiction over this appeal. We conclude that this Court does have subject-matter jurisdiction over Plaintiff's appeal.

dismissal of the constitutional claim and the district court's refusal to appoint a guardian ad litem.[7] We now turn, however, to a more difficult question: the district court's dismissal of Plaintiff's statutory claim.

III.

Plaintiff contends that the district court erred in rejecting his statutory claim based on 8 U.S.C. § 1158. Section 1158 provides that "[a]ny alien . . . may apply for asylum." 8 U.S.C. § 1158(a)(1). Plaintiff says that, because he is "[a]ny alien," he may apply for asylum. Plaintiff insists that, by the applications signed and submitted by himself and Lazaro, he , in fact, did apply for asylum within the meaning of section

[7]Also before this Court is a recently filed motion of Intervenor, Juan Miguel Gonzalez, to remove Lazaro Gonzalez as Plaintiff's next friend and to substitute Plaintiff's father as next friend. Notwithstanding that much has happened since Lazaro brought this suit as Plaintiff's next friend, Lazaro (aided by a troop of seasoned lawyers) has completely and steadfastly pressed Plaintiff's claimed rights in the district court and in this Court. We see no powerful reason to make a change at this point. We, therefore, deny Intervenor's motion to remove Lazaro and to substitute Intervenor as next friend for the purposes of this litigation.

1158. In addition, Plaintiff argues that the summary rejection by the INS of his applications as invalid violated the intent of Congress as set out in the statute.

The INS responds that section 1158 is silent about the validity of asylum applications filed on behalf of a six-year-old child, by the child himself and a non-parental relative, against the wishes of the child's parent. The INS argues that, because the statute does not spell out how a young child files for asylum, the INS was free to adopt a policy requiring, in these circumstances, that any asylum claim on Plaintiff's behalf be filed by Plaintiff's father. As such, the INS urges that the rejection of Plaintiff's purported asylum applications as legally void was lawful. According to the INS, because the applications had no legal effect, Plaintiff never applied at all within the meaning of the statute.

Guided by well-established principles of statutory construction, judicial restraint, and deference to executive agencies, we accept that the rejection by the INS of Plaintiff's applications as invalid did not violate section 1158.

A.

Our consideration of Plaintiff's statutory claim must begin with an examination of the scope of the statute itself. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778, 2781 (1984); see also INS v. Aguirre-Aguirre, 119 S. Ct. 1439, 1445 (1999) (instructing that analysis set out in Chevron is applicable to immigration statutes); Jaramillo v. INS, 1 F.3d 1149, 1153 (11th Cir. 1993) (en banc) (same). In Chevron, the Supreme Court explained: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 104 S. Ct. at 2781. We turn, therefore, to the plain language of the statute.

Section 1158 provides, in pertinent part:

> Any alien who is physically present in the United States 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), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1) (emphasis added). Section 1158 is neither vague nor ambiguous. The statute means exactly what it says: "[a]ny alien . . . may apply for asylum." See Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1956 (1998) (observing that statute is not ambiguous just because it is broad and that statute may apply to circumstances not envisioned by Congress). That "[a]ny alien" includes

Plaintiff seems apparent.[8] See 8 U.S.C. § 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States"); see also Merritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997) (noting that word "any" has "an expansive meaning"). Section 1158, therefore, plainly would permit Plaintiff to apply for asylum.

When an alien does apply for asylum within the meaning of the statute, the INS -- according to the statute itself and INS regulations -- must consider the merits of the alien's asylum claim. See 8 U.S.C. § 1158(d)(1) ("The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a) of this section.") (emphasis added); 8 C.F.R. § 208.9(a) (requiring INS to "adjudicate the claim of each asylum applicant whose application is complete"). The important legal question in this case, therefore, is not whether Plaintiff may apply for asylum; that a six-year-old is eligible to apply for asylum is clear. The ultimate inquiry, instead, is whether a six-year-old child has applied for asylum within the

[8] The INS concedes that Plaintiff is eligible to apply for asylum pursuant to section 1158.

meaning of the statute when he, or a non-parental relative on his behalf, signs and submits a purported application against the express wishes of the child's parent.

About this question, more important than what Congress said in section 1158 is what Congress left unsaid. In reading statutes, we consider not only the words Congress used, but the spaces between those words. Section 1158 is silent on the precise question at issue in this case. Although section 1158 gives "[a]ny alien" the right to "apply for asylum," the statute does not command how an alien applies for asylum. The statute includes no definition of the term "apply." The statute does not set out procedures for the proper filing of an asylum application. Furthermore, the statute does not identify the necessary contents of a valid asylum application. In short, although the statute requires the existence of some application procedure so that aliens may apply for asylum, section 1158 says nothing about the particulars of that procedure. See 8 U.S.C. § 1158.

B.

Because the statute is silent on the issue, Congress has left a gap in the statutory scheme.[9] From that gap springs executive discretion.[10] As a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute (here, the INS), to choose how to fill such gaps.[11] See Chevron, 104 S. Ct. at 2793.

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[9] That Congress left a gap in the statutory scheme does not mean that Congress has done something wrong. Whether Congress could or should legislate with sufficient detail to address every conceivable set of circumstances that might arise is highly debatable. See generally Loving v. United States, 116 S. Ct. 1737, 1744 (1996) ("To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government."). Congress may properly commit something to the discretion of the other branches of government.

[10] This case is about the discretion of the executive branch to make policy, not about ministerial enforcement of the "law" by executive officials. It has been suggested that the precise policy adopted by the INS in this case was required by "law." That characterization of this case, however, is inaccurate. As we have explained, when the INS made its pertinent policy, the preexisting law said nothing about the validity of Plaintiff's asylum applications.

Instead, Congress just provided that "[a]ny alien" may apply for asylum and left the details of the application process to the discretion of the INS. See Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1140 (9th Cir. 1988) (en banc) (Hug, J., dissenting) (explaining that sometimes "Congress enacts quite general provisions, with the specifics to be filled in by the agency"). The INS, in its discretion, decided to require six-year-old children – who arrive unaccompanied in the United States from Cuba – to act in immigration matters only through (absent special circumstances) their parents in Cuba. The INS could have shaped its policy in a different fashion, perhaps allowing relatives (for example, those within the fourth degree of relationship) in the United States to act for such children. But it did not, and we cannot. That choice was the sole prerogative of the executive branch. According to the principles set out in Chevron, we can only disturb that choice if it is unreasonable. See Chevron, 104 S. Ct. at 2793; see also Mistretta v. United States, 109 S. Ct. 647, 678 (1989) (Scalia, J., dissenting) (explaining discretionary authority of executive branch in administering statutory scheme).

[11] When a statute is ambiguous or silent on the pertinent issue, it ordinarily is for the judicial branch to construe the statute. See generally Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177

(1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). But the ordinary rule does not always apply: where Congress has indicated that gaps in the statutory scheme should be filled in by officers of the executive branch (a political branch accountable to the people and fit for making policy judgments), then the gaps should not be filled in by federal judges. Where Congress has committed the enforcement of a statute to a particular executive agency, Congress has sufficiently indicated its intent that statutory gaps be filled by the executive agency. And the Supreme Court has directed that, for such statutes, if "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, 104 S. Ct. at 2782.

Moreover, the authority of the executive branch to fill gaps is especially great in the context of immigration policy.[12] See Aguirre-Aguirre, 119 S. Ct. at 1445. Our proper

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[12] The authority of the executive branch in immigration matters stems from the primacy of the President and other executive officials (such as the INS) in matters touching upon foreign affairs. See Aguirre-Aguirre, 119 S. Ct. at 1445. Respect for the authority of the executive branch in foreign affairs is a well-established theme in our law. See United States v. Curtiss-Wright Export Corp., 57 S. Ct. 216, 221 (1936) (recognizing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"). And the judicial respect for executive authority in matters touching

review of the exercise by the executive branch of its discretion to fill gaps, therefore, must be very limited. See Pauley v. Bethenergy Mines, Inc., 111 S. Ct. 2524, 2534 (1991).

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upon foreign relations is even greater where the presidential power has been affirmed in an act of Congress. See Youngstown Sheet & Tube Co. v. Sawyer, 72 S. Ct. 863, 870 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."); see also United States v. Frade, 709 F.2d 1387, 1402 (11th Cir. 1983) (same).

That the courts owe some deference to executive policy does not mean that the executive branch has unbridled discretion in creating and in implementing policy. Executive agencies must comply with the procedural requirements imposed by statute. See Morton v. Ruiz, 94 S. Ct. 1055, 1073 (1974). Agencies must respect their own procedural rules and regulations. See id. at 1074; see also Hall v. Schweiker, 660 F.2d 116, 119 (5th Cir. 1981). And the policy selected by the agency must be a reasonable one in the light of the statutory scheme. Chevron, 104 S. Ct. at 2782. To this end, the courts retain the authority to check agency policymaking for procedural compliance and for arbitrariness. But the courts cannot properly reexamine the wisdom of an agency-promulgated policy.[13] See SEC v. Chenery Corp., 67 S. Ct. 1575, 1582 (1947) ("The wisdom of the principle adopted is none of our concern.").

In this case, because the law -- particularly section 1158 -- is silent about the validity of Plaintiff's purported asylum applications, it fell to the INS to make a discretionary policy choice. The INS, exercising its gap-filling discretion, determined

[13] The Supreme Court has instructed us with these words:

> [F]ederal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Chevron, 104 S. Ct. at 2793 (citation omitted).

these things: (1) six-year-old children lack the capacity to sign and to submit personally an application for asylum; (2) instead, six-year-old children must be represented by an adult in immigration matters; (3) absent special circumstances, the only proper adult to represent a six-year-old child is the child's parent, even when the parent is not in this country; and, (4) that the parent lives in a communist-totalitarian state (such as Cuba),[14] in and of itself, does not constitute a special circumstance requiring the selection of a non-parental representative. Our duty is to decide whether this policy might be a reasonable one in the light of the statutory scheme. See Chevron, 104 S. Ct. at 2782.

But we first address Plaintiff's contention that the "policy" relied on by the INS in this case is really no policy at all but is, in reality, just a litigating position. An after-the-fact rationalization of agency action -- an explanation developed for the sole

[14] See U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000) (noting that "Cuba is a totalitarian state," where Communist Party "exercises control over all aspects of Cuban life").

purpose of defending in court the agency's acts -- is usually entitled to no deference from the courts. Bradberry v. Director, Office of Workers' Comp. Programs, 117 F.3d 1361, 1366 (11th Cir. 1997). But we are unable to say that the position of the INS here is just an after-the-fact rationalization.

The INS policy toward Plaintiff's application was not created by INS lawyers during litigation, but instead was developed in the course of administrative proceedings before litigation commenced.[15] Cf. IAL Aircraft Holding, Inc. v. FAA, 206 F.3d 1042, 1046 & n.5 (11th Cir. 2000). While the policy announced by the INS may not harmonize perfectly with earlier INS interpretative guidelines (which are not law),[16] the parties have cited, and we have found, no statutory provision, no regulatory authority, and no prior agency adjudication that "flatly contradicts" the policy. Cf. General Elec. Co. v. Gilbert, 97 S. Ct. 401, 411 (1976); see also Motor Vehicle Mfrs.

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[15] The INS policy on unaccompanied six-year-old children purporting to file for asylum against their parents' wishes was set out in these writings: (1) a memorandum, dated 3 January 2000, from the INS General Counsel to the INS Commissioner; (2) two letters, dated 5 January, from an INS district director to Plaintiff's lawyers and Lazaro, letters explaining the decision of the INS Commissioner; and (3) a letter, dated 12 January, from the Attorney General to Plaintiff's lawyers and Lazaro.

[16] The INS Guidelines "do not have the force and effect of law." Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1511 (11th Cir. 1992).

Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856, 2866 (1983) (noting that agencies have latitude to "adapt their rules and policies to the demands of changing circumstances"). That the INS policy was developed in the course of an informal adjudication, rather than during formal rulemaking, may affect the degree of deference appropriate but does not render the policy altogether unworthy of deference. See Chenery, 67 S. Ct. at 1580; see also Cook v. Wiley, 208 F.3d 1314, 1319-20 (11th Cir. 2000) (explaining that executive policies not "subjected to the heightened scrutiny of [formal] rulemaking" are nonetheless entitled to "some deference"); Bigby v. INS, 21 F.3d 1059, 1063-64 (11th Cir. 1994) (finding Chevron deference appropriate even though agency policy had not been adopted as regulation); U.S. Mosaic Tile Co. v. NLRB, 935 F.2d 1249, 1255 n.6 (11th Cir. 1991) ("Although the agency action in Chevron involved a legislative regulation, the deference standards set forth in that case are now applied to most agency actions, including administrative adjudications . . . ."). And that the INS policy may not be a longstanding one likewise affects only the degree of deference required.[17] See Chenery, 67 S. Ct. at 1580. The INS policy,

[17] The INS claims that the approach taken in Plaintiff's case is the INS's longstanding position on young, unaccompanied aliens. The INS, however, points to no evidence in the record showing that the INS, in the past, has taken this approach. But, even assuming that Plaintiff's case triggered the making of this policy to fit cases like Plaintiff's peculiar circumstances, deference to the INS policy would still be due if the policy is a reasonable one. See Chenery, 67

therefore, is entitled to, at least, some deference under Chevron; and that deference, when we take account of the implications of the policy for foreign affairs, becomes considerable.

S. Ct. at 1580 ("[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule.").

We accept that the INS policy at issue here comes within the range of reasonable choices. First, we cannot say that the foundation of the policy -- the INS determination that six-year-old children necessarily lack sufficient capacity to assert, on their own, an asylum claim -- is unreasonable.[18] See Polovchak v. Meese, 774 F.2d 731, 736-37 (7th Cir. 1985) (presuming that twelve-year-old child was "near the lower end of an age range in which a minor may be mature enough to assert" an asylum claim against the wishes of his parents). Because six-year-old children must have some means of applying for asylum, see 8 U.S.C. § 1158(a)(1), and because the INS

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[18] In other words, we do not think that the INS, as a matter of law, must individually assess each child's mental capacity; we cannot say that looking at capacity instead of age for young children is required. Instead, we recognize that absolute line drawing – although necessarily sacrificing accuracy and flexibility for certainty and efficiency – is an acceptable approach. See Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2567-68 (1976). And, as long as the approach taken by the INS is a reasonable one, we need not decide what the best approach would be.

We, however, do not mean to suggest that the course taken by the INS is the only permissible approach. Although the INS is not required to let six-year-old children speak for themselves about asylum, neither is the INS required to ignore the expressed statements of young children. Even young children can be capable of having an accurate impression of the facts about which they might speak. To obtain asylum, we doubt that it is essential for a child to be able to debate the merits of Marxism-Leninism against the merits of Western-style democracy. Some reasonable people could conclude that it should be sufficient for a child to be able to speak about his fears and to recount the facts that support his fears about returning to another country. Not infrequently, the law does permit six-year-old children (and even younger children) to speak and, in fact, does give their words great effect. See, e.g., Pocatello v. United States, 394 F.2d 115, 116-17 (9th Cir. 1968) (affirming district court's admission of five-year-old's testimony); Miller v. State, 391 So.2d 1102, 1106 (Ala. Crim. App. 1980) (affirming decision of trial court to permit four-year-old to testify); Baker v. State, 674 So.2d 199, 200 (Fla. Dist. Ct. App. 1996) (affirming trial court decision admitting testimony and statements of six-year-old victim).

has decided that the children cannot apply personally, the next element of the INS policy -- that a six-year-old child must be represented by some adult in applying for asylum -- necessarily is reasonable.

The INS determination that ordinarily a parent (even one outside of this country)[19] -- and, more important, *only* a parent -- can act for his six-year-old child (who is in this country) in immigration matters also comes within the range of reasonable choices. In making that determination, INS officials seem to have taken account of the relevant, competing policy interests: the interest of a child in asserting a non-frivolous asylum claim; the interest of a parent in raising his child as he sees fit; and the interest of the public in the prompt but fair disposition of asylum claims. The INS policy -- by presuming that the parent is the sole, appropriate representative for a child -- gives paramount consideration to the primary role of parents in the upbringing of their children. But we cannot conclude that the policy's stress on the

[19] We conclude that the approach taken by the INS about out-of-the-country representatives was a reasonable one. Other approaches might have been available. The INS might have selected a policy giving more weight to the fact that the parent of a child in the United States remained outside of this country's jurisdiction. For example, maybe the INS could have required that the adult representative -- purporting to act in immigration matters (either by applying for asylum on behalf of the child or in effect vetoing an application for asylum) for a child in this country -- be present in this country himself at the pertinent time. See, e.g., Cozine v. Bonnick, 245 S.W.2d 935, 937 (Ky. 1952) (requiring that next friend, purporting to represent child in court, be resident of state). But what else might have been done is not decisive for us.

parent-child relationship is unreasonable.[20] See Ginsberg v. New York, 88 S. Ct. 1274, 1280 (1968) ("[T]he parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.").

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[20] We do not suggest that recognizing the parent-child relationship to the exclusion of other familial relationships is the only reasonable approach. The parent-child relationship is obviously an important one. See Wisconsin v. Yoder, 92 S. Ct. 1526, 1541-42 (1972); Pierce v. Society of Sisters, 45 S. Ct. 571, 573 (1925); see also In re Custody of Smith, 969 P.2d 21, 27-28 (Wash. 1998), cert. granted sub nom. Troxel v. Granville, 120 S. Ct. 11 (1999). Still, although the common practice in the courts of this country seems to be that a parent will be appointed to act as next friend for a child, a parent is not usually entitled to be the next friend of his child as a matter of absolute right. See Fong Sik Leung v. Dulles, 226 F.2d 74, 82 (9th Cir. 1955) ("[No] parent [] may claim to be a guardian ad litem of his minor child as a matter of right."). Especially because the best interests of a child and the best interests of even a loving parent can clash, parental

authority over children – even where the parent is not generally "unfit" – is not without limits in this country. See, e.g., In the Matter of Sampson, 323 N.Y.S.2d 253, 255 (N.Y. App. Div. 1971) (affirming order requiring disfigured child to undergo risky cosmetic surgery against genuine wishes of child's only parent: the state contended surgery would have "a beneficial effect" upon child); Crommelin-Monnier v. Monnier, 638 So.2d 912, 916 (Ala. Civ. App. 1994) (requiring appointment of guardian ad litem where custodial parent sought to remove child to foreign country). In addition, the law in the United States frequently treats more distant familial relationships as important. See, e.g., Kan. Stat. Ann. § 38-1541 (permitting any person related within the fourth degree to child to move to intervene in "child in need of care" proceedings); Ala. Code § 12-16-150(4) (allowing challenge for cause where potential juror is related within ninth degree to party); O.C.G.A. § 15-12-135(a) (disqualifying persons related within the sixth degree to interested parties from jury service).

Critically important, the INS policy does not neglect completely the independent and separate interest that a child may have, apart from his parents, in applying for asylum. See Polovochak, 774 F.2d at 736-37. Instead, according to the INS policy, special circumstances may exist that render a parent an inappropriate representative for the child.[21] Where such circumstances do exist, the INS policy appears to permit other persons, besides a parent, to speak for the child in immigration matters. So, to some extent, the policy does protect a child's own right to apply for asylum under section 1158 despite the contrary wishes of his parents.

[21] Under the INS policy, a substantial conflict of interest between the parent and the child may require or allow another adult to speak for the child on immigration matters. In considering whether a substantial conflict of interest exists, the INS considers the potential merits of a child's asylum claim. If the child would have an exceedingly strong case for asylum, the parent's unwillingness to seek asylum on that child's behalf may indicate, under the INS policy, that the parent is not representing adequately the child's interests.

We are not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction. Because Congress has decided that "[a]ny alien" (including six-year-old children) may apply for asylum, 8 U.S.C. § 1158(a)(1), Congress has charged the INS -- when it promulgates policy and fills gaps in the statutory scheme -- with facilitation, not hindrance, of that legislative goal. See Shoemaker v. Bowen, 853 F.2d 858, 861 (11th Cir. 1988) (noting that Chevron does not provide agency with license to "frustrate[] the underlying congressional policy"). We recognize that, in some instances, the INS policy of deferring to parents -- especially those residing outside of this country -- might hinder some six-year-olds with non-frivolous asylum claims and prevent them from invoking their statutory right to seek asylum. But, considering the well-established principles of judicial deference to executive agencies, we cannot disturb the INS policy in this case just because it might be imperfect. See Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 100 S. Ct. 2844, 2875 (1980) (Burger, C.J., concurring) (noting that agency policy may be valid although policy does not perfectly accomplish legislative goals). And we cannot invalidate the policy -- one with international-relations implications -- selected by the INS merely because we personally might have chosen another. See Chevron, 104 S. Ct. at 2793; see also

Jaramillo, 1 F.3d at 1152-53. Because we cannot say that this element of the INS policy -- that, ordinarily, a parent, and only a parent, can act for a six-year-old child in immigration matters -- is unreasonable, we defer to the INS policy.

The final aspect of the INS policy also worries us some. According to the INS policy, that a parent lives in a communist-totalitarian state is no special circumstance, sufficient in and of itself, to justify the consideration of a six-year-old child's asylum claim (presented by a relative in this country) against the wishes of the non-resident parent. We acknowledge, as a widely-accepted truth, that Cuba does violate human rights and fundamental freedoms and does not guarantee the rule of law to people living in Cuba.[22] See generally U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000) ("[The Cuban Government] continue[s] systematically to violate fundamental civil and political rights of its citizens."). Persons living in such a totalitarian state may be unable to assert freely their own legal rights, much less

[22] According to the United States Department of State, the human rights record of the Cuban government is "poor." Cuban citizens who oppose or criticize the government routinely are "harass[ed], threaten[ed], arbitrarily arrest[ed], detain[ed], imprison[ed], and defame[d]." Cuba regularly denies citizens "the freedoms of speech, press, assembly, and association," and restricts the free exercise of religion. The Cuban constitution provides that "legally recognized civil liberties can be denied to anyone who actively opposes the 'decision of the Cuban people to build socialism.'" See U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000); see also UNHCHR Res. 2000/25, U.N. Comm. on Human Rights, 56th Sess., U.N. Doc. E/CN.4/2000/L.11 (2000) (expressing concern about "the continued violation of human rights and fundamental freedoms in Cuba").

the legal rights of others. Moreover, some reasonable people might say that a child in the United States inherently has a substantial conflict of interest with a parent residing in a totalitarian state when that parent -- even when he is not coerced -- demands that the child leave this country to return to a country with little respect for human rights and basic freedoms. . . .

Nonetheless, we cannot properly conclude that the INS policy is totally unreasonable in this respect. The INS policy does take some account of the possibility of government coercion: where special circumstances -- such as definite coercion directed at an individual parent -- exist, a non-parental representative may be necessary to speak for the child. In addition and more important, in no context is the executive branch entitled to more deference than in the context of foreign affairs. See generally United States v. Curtiss-Wright Export Corp, 57 S. Ct. 216, 221 (1936). This aspect of the INS policy seems to implicate the conduct of foreign affairs more than any other. Something even close to a per se rule -- that, for immigration purposes, no parent living in a totalitarian state has sufficient liberty to represent and to serve the true, best interests of his own child in the United States -- likely would have significant consequences for the President's conduct of our Nation's international affairs: such a rule would focus not on the qualities of the particular parent, but on the qualities of the government of the parent's country. As we understand the legal precedents, they, in effect, direct that a court of law defer especially to this international-relations aspect of the INS policy.

We are obliged to accept that the INS policy, on its face, does not contradict and does not violate section 1158, although section 1158 does not require the approach that the INS has chosen to take.

C.

We now examine the INS's application of its facially reasonable policy to Plaintiff in this case. Although based on a policy permissible under Chevron, if the ultimate decision of the INS -- to treat Plaintiff's asylum applications as invalid -- was "arbitrary, capricious, [or] an abuse of discretion," the decision is unlawful.[23] See 5 U.S.C. § 706(2)(A); see also INS v. Yueh-Shaio-Yang, 117 S. Ct. 350, 353 (1996); Citizens to Preserve Overton Park, Inc. v. Volpe, 91 S. Ct. 814, 822 (1971). But

[23] The INS asks us to apply the "facially legitimate and bona fide reason" standard of review set out in Kleindienst v. Mandel, 92 S. Ct. 2576, 2585 (1972), instead of the more stringent "arbitrary, capricious, or an abuse of discretion" standard. We think that the Kleindienst standard is not the correct standard to apply in this case. But we do note that, even if the Kleindienst standard were applied, the result in this case would remain the same.

whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here.

The application signed and submitted by Plaintiff himself, insofar as the INS has decided that six-year-old children cannot file for asylum themselves, necessarily was a nullity under the INS policy. As we have explained, the INS's per se rule -- prohibiting six-year-old children from personally filing asylum applications against their parents' wishes -- is entitled to deference under the law. The INS, therefore, did not act arbitrarily or abuse its discretion in rejecting Plaintiff's own purported asylum application as void.

Plaintiff contends that, even if the INS policy is facially reasonable under Chevron, the INS decision to reject the applications submitted by Lazaro was arbitrary. Plaintiff asserts that two special circumstances -- the alleged coercion of Juan Miguel by the Cuban government and the objective basis of Plaintiff's asylum claim -- bear negatively upon Juan Miguel's fitness to represent Plaintiff in immigration matters. The INS, according to Plaintiff, was therefore required to recognize some other adult representative -- namely, Lazaro -- to act on Plaintiff's behalf. We, however, conclude that the INS adequately considered these circumstances in reaching its ultimate decision.

The INS first determined that Juan Miguel, in fact, was not operating under coercion from the Cuban government or that, even if he was, his honest and sincere desires were aligned with those of the Cuban government. That determination was not clearly wrong and was no abuse of discretion. An INS official, on two occasions, interviewed Juan Miguel in person in Cuba. Aware of the possibility that Juan Miguel might be under some kind of coercion, the INS official took steps to ensure that Juan Miguel could express freely his genuine wishes about Plaintiff's asylum claim. The INS official, after meeting with Juan Miguel face-to-face, concluded -- based upon her observations of his demeanor -- that Juan Miguel's statement was not the result of duress or coercion. We, therefore, cannot say that the INS's rejection of Plaintiff's contention about coercion was arbitrary.

The INS also preliminarily assessed the objective basis of Plaintiff's asylum claim and concluded that his claim for asylum probably lacked merit.[24] Again, we cannot conclude that the INS's determination was arbitrary or an abuse of discretion. In making this assessment, the INS considered the information contained in the

[24] We do not decide, as the INS advocates, that this summary and preliminary assessment of the merits of Plaintiff's asylum claim was a "consideration" of Plaintiff's purported asylum application within the meaning of the statute. But we do accept that this rough look at the potential merits was a legitimate part of deciding whether Plaintiff's father had a substantial conflict of interest with Plaintiff about asylum that would disqualify the father from representing

asylum applications and information provided to the INS by Plaintiff's lawyers. In addition, the INS interviewed Lazaro and inquired about the basis for Plaintiff's asylum claim.[25]

The essence of Plaintiff's asylum claim was that, if he is returned to Cuba: (1) he will not enjoy the freedom that he has in the United States; (2) he might be forced to undergo "re-education" and indoctrination in communist theory; and (3) he might be used by the Cuban government for propaganda purposes. No one should doubt that, if Plaintiff returns to Cuba, he will be without the degree of liberty that people enjoy in the United States. Also, we admit that re-education, communist

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Plaintiff.

[25] That the INS, in making a preliminary assessment of the strength of Plaintiff's asylum claim, never interviewed Plaintiff has worried us. But the INS did speak with persons representing Plaintiff -- Lazaro, Marisleysis, and Plaintiff's lawyers -- on more than one occasion about the nature of his asylum claim.

indoctrination, and political manipulation of Plaintiff for propaganda purposes, upon a return to Cuba, are not beyond the realm of possibility.

Nonetheless, we cannot say that the INS's assessment of Plaintiff's asylum claim -- that it probably lacked merit -- was arbitrary. To make a meritorious asylum claim, an asylum applicant must show that he has a "well-founded fear of persecution" in his native land. See 8 U.S.C. § 1101(a)(42). Congress largely has left the task of defining with precision the phrase "well-founded fear of persecution" to the INS. See Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1296 (11th Cir. 1990) (stating that, where statutory term is ambiguous, agency properly defined term through adjudications); see also Singh v. INS, 134 F.3d 962, 967 (9th Cir. 1998) (noting that statutes do not define "persecution" or specify acts constituting "persecution").

Plaintiff points to no earlier INS adjudications or judicial decisions where a person, in circumstances similar to Plaintiff's, was found to have established a "well-founded fear of persecution." Political conditions "which affect the populace as a whole or in large part are generally insufficient to establish [persecution]." See Mitev v. INS, 67 F.3d 1325, 1330 (7th Cir. 1995). We cannot say that the INS had to treat education and indoctrination as synonymous with "persecution." See Ghaly v. INS

58 F.3d 1425, 1431 (9th Cir. 1995) (explaining that "persecution is an extreme concept that does not include every sort of treatment our society regards as offensive"); see also Mikhailevitch v. INS, 146 F.3d 384, 390 (6th Cir. 1998) (stating that "persecution" "requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty"); Bradvica v. INS, 128 F.3d 1009, 1012 (7th Cir. 1997) ("[M]ere harassment does not amount to persecution."); Ira J. Kurzban, Kurzban's Immigration Law Sourcebook, 254-61 (6th ed. 1998) (citing cases discussing meaning of "persecution"). Not all exceptional treatment is persecution. The INS's estimate of the purported applications -- as applications that were not strong on their merits -- is not clearly inaccurate.[26]

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[26] We do not know for certain that, if Plaintiff's asylum applications were accepted and fully adjudicated, Plaintiff necessarily would fail to establish his eligibility for asylum. Depending on how the record was developed, we expect that a reasonable adjudicator might find that Plaintiff's fears were "well-founded." We also think that some reasonable adjudicator might regard things

like involuntary and forcible "re-education" as persecution. But these issues are not questions that we, in the first instance, are to answer. The ultimate merits of an asylum petition are not before this Court at all. Instead, they are matters that would be committed to the discretion of the INS. The INS (and the courts) never have suggested that an asylum applicant in like circumstances was eligible for asylum. We cannot say that the INS's assessment of the likelihood of success of the applications in this case was arbitrary.

We have not the slightest illusion about the INS's choices: the choices -- about policy and about application of the policy -- that the INS made in this case are choices about which reasonable people can disagree. Still, the choices were not unreasonable, not capricious and not arbitrary, but were reasoned and reasonable. The INS's considerable discretion was not abused.

CONCLUSION

As policymakers, it is the duty of the Congress and of the executive branch to exercise political will. Although courts should not be unquestioning, we should respect the other branches' policymaking powers. The judicial power is a limited power. It is the duty of the judicial branch not to exercise political will, but only to render judicial judgment under the law.

When the INS was confronted with Plaintiff's purported asylum applications, the immigration law of the United States provided the INS with no clear answer. The INS accordingly developed a policy to deal with the extraordinary circumstances of asylum applications filed on behalf of a six-year-old child, by the child himself and a non-parental relative, against the express wishes of the child's parents (or sole parent). The INS then applied this new policy to Plaintiff's purported asylum applications and rejected them as nullities.

Because the preexisting law compelled no particular policy, the INS was entitled to make a policy decision. The policy decision that the INS made was within the outside border of reasonable choices. And the INS did not abuse its discretion or act arbitrarily in applying the policy and rejecting Plaintiff's purported asylum applications. The Court neither approves nor disapproves the INS's decision to reject the asylum applications filed on Plaintiff's behalf, but the INS decision did not contradict 8 U.S.C. § 1158.

The judgment of the district court is AFFIRMED[27].

[27]NOTICE OF SHORTENED TIME: We order that, if petitions for rehearing or suggestions for rehearing en banc are to be filed, they must be filed within 14 days of this date. Expect no extensions.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
FAMILY DIVISION

IN RE: THE MATTER OF CASE NO. 00-00479-FC-28

LAZARO GONZALEZ, as Custodian of
ELIAN GONZALEZ, a Minor,
Petitioner,
and

JUAN MIGUEL GONZALEZ-QUINTANA,
Respondent.
_____________________________________/

Final Order

THIS CASE comes to the Court upon various emergency motions brought by Petitioner seeking expedited discovery and an imminent hearing upon his Petition for temporary custody of the minor child, Elian Gonzalez.

For the reasons stated below, and with concern for those on both sides who feel so passionately about this case, the Court finds that this matter is federally pre-empted and that this court further lacks subject matter jurisdiction, and therefore dismisses this action and terminates the order of January 10, 2000 entered by a predecessor judge.

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CASE NO. 00-00479-FC-28

Case History

Core facts are not in dispute: this extraordinary case began on an evening on a Cuban beach, when fourteen people, including this child and his mother, fled the island in a small boat. Their destination was the shore of Florida and the United States of America. In rough seas, eleven people perished, including the child's mother. The child survived, alone in the ocean, by clinging to a floating tire. He was found at sea by fishermen who immediately contacted the United States Coast Guard, which transported the child to a local hospital. On November 27, 1999, Elian Gonzalez reached America. As an unaccompanied minor alien, Elian Gonzalez was taken into custody by the United States Immigration and Naturalization Service ("INS") and paroled into the loving arms of his great uncle, Petitioner in this matter. Who would have dreamed that the celebration of this child's survival would have been lost so soon in an international tug of war over him?

The child's father, investigation revealed, remained in Cuba. After two interviews in Cuba, the INS determined that Juan Miguel Gonzalez-Quintana was an active, involved and loving father, who freely and voluntarily requested that his son be returned to his home in Cuba.

In the meantime, in Florida, the Petitioner sought to file political asylum petitions on behalf of the child and by the child directly. After the INS determined that the father had the right to control the child's asylum application and wished it withdrawn, INS rejected the asylum applications filed, and announced in early January that the child would be returned to the father in Cuba.

INS and the United States Attorney General, who is charged with the executive responsibility for immigration, determined that only the father could speak for the child, that there would be no hearing on the asylum petitions filed by Petitioner, and that the child would be returned to the father by January 14, 2000, four months ago.

Petitioner did not agree with INS and the Attorney General that the child should be returned to his father in Cuba. Petitioner objected to the INS procedure and asserted that INS had violated the child's independent due process rights to an political asylum hearing. He wanted the child to stay in the United States, where he would live in a free country. Recognizing that his control over the child extended only to the extent of the grant of the INS parole, Petitioner filed this action in state court on January 7, seeking temporary custody and a protective order prohibiting action by the INS.

The Petitioner, Lazaro Gonzalez, sought the following:

"Petitioner requests temporary custody of the Minor Child for purposes of providing legal consent to all necessary and reasonable medical care for ELIAN GONZALEZ, including psychological care, and to provide for ELIAN's due process rights to seek political asylum in the United States, and for such other things which are necessary for the care of ELIAN, until such time as there is a final disposition of the aforesaid application for political asylum on behalf of the Minor Child." *Petition at p. 6, paragraph h.*

"Petitioner seeks an evidentiary hearing, an Order awarding temporary custody of ELIAN for a period of time sufficient to adjudicate the application for asylum with INS." *Petition at p. 6, paragraph 14.*

The Petition was predicated upon implied consent from Elian's deceased mother, *see memorandum of law p. 7,* and the argument that the father could not object or consent because he could not freely express his wishes while in Cuba and under the control of Castro.

See, memorandum of law at I., page 7.[1]

The Petition further alleges that if JUAN MIGUEL GONZALEZ-QUINTANA objects to Petitioner's custody of the child, that Petitioner asserts he is unfit to provide for the care and control of Elian and that he has abused, abandoned, or neglected Elian based on the argument that: "While it is true that his father...is not responsible for the environment existing in Cuba or the violations of humanitarian rights commonplace in Cuba, by insisting that the boy be placed in the aforesaid environment, the father is engaging in conduct which constitutes abuse or neglect, as referred to in Fla. Stat. § 751.05(3) and as defined in Fla. Stat. Chapter 39." *Memorandum of law p. 11.*

A predecessor judge considered the petition's allegations and the motion for protective order on an emergency ex-parte basis, without a response from the INS or the father. On January 10, 2000, she entered a Temporary Protective Order granting Lazaro Gonzalez temporary custody pending service of process upon the father and a full hearing. The Judge reserved on subject matter jurisdiction. *Order of January 10, 2000, p.4, n.3.* The order also stated that it prohibited the removal of the child from the jurisdiction of the court. *Order of January 10, 2000, p.6 , paragraph 3.*

The ruling of January 10, 2000 was based upon the ex-parte motion, in an effort to act as quickly as possible given the urgent nature of Petitioner's allegations. Jurisdiction was

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[1] "...[T]his Court should not and cannot consider any objection of JUAN MIGUEL GONZALEZ-QUINTANA, the child's father, unless he is removed from his coercive environment and appear [sic] in this Court so that he may speak openly concerning the best interests of the Minor Child." *Memorandum of law at p. 9.*

primarily justified under the theory of *parens patriae,* the theory that the state has the inherent power to protect children within its borders. The essential nature of the Temporary Protective Order was to give Petitioner the opportunity to pursue legal remedies in federal court with regard to his assertions that INS had violated due process and the child's constitutional rights by failing to give him a political asylum hearing. Petitioner did so. The order also permitted Petitioner to secure necessary health, psychological and material care for the child.

Additional research and developments in the case have caused the examination of relevant case law which was not available to the court in January. After receiving the temporary custody order, Petitioner proceeded to federal district court to seek an injunction prohibiting the INS from removing the child from Lazaro Gonzalez and requiring INS to grant the child a political asylum hearing. The federal district court concluded that Lazaro Gonzalez had standing to bring the action in federal court as the child's next friend, *Order of Judge K. Michael Moore in Gonzalez v. Reno*, 2000 WL 289604 (S.D. Fla. March 21, 2000) and did not reach the validity of the state custody order. *Id. at fn. 25.*

Petitioner attempted to serve the summons and petition upon Juan Miguel Gonzalez-Quintana, Elian's father, in Cuba. However, no additional substantive relief was requested in state court until after the Petitioner lost the federal district court case. Last Saturday night, four months after the state court action was commenced, the Petitioner filed a request to take the deposition of the father within three days, and asked for a trial within 10 days. In sum, only after that loss, and during the currently pending appeal to the federal court of appeals for the Eleventh Circuit, and only since the father has arrived in the United States to seek implementation of the federal decision, has Petitioner returned to state court to aggressively seek a hearing in an effort to continue to keep the child in Miami. INS and the Attorney General have decided to move forward on reuniting father and son.

In response to Plaintiff's motions, the court requested Petitioner brief the issues of subject matter jurisdiction, federal preemption, standard of law and their motion for default. As the first two jurisdictional issues are dispositive, the court does not reach standard of law or default.

Some may question the court's decision to rule without oral argument from the attorneys. The court decided to rule on this case without additional hearings for the following reasons: first, Petitioner's lawyers submitted an excellent brief which did an exceptionally thorough job of laying out the legal authority under which Petitioner asks this court to proceed. These are exclusively legal issues. Hearings are generally granted so that the court may take evidence. In this matter, evidence cannot be taken until the court can determine whether it has jurisdiction. It is important to understand that the question before the court at this point is not whether it *should* hear this case, but rather whether it *could* hear this case. This is not a discretionary call. Let no one conclude that this case was decided on legal technicalities — jurisdiction is ground zero in court. Without it, judges have no power to intervene.

Finally, this case has inflamed the passions of our community to the point that references to potential riots have been made by our leaders. There is no purpose in prolonging the anxiety of this family and other people who feel so strongly about this case when the law is so clear and when the inevitable result would be ever more crushingly disappointing.

Holding a hearing would only have raised false hopes that somehow this court could legally act and keep Elian Gonzalez here.

General Principles of Jurisdiction

"Jurisdiction is the oxygen of an action. If present, the action is alive and the court may act." Keena v. Keena, 245 So.2d 665 (Fla. 1st DCA 1971). Equally if subject matter is not present, the court may not act.

Jurisdiction over the subject matter in a case refers to a court's power to hear and determine a controversy. Calhoun v. New Hampshire Ins. Co., 354 So.2d 882 (Fla. 1978). Generally, it is tested by the good faith allegations of the pleading, in this case the petition seeking temporary custody. *See,* Calhoun v. New Hampshire Ins. Co., 354 So.2d 882 (Fla. 1978), cited in Jefferson v. State, 724 So.2d 105 (Fla. 3rd DCA 1998).

"Subject matter jurisdiction arises by virtue of law only; it is conferred by constitution or statute and cannot be created by waiver or acquiescence." [citations omitted] Jesse v. State *, 711 So.2d 1179 (Fla. 2nd DCA 1998).*

"Subject matter jurisdiction , always essential to the validity of a court's action, can be challenged at any time, and a lack of subject matter jurisdiction should be recognized by a court even if unchallenged; when party or a court's own examination of a case suggests a lack of jurisdiction, the court is duty bound to consider such issue." Walt v. Walt, 574 So.2d 205 (Fla. 1st DCA 1991). This court required the Petitioner to present his position on subject matter jurisdiction because of the independent obligation imposed upon the court to recognize its own limitations; as stated in the briefing order: "Courts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order." Greene v. Greene, 432 So.2d (Fla. 3rd DCA 1983).

The issue of preemption is a question of subject matter jurisdiction. Florida Auto. Dealers Industry Ben. Trust v. Small, 592 So.2d 1179 (Fla. 1st DCA 1992). The issue of standing to sue concerns a question of jurisdiction to hear and decide the case pled by a particular party. Rogers & Ford Constr. Corp. v. Carlandia Corp. 626 So.2d 1350 (Fla. 1993).

Lack of Jurisdiction due to Federal Preemption

Elian Gonzalez's physical presence in this country is at the discretion of the federal government. The state court cannot, by deciding with whom his custody should lie, subvert the decision to return him to his father and his home in Cuba. This court is prohibited from acting by the Supremacy Clause of the United States Constitution from acting in this case. Const. Art. I, §8.

Federal Preemption is a principle based on the Supremacy Clause of the United States Constitution: Const. Art. I §8. There are different kinds of preemption, two of which are implicated in this case: field preemption and conflict preemption. "Field preemption" arises when Congress has so thoroughly regulated a field or federal interest is so dominating, that an intent for federal law to occupy the field exclusively may be inferred. Pacific Gas & Electric Co. v. Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 202, 103 SCT. 1713, 1721, 75 L.Ed 2nd 752 (1983). "Conflict preemption" arises where state and federal laws or orders are in direct conflict, particularly here where the state order is intended to "prevent or hinder the [federal agency, here the INS] from operating the way Congress intended it to operate." Id. at 202. Both field and conflict preemption apply in immigration matters. Hines v. Davidowitz, 312 U.S. 52, 61 (1941).

"Power to regulate immigration is unquestionable exclusively a federal power." Decanas v. Bica, 424 U.S.351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976).; Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, (1941); Nyquist v. Mauclet, 432 U.S. 1, 97 S.Ct. 2120, 53 L.Ed.2d 63, (1977). The proposition that courts do not have the authority to second-guess the executive branch's decisions regarding permission of immigrants to enter the country is one of long standing, addressed as far back as 1892 in the case of Eiku v. U.S., 142 U.S. 651, 12 S.Ct 336 , 35 L.Ed. 1146 (1892).

"The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field." [immigration] Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). Nowhere is the "delicacy" of the policy judgment implicated more closely than in connection with Cuba. [2]

The Petition presented to this court's predecessor judge sought the opportunity to go to federal court and seek review of the decision of the INS and the Attorney General that the

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[2] Cuba lays 90 miles from our shores. It which has been the subject of an economic embargo for 30 years. We have transmitted both Radio and TV Marti to it people. Our community remains linked to the island with intimate family ties. Federal immigration policy shifts seismically affected this community in the 1980's with the Mariel Boatlift. The question of interdiction of *balseros* at sea remains a difficult issue, and current immigration detente with Cuba was reached only after apparently difficult negotiations. Foreign policy toward Cuba continues to shape local issues.

father speaks for the child and to pursue a claim of denial of due process, by INS, to the child. She granted Petitioner that opportunity through the Temporary Protective Order. The federal district judge determined that Petitioner could pursue the claim as a "next friend" on behalf of the child under federal procedural rules. [3] Petitioner can proceed with his appeal to the Eleventh Circuit based upon the district court's ruling as to his standing to sue on behalf of the child. The status of the state court action no longer affects the federal action or appeal.

The Petitioner went to federal district court, and the district court judge rendered a fifty-page carefully and thoroughly reasoned ruling which addressed the issues. Judge Moore determined that the Attorney General conducted the necessary investigation and did not abuse her discretion in coming to the conclusion that the child had a loving and adequate home waiting for him with his father, who desperately wanted his first-born son back in his arms.

The remedy sought in this court is custody of the child. While the court recognizes the many, many authorities that establish that domestic relations, family law, is an area reserved to the state courts, Petitioner fails to recognize the fundamental nature of his case -- it is an immigration case, not a family case. *See,* Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981): "Recent authority ... seems to favor a broader inquiry into the nature of the claim rather than resolution of the issue by technical appellation" *Id.* at 564.

This case is designed to keep Elian Gonzalez in Miami over the federal government's and his father's objection, and under the name of a custody claim. Petitioner's increased

[3]The state court order was not the basis of Petitioner's standing to sue in federal court under Federal District Court Judge Moore's analysis..

level of activity in the state court action correlates with announcements by INS of reunification of the child with his father. The United States through the Attorney General has articulately and bluntly insisted that reunification **will** occur. The basis for the custody claim is that the child should not live in Cuba, with his father, and is better off here. The Court's ability to reach that decision is derailed by the federal government decision that he must return to Cuba, his homeland, and be with his father. This court cannot second guess the INS. In the end, a determination by this court as to who should have custody of Elian Gonzalez would not prevent his deportation to Cuba and his father, because deportation is exclusively the province of the federal government. "Custody is not a statutory factor in determining deportability." Johns v. Department of Justice, 653 F.2d. 884 (5th Cir. 1981).

The cases cited by Petitioner in his brief do not provide guidance under the unique facts of this case. Gao v. Jenifer, 185 F.3rd 548 (6th Cir. 1999) deals with a juvenile alien whose status was addressed by the INS prior to an amendment to the federal immigration law which provided 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." 8 U.S.C §1101(a)27(j) (1999) [dealing with illegal and unaccompanied minors placed in foster care and whether the juvenile court has jurisdiction to declare them dependent.] The Johns case, supra, specifically addressed the lack of control the state court has over deportation issues. Bergstrom v. Bergstrom, 623 F.2d 517 (8th Cir. 1980) involved a U.S. citizen father's attempt to utilize the federal district court to modify a prior custody ruling between him and the U.S. citizen mother regarding the U.S. citizen child.

The court finds the reasoning of In Re C.M.K., 552 N.W. 2d 768 (Minn.Ct. App. 1996) of most assistance. In C.M.K., the child was a juvenile Chinese national who was smuggled into the United States. INS found him, and after he was placed with a foster family, moved to deport him. The family filed in state court for dependency. The Minnesota Court of Appeals affirmed the trial court's finding that it was without jurisdiction due to federal immigration preemption, particularly noting that issues of asylum are not subject to state court jurisdiction. Most importantly in that case, the family alleged that the child would be subject to "imprisonment, fines, harassment, and physical assault if he is returned to China." *Id.* at 771. The Court of Appeals found that the family was basing its claim on "... alleged circumstances in another country and therefore, circumstances directly related to the immigration process." *Id at 771.* "A finding that C.M.K. is in need of protection or services based on circumstances in China would directly conflict with the immigration proceedings and, thus, is preempted by federal law." *Id. at 771.*

Petitioner is not without a remedy to seek delay of the INS action, which has been available to him since March 21,2000. Federal Rule of Appellate Procedure 8 provides that a party may proceed in federal court to seek a stay of the ruling of the district court which affirmed the authority of the Attorney General and the INS in this matter.

Lack of Jurisdiction based upon Petitioner's Lack of Standing to sue under Chapter 751

The Petitioner sought relief under Florida Statute 751 titled "Temporary_Custody of

Minor Children by Extended Family." If the petitioner does not have standing to sue under Fla. Stat. 751, then this court cannot exercise jurisdiction under Fla. Stat. §61.1308 because there is no viable custody claim. The Act's mission is stated:

> The purposes of ss. 751.01-751.05 are to:
>
> (1) Recognize that many minor children in this state live with and are well cared for by members f their extended families. ...Because of the care being provided the children by their extended families, they are not dependent [wards of the state] children.
>
> (2) Provide for the welfare of minor children who are living with an extended family...At present, such family members are unable to give complete care to the child in tier custody because they lack a legal document that explains and defines their relationship to the child, and they are unable effectively to consent to the care of the child by third parties
>
> (3) Provide temporary custody of a minor child to a family member or putative father having physical custody of the minor child to enable the custodian to:
>
> (a) Consent to all necessary and reasonable medical and dental care for the child, including non-emergency surgery and psychiatric care;
>
> (b) Secure copies of the child's records, held by third parties, that are necessary to the care of the child, including , but not limited to:
>
> 1. Medical, dental, and psychiatric records;
> 2. Birth certificates and other records; and
> 3. Educational records;
>
> (c) Enroll the child in school ...
>
> (d) Do all other things necessary for the care of the child.
>
> *Fla. Stat. §751.01*

In the definition section of the statute, Fla. Stat. §751.011, The Florida legislature defined the words "Extended family" and "putative father" and stated:

> As used in ss. 751.01-751.05, the term:

(1) "Extended family" is any family composed of the minor child and a relative of the child who is the child's brother, sister, grandparent, aunt, uncle or cousin."

The terms "relative" and "family member" are not defined anywhere in Chapter 751. The term "extended family" is not used in the rest of the statute, even though the definition says "as used in ss. 751.01-751.05".

Fla. Stat. §751.02, "Determination of temporary custody proceedings; jurisdiction" provides: "Any relative of a minor child...with whom the child is presently living, may bring proceedings in the circuit court to determine the temporary custody of the child."

Lazaro Gonzalez's petition seeking temporary custody under Chapter 751 reflects that the Petitioner is "Paternal Great Uncle." *Petition, p.g, paragraph 13 (g).* Despite the limited list of extended family members who may sue under chapter 751, Petitioner asserts that he is a "relative", and therefore has standing to bring this claim to the child. If the statute's effect is limited by the definition of "extended family", then Petitioner is too remotely related to the child to bring this action under chapter 751 and this court has no jurisdiction.

To determine whether the legislature meant to empower any relative to take a child or whether the legislature sought to limit the remedy to the list of "extended family" members that they took the trouble to define is a question of statutory construction.

The legislative intent in passing the law is the polestar by which the court must be guided. State v. Webb, 398 So.2d 820, 824 (Fla. 1981). The rules of statutory construction exist so that a court may determine the legislature's intent and effect the purpose of the law. Barnett Bank of South Florida v. State Dept. of Rev., 571 So.2d 527, 528 (Fla. 3rd DCA

1990). The starting point is the clear language of the statute itself; if the language is clear and unambiguous, the court stops there. Barnett Bank, id. at 528. Petitioner argues that the word "relative" used in §751.02 is clear and unambiguous. However, courts must look beyond plain language if applying the literal construction would render other provisions meaningless. Unruh v. State, 669 So.2d 242, 245 (Fla. 1996).

To determine intent, the court must look to other factors in addition to the language used, including the subject matter and the stated purpose of the law. Badaraco v. Suncoast Towers V Assoc., 676 So.2d 502, 503 (Fla. 3rd DCA 1996). The title of the act is important. Carliile v. Game and Fresh Water Comm'n, 354 So.2d 362, (Fla. 1977). The title is deemed to be a "...direct statement by the legislature of its intent." State v. Webb, 398 So.2d 820 (Fla. 1981). The title of this act is "Temporary Custody of Minor Children by **Extended Family**". [emphasis added]

Also of importance is identification of the "evil to be corrected" by the law. Webb, supra. The legislative history reflected in the bill analyses of the Florida House of Representatives and the Florida Senate reflect as follows: the bill summary from the House states: "This bill creates an action for temporary custody of minor children who are currently living with members of their extended family..." Florida House of Representatives, Committee on Judiciary, *Final Bill Analysis & Economic Impact Satement CS/HB 1185*, 5/3/93. The House's substantive analysis states:

"PRESENT SITUATION: At the present time it has been reported by Florida Legal Services, Inc. that there are minor children living with family members... without an order granting custody. This presents a problem to these family members when a third party requires consent to care for or provide services to these children. Currently, the available solution for these families is to initiate a guardianship proceeding in probate court or to initiate a dependency proceeding under Chapter 39, Florida Statutes." Id. at p. 2, *"Substantive Analysis."* The Senate's summary of the "Present Situation" echoes the House staff analysis. Florida Senate, *Senate Staff analysis and Economic Impact Statement*, 2/25/93.

The "Comments" section provides: "This bill would provide a relatively simple procedure for extended families and putative fathers to obtain custody of minor children....At the present time there is statutory authority for an adjudication of the custody of a child in a dissolution proceeding, through a paternity action, adoption, and juvenile dependency. In addition, a guardianship action encompasses custody, but the procedure is cumbersome and results in a family law issue being adjudicated in probate court rather than in a family law court. The dependency proceeding requires the showing of abandonment or unfitness of the natural parent. In addition, it results in the continual involvement of the Department of Health and Rehabilative Services which is costly and not warranted in the types of situations which this bill addresses." Florida House bill analysis, *supra.*, p. 5, 5/3/93.

The Senate's legislative staff analysis acknowledged the definition issue: "The bill defines 'putative father' and 'extended family' for purposes of **its provisions.** [emphasis added]. However, the term 'extended family' is used only in the statement of the act's purpose...not..in the substantive provisions of the bill. Therefore, the bill would probably be clarified if the term 'relative' were defined in lieu of, or in addition to the term 'extended family'." Florida Senate staff analysis *supra.*, p. 4, 2/25/93.

The legislature ignored its staff's advice on clarifying the bill, and passed Chapter 751 with the definition of "extended family". However, during the rush of passage, uncles were omitted from the list. The legislature revisited the statue in 1997 to add "an uncle of a minor child" to the definition of extended family. See, Florida House of Representatives Committee on Judiciary, *Final Bill Analysis & Economic Impact Statement CS/HB 1087*, 5/20/96. The Bill analysis again refers to Chapter 751 as providing means to place minor children with extended family members, and notes: "This chapter allows those extended family members to seek temporary custody oft eh child, without which they could not consent to care of the child by third parties. In the 1993 session, the word "uncle" wa inadvertently left out of CS/HB 1185.

As a result, the definition of extended family does not include the word "uncle". At least two men were denied legal temporary custody because of the current definition of extended family." Id. at p. 3. In reviewing the entire legislative history and every staff analysis available, not once does a legislative intent to grant the opportunity to seek custody to any relative outside the extended family definition ever appear.

An additional fundamental rule of construction requires the application of the doctrine of *in pari materia*, which means looking at all the provisions of the chapter together. DeArmas v. Ross, 680 So.2d 1131 Fla. 3rd DCA 1996). Phrases cannot be read in isolation. Instead the phrases at issue must be read in the context of the entire section. Acosta v. Richter, 671 So.2d 149, 154 (Fla. 1994). Whenever possible, a court must adopt a construction of a statute that harmonizes and gives effect to all the provisions within an act, giving effect to the whole statute. Unruh, supra., at 245. Allowing any "relative" to sue for temporary custody under §751.05 would wipe out the definition of extended family in §751.011. Why create a limited list of family members if any relative, no matter how distantly related, can sue? To adopt Petitioner's construction would violate the laws governing the court's obligation in construing the laws passed by the legislature.

> "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." Reno v. Flores, 507 U.S. 292, 113 S.Ct 1439, 123 L.Ed.2d 1 (1993), fn. 6.

Under case law decided prior to the passage of Chapter 751 in 1993, and of which the legislature is presumed to be aware, the "great-uncle " issue was raised. In Kennedy v.

Kennedy, 559 So.2d 713 (Fla. App. 1990) a great uncle and aunt were denied custody of their great niece/nephew where there was an attempt to show that the mother was unfit. Certainly the legislature could have included relatives within the second degree of consanguinity, meaning great-aunts, great-uncles, and second or third cousins, if they had wished to exercise the choice to do so.

The single application of this statute in a similar case, Glockson v. Manna, 711 So.2d 1332 (Fla. 2nd DCA 1998) states: "Section 751.05(3) specifies that an award of temporary custody to **an extended family member** over the objection of a natural parent may be granted only upon a finding, by clear and convincing evidence, that the parent is unfit, in which case the trial court must make a finding that the parent has abused, abandoned, or neglected the child as defined by chapter 39, Florida Statutes (1997)." [emphasis added by the court]. The Glockson court applied the definition section to the cause of action. *Id.*

In considering all the rules that apply when a court construes a statute, the court must conclude that as a paternal great-uncle, despite how loving, caring and well-motivated he may be, the law of the state of Florida does not permit the Petitioner to sue under this statute for temporary custody of this child.

The Effect Of This Ruling

A black robe is not a license for a judge to intervene in many of society's tragedies. The most difficult aspect of being a judge is watching horrible situations unfold and knowing that despite the awesome power of the judiciary, you are powerless to intervene. This case is one of those situations. This case has brought out strong feelings, passions, nowhere more visibly than in the streets of the city where this courthouse sits. Along with the people of the world, this court has watched the struggle between a family fighting for love and freedom and a father fighting for love and family. Which is more important? In the end, it depends on every person's individual experience.

Lazaro Gonzalez, and his wife Angela, and his daughter Marisleysis, have sacrificed their home, their health, and their peace of mind for this child. They nursed him through his recovery from his ordeal at sea and the loss of his mother. They are afraid for him, and are striving to do what they think is best for this child. This case has torn apart a once-close family. Although this court is constrained by the law to reach this result, but it must recognize the devotion and selflessness of this family.

This court also recognizes that the decision of this family court will be very difficult for those members of the community who had hoped desperately that the child could stay here. As family judges sitting in downtown Miami, we see case after case where families are separated because of the oppression and tyranny in Cuba. We handle divorce cases where fathers and mothers are divorcing spouses and children left in Cuba, whom they may never see. We see the pain in their faces when as we ask them about their children. In miles, this courthouse is roughly as close to Havana as it is to Orlando. This court knows that many in this community are sons and daughters, mothers and fathers, brothers and sisters of those who suffer the political oppression and tyranny of Cuba from the inside of a Cuban prison. They are angry and they are frustrated and they know exactly what the price of freedom is, and they are very afraid for this child. The experience of this community must be respected.

Equally worthy of respect are those who have reached the opposite conclusion about where Elian Gonzalez should be. Those who believe that the child should be with his father understand the unbearable pain of the loss of a child. There is nothing to compare with the sorrow of an empty home where a child is missing. There are toys that will not be played with, a bed undisturbed. There is an awful silence that comes with the loss of a child that cannot be filled with any degree of noise other than the sound of that particular child. Every parent who has for a moment imagined their world without their child in it, the total fear and overwhelming emptiness, can empathize with Juan Miguel Gonzalez-Quintana. Some feel the father is selfish by insisting his son be returned to him -- but what parent really believes that anyone else could raise his child with the same degree of love and devotion as he? While we may not agree with Juan Miguel Gonzalez-Quintana's decision to live in Cuba, the freedoms which we stand for here in America require that we respect that decision, which the Attorney General has concluded is genuine and not coerced. Seeing the love and devotion to their Cuban homeland in our exile community, perhaps one can understand why Juan Gonzalez does not want to leave a country which many believe is Paradise lost.

The difference between the United States and Cuba is far wider than the 90 miles of the Florida Straits. Here, we live under a system of laws, not a system of men. The law is established by the representatives of our citizens in our legislature. This court is sworn to uphold the laws and the Constitution of the State of Florida, and is not free to substitute her individual opinions. If the law were what any one powerful person decreed it to be, then the differences between Cuba and America which make this case so difficult would vanish. None of us would be free. Our nation, and this state, guarantees the precious right to parent your children, in privacy, without the unfettered intrusion of others. That freedom necessitates this result. Courts must "reconcile ourselves to the idea that there are myriads of problems and troubles which judges are powerless to solve..." quoting United States Supreme Court Justice Warren Burger, in In Re Dubreuil, 603 So.2d 538 (Fla. 4th DCA 1992).

Judges watch television, too. I have watched Elian Gonzalez day after day. This is a beautiful child. He has survived the heart-wrenching loss of a mother and is enmeshed in the terror of a custody fight, and no matter how well-intentioned everyone in this case is, his days are filled with uncertainty. It is axiomatic in family court that six years old is too young to make life-altering decisions. What a lonely place for a six-year old. This is so hard for him. This is so hard for us all.

At this point, this child has become a joke on Letterman and Leno, a skit on Saturday Night Live, and an hourly update on daytime tv. We are losing sight of him as a child and starting to treat him as a thing. We need to stop. We need to turn off the cameras and let him return to the life of a child. The challenge with regard to this court's decision will be the choice of whether Elian Gonzalez will bring out the best in us all, or bring out the worst in us all. He deserves our best.

Orders

For the reasons stated above, this court terminates the effect of the order of January 10, 2000, and determines it does not have subject matter jurisdiction in this case, based on federal preemption and standing. This matter is dismissed. No motion for rehearing will be entertained.

Done and ordered in chambers at Miami, Miami-Dade County, Florida, this 13th day of April, 2000 at 12:02 p.m.

Circuit Court Judge Jennifer D. Bailey

Cc:
Service List & U.S. Attorney