IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11424-D

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

Plaintiffs-Appellants,

v.

JANET RENO, Attorney General of the United States;
DORIS MEISSNER, Commissioner of the United State 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.

BRIEF AMICUS CURIAE OF THE ASSOCIATION FOR OBJECTIVE LAW, SUPPORTING PLAINTIFFS-APPELLANTS' PETITION FOR PANEL OR EN BANC REHEARING AND REVERSAL

Amy Peikoff, Esq.
Robert S. Getman, Esq.
Counsel for *Amicus Curiae*
TAFOL, PO Box 7597
New York, N.Y. 10001
(212) 694-6732

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Regulations

TABLE OF CONTENTS

STATEMENT OF INTEREST

THE ASSOCIATION FOR OBJECTIVE LAW (TAFOL) is a Missouri non-profit corporation, founded over a decade ago, with members across this and foreign lands, whose purpose is to advance Objectivism, the philosophy of Ayn Rand, as the basis of a proper legal system.

Objectivism holds that a man's mind must be left free in order for him to develop mentally, spiritually, and physically – i.e., to sustain his life, health, and happiness. The fundamental rights of life, liberty, property, and pursuit of happiness identified in this country's founding documents are principles necessary to preserve the free functioning of man's mind in a social context. TAFOL, through such measures as the filing of *amicus curiae* briefs, strives to help protect these rights when they are implicated in legal proceedings.

In the present case, Elian himself (and not just his father) has individual rights, rights whose wellspring lies in man's nature, just as do those of Americans. These rights are implicated because Elian will lose them if he is returned to Cuba, a country that does not recognize rights. TAFOL members seek to achieve a society in which these rights are consistently upheld and therefore, have an interest in making sure their country's government and its agencies act consistently to do so in every way. Accordingly, TAFOL views this case not as "just a Cuban case" but as an *American* case, and therefore supports the Plaintiffs'-Appellants' position.

ARGUMENT

One of the most disturbing elements of this appeal is that the Panel's initial opinion and its second opinion almost seem to come from different Panels. The initial opinion raises one serious concern and question after another – and even the second opinion finds many facts and issues to be quite troubling. In the face of these concerns the Panel nonetheless reversed much of its earlier stance and deferred to the INS. Such deference is neither required nor can it reasonably survive so many serious doubts.

Amongst these grave concerns voiced by the initial opinion (of 4/19/2000) are:

- What will happen to Elian if he returns to Cuba? (expressed, though not addressed)
- Even under *Chevron* (let alone *Christensen* now), there is serious doubt of INS position under §1158.
- INS' treating an application as nullity is not a procedure for "considering" it.
- INS rules in fact do envision minors seeking asylum against parents' wishes.
- It was "unclear" that INS considered all relevant factors, particularly the child's "separate and independent interests" in seeking asylum. And
- There was no INS communication with Elian himself before the determination, yet Elian might be competent to testify.

And amongst these grave concerns voiced even by the second opinion (of 6/1/2000) are:

- Again declining to rule that INS' assessment was "consideration" of the application.

- Again being troubled by the extent INS policy adheres to wishes of parents, especially parents outside the jurisdiction.
- Again being further troubled by the potential substantial and inherent conflict of interest of a parent in a totalitarian state, even assuming he is not individually coerced.
- The Panel's conceding that "re-education" of Elian, if returned, is quite possible. And
- The Panel's conclusion that Elian's application, *if heard, might well be granted* "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." (*id*. at n. 26).

TAFOL submits that either opinion's collected doubts overcome any proper standard of deference, and together, swamp it.

Further, TAFOL respectfully reminds the Court that the Supreme Court recently limited agency deference, holding, in *Christensen v. Harris County*, ___ U.S. ___, 120 S.Ct. 1655 (2000) ("*Christensen*") that many an administrative policy or opinion deserves less deference than under the rule of *Chevron, USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ("*Chevron*"): that policies like those herein merit "respect" *only* to the extent that their bases are *persuasive*. The many grave doubts the Panel voiced in its initial, and even its second, opinion gives good ground to conclude that had it applied this lower standard of deference and the test of persuasiveness, it may well have withheld deference to the INS. Alternatively, we

also submit that the deference the Panel paid was excessive even under *Chevron*, especially when the policy eviscerates the statutes as discussed herein, and because it is overdoing judicial deference to relegate courts merely to ascertaining whether a policy is "arbitrary" or "totally unreasonable" as the Panel did -- a function tantamount to acting merely as an administrative lunacy commission.

I. All Aliens Should Have a Due Process Right to an Asylum Hearing

TAFOL respectfully submits that the Panel erred in summarily rejected Plaintiffs' Due Process claims and request for a guardian *ad litem*. A number of Circuit and District Courts have agreed that at least "procedural due process" and a hearing is due because Congress must have desired any procedure it established to be fundamentally fair. *E.g., Selgecka v. Carroll,* 184 F.3d 337 (4th Cir. 1999) (stowaway from Bosnia entitled to a hearing before an immigration judge); *Marincas v. Lewis,* 92 F.3d 195 (3d Cir. 1996); *Yiu Sing Chun v. Sava*, 708 F.2d 869 (2d Cir. 1983); *Augustin v. Sava*, 735 F.2d 32 (2d Cir. 1984); *Amaritei v. Ferro,* No. MJG-96-1874 (D. Md. 1996). Here, incredibly, Elian himself was never heard by the INS. But even aside from these cases from other Circuits, TAFOL submits that much of this Circuit's own precedent supported a right to an asylum hearing, with representation by both "sides" and a guardian *ad litem* for those children who may suffer from a potential conflict of interest with their parents.

In *Haitian Refugee Center v. Smith,* 676 F.2d 1023 (5th Cir. B 1980) ("*HRC*"), the law in this (now 11th) Circuit was held to be that:

> Congress and the executive have created, *at a minimum*, a constitutionally protected right to petition our government for political asylum. Specifically, we find in the federal regulations establishing an asylum procedure – regulations duly promulgated pursuant to congressional delegation of authority to the Attorney General and having the force and effect of law --, when read in conjunction with the United States' commitment to resolution of the refugee problem as expressed in the United Nations Protocol Related to the Status of Refugees and in 8 U.S.C. § 1253(h), a clear intent to grant aliens the right to submit and the opportunity to substantiate their claim for asylum.

676 F.2d at 1038 (emphasis supplied) (footnotes omitted) (citing 8 C.F.R. §§ 108.1, 108.2 (1978), 8 U.S.C. § 1103(a), (b) (1976)). The Court so held based on the Supreme Court's

recognition "that constitutionally protected liberty or property interests may have their source in positive rules of law creating a substantive entitlement to a particular governmental benefit." *See id.* at 1038 & n.31; *Hewitt v. Helms*, 459 U.S. 460, 466, 103 S.Ct. 864, 868-69, 74 L. Ed. 2d 675 (1983).

Although TAFOL believes that non-Cuban refugees have rights, because this case involves a refugee from Cuba, the Court must honor the extraordinary Congressional grant of special liberal treatment to refugees from Communist Cuba, expressed in the Cuban Adjustment Act, 8 U.S.C. 1255. Both that Act and the State Department's own reports on the nature of the government of Cuba underline the fact that the for INS policy to ignore the nature of Cuba *is* unreasonable and against Congress' mandate. Equally unreasonable is the Panel's avoiding any judgment on the nature of Cuba; Cuba's own basic documents of government make clear that Cuba itself considers not Juan Miguel but *Cuba* to be the parent of Elian, and thus one cannot simply accept Juan Miguel as the parent and spokesman, nor ultimately judge the child's best welfare without examining the nature of Cuba. These considerations are compelling reasons to adhere to due process safeguards when failure to do so might result in returning a refugee to an oppressive totalitarian regime.

Respectfully, in summarily rejecting Plaintiffs' Due Process arguments and request for a guardian, the Panel put too much weight on *Jean v. Nelson*, 727 F.2d 957 at 968 (11th Cir. 1984) (*en banc*), *aff'd on other grounds*, 472 U.S. 846 (1985), a case not involving Cubans, to support the proposition that "Aliens seeking admission to the United States . . . have no constitutional rights with regard to their applications . . . ." *Id.* *Jean* did not reject a due process right to an asylum hearing; but only ruled on whether the government is required to *notify* aliens who face

exclusion or deportation of the opportunity to apply for asylum. *See Jean,* 727 F.2d at 987 (Kravitch, J., dissenting) ("any . . . discussion by the majority [about the constitutional rights of excludable aliens] can only be viewed as *dicta* in deciding future cases.").

This Circuit's later ruling on the viability of *Jean* was limited, referring to that Court's holding on the issue of non-discriminatory parole consideration, rather than a right to notice or hearing. *Cuban American Bar Ass'n v. Christopher*, 43 F.3d 1412 1428 n.20 (11th Cir 1995), *cert. denied,* 516 U.S. 913 (1995) ("*CABA*"). Neither the Supreme Court nor this Court considered the asylum-related issue to have been a necessary holding in *Jean* on Constitutional grounds. Finally, and notably, *CABA* extended *Jean's* analysis only on the issue of *extraterritorial* application of our constitution and statutes, and thus is not relevant herein. Beyond misplaced reliance on *Jean*, the other authority invoked by the government in its brief before the Panel is inapposite rulings preceding enactment of the laws cited in *HRC*, including 8 C.F.R. §§ 108.1, 108.2 (1978) and 8 U.S.C. § 1103(a), (b) (1976), which the *HRC* court said formed the basis for an alien's due process right to petition for asylum. Further, the United States did not accede to the United Nations Protocol Relating to the Status of Refugees until 1968, after which the corresponding provisions in 8 U.S.C. § 1253 (h), now 8 U.S.C. § 1231 (b)(3) (Supp. IV 1998), were enacted.

Finally, *Ramirez-Osorio v. INS*, 745 F.2d 937 (5th Cir. 1984), held that, "assuming aliens have a constitutionally protected right to petition for asylum, the notice *and hearing* procedures used by the INS provide sufficient due process protections for the exercise of that right." *Id.* at 947 (emphasis supplied). So, like *Jean*, *Ramirez-Osorio* asked only whether one has a due process right to *notice* of his right to petition for asylum -- yet properly expressed the view that

due process procedures consisted not only of notice but *hearing* as well. Accordingly, this Court should reverse the holding of the Panel that Plaintiff does not have a due process right to have a plenary asylum hearing with a guardian *ad litem* guaranteed to be untainted by conflict of interest.

II. Plaintiff is Entitled to Reversal on His Statutory Claim

The Panel found that while Plaintiff, in the language of §1158, is "[a]ny alien," and therefore may apply for asylum, Plaintiff nonetheless had not *applied*. It said that, because Congress did not define what constitutes an "application" for an alien in Plaintiffs' particular situation, the INS had discretion to formulate a policy to fill this "gap". It found the INS' policy, which said

> (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), in and of itself, does not constitute a special circumstance requiring the selection of a non-parental representative

was not unreasonable nor an abuse of discretion. Respectfully, these conclusions are sophistical, as TAFOL shows below.

A. The INS' Policy Regarding Plaintiffs' Asylum Application Was Not Reasonable In Light of the Statutory Scheme of 8 U.S.C. § 1158

Section 1158 says "*Any* alien" may apply for asylum, and *commands* the Attorney General to "establish a procedure for the consideration of [such] asylum applications." 8 C.F.R. § 208.9(a) requires the INS to "*adjudicate* the claim of each asylum applicant whose application is complete." Together, these broad, clear commands should inhibit policies restricting the meaning of "application".

Plaintiffs' applications were "complete" -- the plain term of the *statute* --featuring all required items. Even the INS conceded that Elian was "eligible" to apply for asylum. Respectfully, to hold that Elian is "any alien" but that despite completed applications he had nonetheless not "applied" is no more logical than the recently famed answer about "it depends on

what the meaning of 'is' is". And, we submit that this "reasoning" is an "end run" improperly circumventing the statutory scheme, which a policy cannot properly undercut.

The statute does not have to provide a definition of "application" in order to give a certain context for its interpretation. Suppose, as here, a six-year-old alien applies, through a relative as next friend, and the INS adopts a policy that an "application" requires first the endorsement of the dictator of the government from which the alien fled. Such policy would obviously contradict the intent of the statute, even though it purports merely to define "application." In this case, because Juan Miguel cannot consent to an asylum application unless Castro as his ruler does, Elian's opportunity to make an application is rendered illusory. Thus, the INS' policy restrictions as to what constitutes an "application" affect *who* can apply for asylum – not merely how. If allowed to stand, the INS policy, contrary to the clear language of §1158 -- – and even though children are the *most vulnerable* to the intimidation and indoctrination that awaits them upon return to such countries -- will paradoxically mean that *no* six-year-olds from communist-totalitarian dictatorships will be found to be "any alien."

Nonetheless, the INS claims a right to make a new policy – and apply it *retroactively* to Elian's applications – so as to retroactively void them. Even more, the INS claims the right to make the general policy subject to several "*special circumstances*" – an unmistakably case-by-case term -- yet declare administratively without any opportunity for a fair hearing of facts from both sides, whether the special circumstances are in fact present. Even assuming that such a retroactive procedure is not questionable, holding that Elian's applications were void because the INS permissibly found none of these "special circumstances" above to apply, was error. And because the INS policy was a bureaucratic edict, neither a genuine "adjudication" nor even a

product of open rulemaking with notice and opportunity for public comment, the error committed is graver still.

"Special circumstances" relate to individual cases – and individual fact-findings. At the very least, any alien who can make a *prima facie* case that there exist in his native country circumstances which threaten to harm him should be entitled to a *hearing*. TAFOL submits that "*Adjudication" implies a Hearing*. Indeed, when the Panel asserted that the requisite "persecution" must be shown to be individualized and when it accepted as a fact INS' staff's conclusion that Juan Miguel had been free to express his views on asylum without conflict of interest with Elian, it unwittingly *underlined* the need for a hearing. A hearing is our system's primary tool for reaching a fair determination of facts in an individual case after allowing both sides to be heard.

Assume *arguendo* that a policy that, absent special circumstances, only a parent can act for his six-year-old child in immigration matters, may be reasonable. Nonetheless, a policy that the fact that a parent's living in a communist-totalitarian state – especially the state which is the target of special legislation such as the Cuban Adjustment Act -- is *never* alone a special circumstance requiring departure from the default rule, is unreasonable in light of the statutory scheme.

1. The INS' policy in this case is unreasonable because it presumes that a parent living in a communist-totalitarian dictatorship is "free" to say something that discredits the totalitarian regime.

To be valid, the INS policy regarding applications should rarely prevent "any alien" from applying. In Elian's situation, it should reasonably allow for children having *prima facie* valid asylum claims to apply for asylum and be heard. But precisely the opposite is true under

the INS "policy" here; paradoxically, the more *valid* the child's asylum claim (*i.e.*, the more tyrannical the totalitarian regime), the more likely it is that the parent would be *prevented* from making an asylum claim for the child.

In a communist-totalitarian dictatorship like Cuba, a parent is not free to express the best interest of his child if that would disparage the country's regime. To say that one's child would be better off living in a free country than under such a regime, *i.e.*, to support the child's asylum claim in a free country like the US, would flagrantly disparage the regime. Therefore, reasonable respect for elemental fairness and a child's rights should require at least a rebuttable presumption that a parent's requesting the return of his six-year-old child to a totalitarian state represents a "special circumstance" requiring that a non-parental but politically free adult relative (or perhaps even an adult non-relative) be allowed to apply for asylum on behalf of the child.

TAFOL recognizes that a parent has the right to determine the upbringing of his child – but he does not have the right to engage in child abuse, for example by denying life-saving medical treatment for the child even based on the parent's religious belief. *See, e.g.*, cases cited in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 270 & n.3 and 307 n.6, 110 S. Ct. 2841, 111 L. Ed. 2d 224, 58 U.S.L.W. 4916 (1990). Every day children in America properly are taken from their parent's custody, when that home is found to be abusive. By the standard of rearing an undamaged child, a communist-totalitarian dictatorship like Cuba is an *abusive country that inherently threatens a child's life*. No parent has the right to return his child to live under a regime that systematically violates its citizens' fundamental rights, thereby threatening all children living under it.

2. Because the INS' policy effectively requires a showing of specific persecution before it will give an asylum hearing to aliens in

Elian's situation, it renders the language of Section 1158, saying "any alien may apply", illusory and empty.

The Panel found that the INS' policy was not "totally unreasonable" because it "takes 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."

Does the INS expect to find evidence of "definite coercion directed at an individual parent"? Does the INS think that if they ask the dictator, he will admit he is coercing the parent, or that he will use force openly? Do they expect the parent or others living under a totalitarian regime to feel free to tell them? Do they expect every alien necessarily to be able himself to identify all the persecutions he faces? What if the parent who would have spoken up for the child is no longer alive, having drowned in her flight to freedom? Do they expect Juan Miguel to be able to be candid, when it is public knowledge that various relatives of Juan Miguel remain in Cuba, as hostages would? One thing is certain: herein the INS refused to listen to such evidence when it comes from exiles, the only ones who would have both access to such information as well as freedom to speak about it. Under such circumstances, the INS "policy" and its application is a "stacked deck".

3. A Court must impinge on the President's ability to conduct foreign policy in order to judge whether the intent of Section 1158 is being carried out properly, so no special deference results for INS policy in this case.

The panel said the INS was entitled to "considerable" deference, and refused to adopt a rule such as that suggested by TAFOL here, believing such rule would interfere with

President's ability to conduct foreign policy by requiring a court to focus on the qualities of the government of the parent's country. Such a focus, we submit, is *indispensable* in order to focus on a child's welfare and best interests, his probable persecution, the adequacy of the parent as a free representative, and whether the parent is free of the conflict of interest from his family's continuing subjection to totalitarian rule. The Panel's second opinion recognized that conflict of interest is material to INS policy and that the child's best interests often trumps even a loving parent's views, *id*. at nn. 20, 21.

First, in a communist-totalitarian state like Cuba, the government *is* in essence the parent. In Cuba the state assumes – often in fact, but always in principle – the prerogatives that America reserves to a child's parents. The Cuban Government:

> assumes arbitrarily the right to educate, indoctrinate, and change the personality. At eleven years of age it imposes a boarding school requirement and separates parents from children. . . . [Even] nutrition, a basic right and obligation of parents is . . . usurped by the state which rations and deprives children of milk at age seven. . . . [The state] is the de facto parent.

Alberto Luzarraga, "Elian Should Stay. A Different Legal Approach," Cuba Free Press, January 8, 2000. A parent living under such a totalitarian regime is powerless to protect his children from it. Therefore, one must judge the government of such a regime because, in effect, it *is* the parent, and child custody is never properly granted to a parent without judging the parent.

What's more, evading judgment on the qualities of the government from which the alien escaped is neither desirable nor even possible; rather, such judgment is *implicit in the very nature of an asylum statute*. The very writing of an asylum statute implies a judgment that some governments are so harmful to their citizens that we should offer their refugees sanctuary; applying an asylum statute requires precisely that one judge the foreign government from which

the alien fled, to see if it is such a country. Thus the INS actually has a *duty* to evaluate the government from which the alien is fleeing, and to judge it according to the standards implicit in the statute. Of all the governments that exist in the world, a communist-totalitarian dictatorship known to have killed many thousands, one uniquely sanctioned by U.S. law and targeted by the remedial Cuban Adjustment Act, is a prime example of a government from which our law aims to protect refugees. Hence, if an INS policy effectively excludes asylum applications from refugee children from such a country, judges should step in and negate the policy in order to effectuate and preserve the asylum statute and Cuban Adjustment Act.

Therefore, in order to review the INS' application of the statute, a court must impinge -- to the extent the *statute* impinges -- on the President's ability to conduct foreign policy. When Congress says "any alien may apply . . . for an asylum hearing" Congress implicitly declares the duty of the INS', Congress' agent, to evaluate whether governments harm the refugee. Judges should confer no special deference in such cases; but should make an independent determination as to whether Congress' mandate is carried out. Carried to its logical end, the alternative would be effectively to prohibit Congress from making any immigration law, because such law would impair the President's ability to make foreign policy, since immigration law clearly concerns acts relating to foreign countries and governments.

Either Congress is prohibited by the separation of powers from touching immigration matters at all, because that involves the President's ability to deal with foreign countries, or Congress has a right, within its right to enact immigration law, to delimit the President's foreign policy making. If the latter, then judges will – and should – impinge on that foreign-policy making in determining whether the INS has carried out the intent of Congress. To give special

deference to the INS in this case is to try to have it both ways: to say on the one hand, that Congress *can* enact a statute which, if properly carried out, necessarily impinges upon the executive's ability to conduct foreign policy; but on the other hand, that judges have little, if any, power to determine whether an executive agency is properly carrying out Congress'statutes.

4. Cuba, a communist-totalitarian dictatorship, is precisely the type of country from which Section 1158 is designed to protect refugee aliens.

Fidel Castro, like other 20th century totalitarian dictators Joseph Stalin and Adolph Hitler, is a mass murderer. He ordered the killing of 15,000 to 17,000 Cubans between the years 1959 and 1990. See Stephane Courtois et al., *The Black Book of Communism*, Mark Kramer, cons. Ed., J. Murphy and Mark Kramer, trans. (Harvard University Press, 1999), p. 664. During the 1960's alone, Castro killed between 7,000 and 10,000, and imprisoned 30,000 others, for political reasons. See id. at 656. In response to these atrocities, among other reasons, Congress laid an embargo upon Cuba that persists (deservedly) nearly a half-century later. And since the embargo was enacted, Cuba nearly helped push the world towards nuclear war during the "Cuban Missile Crisis" by eagerly hosting nuclear missiles that could strike this country, and export mass killing from Cuba to the United States.

Think of the characteristics of the modern totalitarian state: one party rule, no freedom of thought or expression because there is no freedom of speech or of the press (no "opposition" newspapers or broadcasters) and no freedom of petition or assembly. Finally, make the gruesome addition of mass executions for "political crimes" after "show trials". Cuba unmistakably features all of these, as discussed below -- as even "Foggy Bottom" in Washington

agrees. Given its page limitations, TAFOL respectfully refers the Court to its *amicus curiae* brief to the District Court, for a full portrait of Cuban totalitarianism, but notes these highlights.

Castro has a state security department, the DGCI (popularly known as the Red Gestapo), which was created to "infiltrate and destroy the various groups opposed to Castro. The DGCI violently liquidated [political opponents] and oversaw the creation of forced labor camps." Courtois, supra at 655. The department is divided into sections. One "observes everyone who works in culture, sports, and artistic fields, including writers and film directors." *Id.* Another "oversees everyone who works in economic organizations and the ministries of transportation and communication." *Id.* Others are responsible for tapping telephone wires, screening mail, and monitoring the activities and whereabouts of foreign visitors to Cuba. The investigations conducted by the various sections have yielded thousands of "detainees," who assist the Castro regime politically by their forced silence and economically by their forced labor.

Political prisoners are housed with common criminals, so live in fear of violence from fellow inmates. "Some political prisoners held at Boniato [a high security prison known for its extreme violence] have been known to smear themselves with excrement to avoid being raped by other prisoners." Writers opposed to the regime who have been incarcerated in Cuba, tell of the deplorable conditions, including the use, in some prisons, of iron cages scarcely large enough to hold their occupants. In addition to the prisons, Castro has maintained a number of Concentration Camps. One of the largest, "El Manbu, in the Camaguey region, contained more than 3,000 in the 1980's." Courtois, *supra* at 663. Shouldn't governments running Concentration Camps be treated as extraordinary aberrations, as "special" circumstances?

To further maintain "social control," Castro organized a system of Committees for Defense of the Revolution. Members of the CDRs "patrol constantly to root out 'enemy infiltration.'" The CDRs also organize "actos de repudio (acts of repudiation) designed to marginalize and break the resistance of opponents – labeled gusanos (worms) – and their families." In an act of repudiation, "a crowd gathers in front of the opponent's house to throw stones and attack the inhabitants. . . . The police intervene only when they decide that the 'mass revolutionary action' is becoming physically dangerous to the victims." Courtois, *supra* at 662

Have we already forgotten the Red Guards' massive destruction of countless individuals in Communist China, whose policy this mimics? If the heroic man who stood in front of a tank headed to Tienanmen Square had somehow fled to America with his son, but died, and the boy's mother in Red China opposed the son's asylum here, would we simply defer to the policies the INS established herein?

Cuban law presents no obstacle to Castro's totalitarian control. Even when Castro adopted a "constitution" (modeled on the USSR's) in 1976, including provisions limiting the rights of citizens to meet in private groups and otherwise restricting citizens' freedom of association. In 1978, Cuba adopted a law whose stated purpose was preventive law, to prevent criminal acts from occurring. In practice this meant "that any Cuban could be arrested on any pretext if the authorities believed he presented a danger to state security, even if he had not committed any illegal act." Courtois, *supra* at 663.

In a totalitarian dictatorship, "the citizens' own understanding of reality, along with their own value-judgments, is irrelevant to their lives; state force, not individual cognition, is the principle governing their actions. To the extent that an individual . . . is rational, independent,

uncompromising, purposeful, or proud, his life becomes unendurable." L. Peikoff, "Objectivism: The Philosophy of Ayn Rand" 316 (1991). This explains why Dr. Marta Molina, who practiced psychology in Cuba for over 20 years, saw "patients [who] had emotionally traumatic experiences as a result of their resistance to the indoctrination of the Communist ideology." *See* Molina Affidavit below, 2000 U.S. Dist. Lexis 3225 (S.D. Fl. 2000).

Notably, the Panel in both opinions feared Elian will be "*re-educated*". And a totalitarian dictatorship is especially harmful to a child, who does not have even the enslaved adult's ability to cope with a hostile environment. He does not have any clear knowledge or principles to cling to in the face of the intimidation or indoctrination surrounding him, nor can he get much guidance from the frightened adults he encounters.

And the significant spiritual deterioration that results from life in Cuba exists along with the already well-known physical privations that exist there. Cubans suffer from shortages "of everything from milk to medicine, the severe rationing of soap and meat, the lack of toothpaste and anesthesia." "Cubans have made lives out of waiting. They wait for a house to move into, for their turn at the bread line, to buy newspapers that later in the day will be used as toilet paper." Government officials use Communist fealty as a standard to determine who will be permitted to receive higher education and to pursue certain desirable careers. Young children are required to spend one to two months per year away from their homes performing physical labor. Moreover, average citizens have great difficulty obtaining the basic foodstuffs they need to maintain a healthy diet. In sum, Cuba is a land where one is indoctrinated, monitored, threatened, and even terrorized in the name of "ideological and political integration" from an early age., and all the while kept impoverished.

No one – especially not a young child – should be sent to live in such a place. Those who clamor for Elian's return to Cuba say simply that a boy should be with his father – but avoid any thought of how Elian can survive mentally, physically, or psychologically once he is returned there.

5. The INS had every reason to believe that Juan Miguel was operating under coercion and therefore, no basis on which to determine what his "honest and sincere desires" were.

The INS based its opinion that Juan Miguel was sincere in asking for the return of his son on private interviews conducted in Cuba by an INS representative. The representative said, on the basis of Juan Miguel's "demeanor" during these interviews, she found Juan Miguel was not being coerced, or if he was, that his sincere desires were nonetheless aligned with Cuba's. "Demeanor", we submit, is exactly the stuff for *hearings* and cross-examination, let alone psychological experts and judges expert in assessing it, not for the say-so of one or two bureaucrats who did not even preserve a video or sound recording of this "demeanor" to enable review.

And the INS documents produced under the compulsion of the Freedom of Information Act, referred to in Plaintiffs' Petition, are telltale about the INS strategy, litigation posture, and its own doubts about that posture.

Though its political genocide falls numerically short of the "Holocaust" or even that of its ideological brethren in the "Killing Fields" of Cambodia, except in degree Cuba resembles nothing more than a large but poorly-run Concentration Camp, even if the somewhat "workaday" camp depicted in "Life is Beautiful" rather than in Holocaust newsreels. Those camps had signs at their entrances, the State declaring officially that work makes the inmates "free". Believing

those signs, and amateurishly (literally) observing the demeanor of a chosen pre-prepared inmate would never be an acceptable basis for any court to infer that such interview statements were voluntary and sincere.

In addition, as noted above, no one in Cuba can feel free to speak his mind in light of the government's long history of intimidation, incarceration, torture, and mass murder of political dissidents. It is undisputed that much of Juan Miguel's family remains in Cuba, as if they are hostages. Thus Juan Miguel may "sincerely" want Elian to be returned to Cuba *because* he is being coerced. The Cuban government may have threatened Juan Miguel that harm would come to his family if Elian is not returned, and/or may have promised him and his family a number of attractive perks, such as a bigger, nicer house, or a better job, upon the boy's return to Cuba. This combination of carrot and stick could easily have bent Juan Miguel's "wishes" to those of the Cuban government – and therefore produced the convincing "demeanor" of a man who really wants his son returned – but not for the reasons assumed by the INS in its findings. For all the above reasons, the INS should have conducted an asylum hearing – in which both sides would be able to present the evidence for their respective views – rather than make a life-and-death decision based largely on a bureaucrat's snap-judgment of one individual's demeanor.

6. The INS' Preliminary Assessment of the Merits of Plaintiffs' Asylum Claim Was Clearly Unreasonable Because it Used a Standard That Should Not be Applied to Communist-Totalitarian Dictatorships.

Title 8 U.S.C. § 1101(a)(42) says that an asylum applicant must show he has a "well-founded fear of persecution" in his native land in order get asylum. Again, as with Section 1158, the INS was left to fill in the "gap" and define "well-founded fear of persecution." The case the Panel approved found that "Political conditions 'which affect the populace as a whole or in large

part are generally insufficient to establish [persecution].'" (quoting *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995)).

A totalitarian dictatorship, by its nature, systematically persecutes *all* of its citizens. An alien from such a dictatorship should not be required to show additional, "definite" coercion aimed specifically at him to gain asylum. Asylum is a *remedy*, a remedy given generously by a free country whose spirit demands that it not be construed parsimoniously; America, takes the Statue of Liberty as its symbol, and the statue's poem as its spirit of welcoming masses yearning to be free. If *systemic suffocation* in mind and body, in every way, in every respect, for the foreseeable future (as exists in Cuba), is not persecution enough to justify an asylum hearing, then it is difficult to imagine what is.

Further, if our Congress had meant for an alien's asylum claim to hinge on a showing of definite, individually directed coercion, it would have said so, e.g., "any *specially persecuted* alien may apply for asylum." The unrestricted nature of Congress' actual words means that "any alien" should be considered with respect to the nature of the regime as such, apart from the question of the possibility or likelihood of additional, individually directed persecution. However, insofar as this standard requires, as applied to a communist-totalitarian dictatorship such as Cuba, a showing of persecution specific to the individual applying alien, it is wrong.

To adhere to the *Mitev* rule, as the Panel did, is to hold that the *more* completely and systematically totalitarian a country is, and the *more* universal its brutality against its citizens, the *less* chance there will be for asylum under this rule. Thus the *Mitev* rule itself contradicts the very purpose of an asylum statute. The intent of the statute allowing aliens to apply for asylum is to protect those citizens who are likely to be harmed by their governments, regardless of whether

the refugee stands to be harmed by the government *more* than the average citizen, if the harm that threatens the average citizen is itself considerable. If it did so specify, then that would amount to saying that persecution is not persecution, so long as it is *universal.*

Under the *Mitev* view, if the Khmer Rouge executed 1 in 10 people -- but no more -- on a wholly random basis with no individual trials or concern for who is being shot, wouldn't such mass murder nevertheless fail to be a basis for asylum because it is literally targeted at no one and anyone, not a specific person? Or because only 1 million of the citizens would be killed rather than the entire 10 million? In a totalitarian dictatorship like Cuba, every citizen is threatened, directly or indirectly, with concentration camps or death, and therefore one need not show concrete particular harassment, on political grounds or otherwise, in order to show harm.

The Panel admits that Elian will likely lose significant liberties if sent back to Cuba, and that Juan Miguel may not be able freely to assert his – or Elian's – legal rights. The logical response would be: appoint a trustworthy guardian and hold a hearing to get at the facts. However, the Panel writes as if Constitutional freedoms and legal rights are some superadded technicalities that do not affect the lives and well-being of citizens in any way essential to the issue of asylum. The Panel seems to imply that we would need to learn more to know whether Elian will be harmed in Cuba, that knowing he will be giving up these legal prerogatives is not enough, and that this justified the INS finding that Elian's claim lacked merit.

If the Panel's interpretation is right, it is fair to ask: is the Constitution of this country simply a fancy antique parchment without which the citizens would still enjoy the mental, psychological, and spiritual – and material -- conditions that are essential for human well-being? Or, is it not celebrated that everything that stems from our liberties could not be enjoyed without

our Constitution, and that without those liberties our whole welfare would collapse, spiritually, psychologically, mentally, and materially? Unfortunately, in saying that the INS' decision was "reasoned and reasonable," the Panel impliedly endorses the former view.

Elian's mother and stepfather knew better.

CONCLUSION

WHEREFORE, The Association for Objective Law requests that Plaintiffs' motion for Panel and/or *en banc* reconsideration be granted, and upon such reconsideration the Panel decision be vacated and an asylum hearing ordered and a guardian *ad litem* appointed.

Respectfully Submitted,

Amy Peikoff, Esq.
Robert S. Getman, Esq.
Atttoreys for *Amicus* TAFOL

_____
Robert S. Getman

CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies *amicus curiae*, The Association for Objective Law, has no parent corporations and no stock owned by any publicly held company.

Counsel for amicus curiae:

Amy Peikoff, Esq.
Robert S. Getman, Esq.

_____
Robert S. Getman
Attorney for Amicus Curiae, The
Association for Objective Law

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies *amicus curiae*, The Association for Objective Law, certifies that this Brief complies with the page/volume limits, as per FRAP 32 (a) (7) and Circuit Rules.

Amy Peikoff, Esq.
Robert S. Getman, Esq.

_____
Robert S. Getman
Attorney for Amicus Curiae, The
Association for Objective Law

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11424-D

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

Plaintiffs-Appellants,

v.

JANET RENO, Attorney General of the United States;
DORIS MEISSNER, Commissioner of the United State 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.

The undersigned counsel certifies that the following listed persons have an interest in the amicus brief. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Amicus curiae: The Association for Objective Law ("TAFOL") is a Missouri non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code whose purpose is to advance Objectivism, the philosophy of Ayn Rand, as the basis of a proper legal system. It has no parent corporations and no stock owned by a publicly held corporation. Its officers and board of directors consist of the following persons, with each officer being a member of the Board: Michael Conger, Kansas City, MO; James McCrory, Albuquerque, NM; Stephen Plafker, Los Angeles, CA

Counsel for amicus curiae: Amy Peikoff, Esq.
Robert S. Getman, Esq.

_____
Robert S. Getman
Attorneys for Amicus Curiae, The
Association for Objective Law

CERTIFICATE OF SERVICE

I HEREBY AFFIRM AND CERTIFY that on June 21, 2000, two written copies of the foregoing BRIEF*AMICUS CURIAE* OF THE ASSOCIATION FOR OBJECTIVE LAW SUPPORTING PLAINTIFFS-APPELLANTS PETITION FOR PANEL OR *EN BANC* REHEARING AND REVERSAL, were deposited in the U.S. Mail, first-class postage prepaid, addressed as follows:

William Howard, Esq.
Senior Litigation Counsel
Office of Immigration Litigation, Civil Division
UNITED STATES DEPARTMENT OF JUSTICE
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044;

Linda Osberg-Braun, Esq.
HACKLEY, BERNSTEIN & OSBERG-BRAUN, P.L.
2875 N.E. 191st Street, PH 1B
Aventura, FL 33180

Mr. Howard and Ms. Osberg-Braun each consented that service upon them would constitute service upon all Defendants and Plaintiffs respectively.

_____
Robert S. Getman, Esq.