No. _____

IN THE

Supreme Court of the United States

MARKO MILAKOVICH,

Petitioner,

—v.—

USCIS–ORLANDO, MARGARET IGLESIAS, individually,
PAULINE MCGAHEY, individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARKO MILAKOVICH
5060 Harkley Runyan Rd
St. Cloud, Florida 34771-9538
(407) 361-5461
mmilakovich@earthlink.net

Petitioner Pro Se

QUESTIONS PRESENTED FOR REVIEW

Brief Introductory Statement:

The Department of Homeland Security and the United States Citizen and Immigration Services (USCIS) are responsible to administer immigration and citizenship issues; and, the realm of domestic issues traditionally belongs to the States. The questions asked herein pertain to extent of discretionary authority exercised by USCIS to accept in total, accept in part, or reject, State court orders pertaining to domestic matters, and if their "justification" cited "for immigration purposes" is based on a Constitutional-derived authority.

1. Does USCIS, as an administrative agency, have the discretionary authority over duly constituted, judicial State courts and their orders, whereby they are not required to accept State court orders or any of the provisions in a State court order, noting that USCIS frequently asserts this authority by stating, "USCIS does not claim that the state court order was invalid, but rather that it was not 'acceptable' or not 'recognized for immigration purposes' "?

2. While it is understood that when a Federal law and a State law are in direct conflict, without any ambiguity, the Principle of Supremacy applies and the Federal law prevails. It is also understood that if there is some ambiguity between the two laws or statutes, and the USCIS interpretation is reasonable, the USCIS interpretation will normally

prevail. However, if there is an ambiguity and the USCIS interpretation is "not reasonable", it will not prevail. Can the mere challenge of "not reasonable" be sufficient cause to give the Federal courts jurisdiction to make the determination if the USCIS interpretation was "reasonable" or "not reasonable"?

3. Nunc pro tunc is sometimes invoked in State court orders concerning adoption and other domestic relation matters. Typically, USCIS does not recognize nunc pro tunc provisions in any State court order, "for immigration purposes". Must USCIS accept these and other provisions in a State order and proceed accordingly based on the State court order or can it exercise discretionary authority not to accept nunc pro tunc provisions, "for immigration purposes"? It is recognized that USCIS may challenge any State court order or provision in a State court order in the federal courts.

4. In a similar situation as "3" above, if a State court order specifies that adopted children are the same as "blood-born" in all regards to the adopting parents, so that there is no differentiation between natural, DNA-children of the adopting parents and the adopted children of the same parents, does USCIS have the authority to overrule the courts direction, "for immigration purposes", thus not recognizing the "same-as" status of the adopted children, and therefore, in-effect, creating two classes or categories of children?

LIST OF PARTIES TO THE PROCEEDINGS

1. Marko Milakovich, *Pro-Se* Appellant, 5060 Harkley Runyan Rd., St. Cloud, Florida 34771;

2. Eric H. Holder, Jr., Appellee, United States Attorney General;

3. Janet Napolitano, Appellee, Secretary of the United States Department of Homeland Security;

4. Alejandro Mayorkas, Appellee, Director, United States Citizenship and Immigration Services;

5. Margaret Iglesias, Appellee, former Field Office Director, Orlando field Office, United States Citizenship and Immigration Services;

6. Pauline McGahey, USCIS Adjudicator, Orlando Field Office, United States Citizenship and Immigration Services;

7. David J. Kline, Director, Office of Immigration Litigation, District Court Section, Civil Division, U.S. Department of Justice;

8. Stuart F. Delery, Acting Assistant Attorney General, Civil Division, U.S. Department of Justice;

9. The Honorable Karla Spaulding, United States Magistrate Judge, Middle District of Florida;

10. The honorable Gregory A. Presnell, United States District Court Judge, Middle District of Florida;

11. J. Max Weintraub, Senior Litigation Counsel, Office of Immigration Litigation, District Court Section, U.S. Department of Justice, Washington, D.C.;

12. Jeffery S. Robins, Assistant Director, Office of Immigration Litigation, District Court Section, U.S. Department of Justice, Washington, D.C.; and

13. Lana L. Vahab, Trial Attorney, Office of Immigration Litigation, District Court Section, Civil Division, U.S. Department of Justice.

Lana L. Vahab
Trial Attorney
Office of Immigration Litigation
District Court Section
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Phone: (202) 532-4067
Fax: (202) 305-7000

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

PRAYER

It is my humble and erstwhile prayer that this case not be viewed or adjudicated from a perspective of "winner" or "loser", or in the context of two adversarial opponents, but in the light of two honorable opponents who share a common quest for justice, and who believe in the higher principles of truth, honor and integrity; and that each may pursue their opposing objectives while not forsaking their common values and belief in the righteous system of law that is one of the founding principles of our country.

OPINIONS BELOW

On March 13, 2012, United States District Court, Middle District of Florida, Orlando Division, Magistrate Judge Spaulding entered a Report and Recommendation (Doc. 18), recommending that Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 15) be GRANTED. Mr. Milakovich had brought forth the issue of the Florida State court order concerning "Recognition of Foreign Adoption" and its effect on current matter several times during the course of the proceedings. In the Magistrates Report and Recommendations, there was no mention or statement of opinion on the Florida State court order. On March 23, 2012, in the District Court Judge Gregory A. Presnell's Chambers, the order was signed, without any mention or reference to the Florida State court order.

In the United States Court of Appeals for the Eleventh Circuit, before Marcus, Martin and Fay, Circuit Judges, the court finding was entered on December 11, 2012. Regretfully, even though there were errors in fact, the Circuit Court findings did contained some discussion concerning requirements for eligibility to acquire citizenship under various U.S. codes, but made no mention, reference, or opinion on the Florida State court order and its effect on the proceedings. The findings were later entered as judgment and mandate of the court on March 19, 2013.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 11, 2012 for Appeal Number: 12-12990-FF (Pet. 144a); The Petition for re-hearing was DENIED on March 05, 2012 (Pet. 172a), and the judgment was issued as a mandate of the Court of Appeals on March 19, 2013.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

There are many facets to this case impacting many USCs. And, there are three United States Consitutional issues, which are applicable to this case, namely: Amendment 5, concerning Due Process; Amendment 10, concerning federalism and States rights; and Amendment 14, concerning the Due Process Clause and Equal Protection Cause.

However, the Plaintiff, Mr. Milakovich, is only submitting one for consideration by this court. The single issue is the United States Constitution Amendment 10, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".

BACKGROUND

The Plaintiff, Mr. Milakovich, is a retired USAF officer, Vietnam Veteran and more recently served for 3 ½ years in the Middle East imbedded with the USAF in the country of Qatar. While in the Middle East he had a complete and final adoption of his spouse's two nephews, who were sons of her deceased brother—the adoption occurred in India and was unique in that it was authorized by Indian Constitution. He submitted two I-600 Forms, "Petition to Classify Orphan as an Immediate Relative" which meant, if approved they would receive IR-3 visas and would be U.S. citizens upon

entry to the United States. USCIS wrongly returned them (rejected) without processing, thus violating their Amendment 5 rights for due process. USCIS directed Mr. Milakovich to obtain B-2 Visitor Visas for his sons and said the situation would be straightened out after arrival in the United States. As directed he obtained the visas and submitted the paperwork to the USCIS adjudicating officer after arrival in the U.S., but she returned it in three days stating nothing could be done because they had entered on Visitor Visas (which she had directed). Subsequently, Mr. Milakovich obtained a Florida State court order recognizing his son's foreign adoption and specifying that they had a status, the "same-as" blood-born children, born to him and his spouse, which means they were considered the "same-as" his born-in-the-USA children, without any discrimination between the two. The Florida State court order also directed that Florida State issue birth certificates, recognizing the foreign births showing Mr. Milakovich and his spouse as father and mother. Mr. Milakovich informed USCIS of his sons' status but they were not interested and directed him to submit I-130, *Petition for Alien Relative*, and I-485, *Application to Register Permanent Residence or Adjust Status*. Mr. Milakovich did not submit these forms claiming the I-130/I-485 were normal procedures and were not a "corrective action" to the mistakes USCIS had made and that true, corrective measures were available to USCIS, which they did not acknowledge.

Mr. Milakovich subsequently filed a complaint with the U.S. District Court.

A more detailed background is available in the Appendix, Pet. 33a-42a.

INTRODUCTION

State laws deal with domestic issues and the USCIS applies Federal laws to administer its responsibility for immigration and citizenship. However, the U.S. Constitution has not delegated power to the Federal Government to disregard the providence of State laws regarding domestic issues. It has been the frequent practice of USCIS to disregard State laws and State court orders as it deems appropriate, "for immigration purposes", without having specific, Constitutionality-based authority. It is fully recognized and it is not disputed that the State has no authority to encroach upon USCIS citizenship and immigration responsibilities. As a point of substantiation, the Florida State birth certificates issued to foreign born adopted children, specifically state that it does not represent substantiation of U.S. Citizenship, even though the Federal litigant in lower court, in this case, has wrongly stated that it does. On the surface it would appear that there is no need for conflict between a State court order and USCIS—the State issues the court order and USCIS proceeds with immigration processing recognizing the State court

order. Unfortunately this has historically not been the case, and it is profoundly not the case in the matter before the court now.

Unfortunately, there is considerable conflict concerning the recognition of State court orders by USCIS, as typified by this case. As a consequence, with an importance far beyond this single case which Mr. Milakovich is presenting, a United States Supreme Court finding on this topic would be extremely relevant and would spare all the controversy between different Circuit Courts and between the States and Federal Courts (savings in time, money, resources and frustrations). Such a ruling would also abrogate USCIS and other Federal agencies pretending not to hear any arguments presented to them that the State law and State Court orders do exist and must be recognized and acted upon, recognizing that redress options are available. Such a ruling would end this conflict.

There should be no conflict between Federal and State laws and statutes. It is well-established that Article VI, Clause 2 of the United States Constitution, known as the Supremacy Clause, mandates that all state judges must follow federal law when a conflict arises between federal law and either the state constitution or state law of any State when the two are substantially the same and are in direct conflict. When the two are similar and the Federal interpretation is "reasonable", it will prevail. If there is a challenge to the "reasonableness" it will

be resolved in Federal Court. Unfortunately, this approach to conflict resolution has been muted by USCIS frequently exercising self-claimed, discretionary authority "for immigration purposes" to preclude any conflicts, by their mandate. This is the critical issue for which Mr. Milakovich has claimed deprivation of his and his son's Constitutional rights, specifically in regards to Amendment 10 of the United States Constitution.

STATEMENT OF THE CASE

NOTE: Mr. Milakovich, in an effort to provide a better understanding of this case, and to provide clarity to his concern that the Florida State court order of "Recognition of Foreign Adoption" has been largely discounted and ignored by the Defendants, will address the "Statement of the Case" in Three parts.

Part One: Basic Overview

Part Two: Extracts from District Court Documents, which are relevant.

Part Three: Additional comments.

Part One

There is a plethora of issues related to this case. However, only one issue will be presented to the U.S. Supreme Court in the interests of brevity, an issue, which Mr. Milakovich, considers very fundamental to the judicial process, namely an issue of

Federalism and Amendment 10. In this case, the specific issue is what Constitutional authority has been given to USCIS to accept in total, accept in part, or deny, any State court order as it administers its duty concerning immigration and citizenship matters. Mr. Milakovich has repeatedly raised the issue of his sons' Florida State court order for Recognition of Foreign Adoption and except for one occasion, has been "stonewalled." As a side note, Mr. Milakovich's issue of deprivation of Constitutional rights under Amendment 5 has also been challenged when a federal form he submitted was not accepted for adjudication, the defense claims it was a discretionary action.

The tactical essence of the case is that the Defense claims the court does not have jurisdiction and Mr. Milakovich believes it does, based on many issues, but primarily that it concerns a Constitutional issue. Basically, Mr. Milakovich has been trying to be heard in a court of law before a panel of his peers, and the defense has been trying to prevent this, and so far they have been successful. Mr. Milakovich would also like to acknowledge the defenses' skillful employment of the debating technique, often referred to as the "Strawman Argument" (http://en.wikipedia.org/wiki/Straw_man), which has needlessly clouded the real issues but has been persuasive to the court.

Part Two

NOTE: This part contains very relevant information already presented in District Court, but which Mr. Milakovich believes should be presented in this forum.

AMENDED COMPLAINT BY PLAINTIFF, August 17, 2011; and, SECOND AMENDED COMPLAINT, October 27, 2011. Doc. #3.

> "Relevant is; a Florida State Court Order stating sons have the status of natural-born children to Plaintiff and spouse, Florida State issued Birth Certificates, Florida State Declaration of Domicile; and, the U.S. Department of Defense recognition of sons as equivalent to U.S. Citizens as evidenced by their being accepted for registration in the Defense Enrollment Eligibility Reporting System (DEERS) and subsequent award of U.S. Military dependent identification cards."

PLAINTIFF'S RESPONSE TO DEFENDANTS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT FOR LACK OF JURISDICTION AND FOR FAILURE TO STATE A CLAIM, Doc #12; November 14 2011. Mr. Milakovich again brought up the issue of the Florida State court order several times, as follows:

Pg. 2: "Furthermore and more profound, the attorney who prepared the Motion to Dismiss, has in her possession a (copy of a) Florida State Court Order validating the adoption and conferring all the rights, privileges, and obligations the same as a blood-born children of the Plaintiff and his spouse."

Pg. 8: "The Plaintiff is recognized by the State of Florida as the natural-birth parent of his sons, and therefore is the legal guardian and does have the right to sue on behalf of his minor sons."

Pg. 17: "The Plaintiff finds it curious that the Defendants do not take any issue with the Plaintiff's Complaint that states "a Florida state court Order stating sons have the status of natural-born children to Plaintiff and spouse, Florida State issued Birth Certificates, Florida State Declaration of Domicile, and the U.S. Department of Defense recognition of sons as equivalent to U.S. Citizens as evidence by their being accepted for registration in the Defense Eligibility Reporting System (DEERS) and subsequent award of U.S. Military dependent identification cards." This is germane information because it relates to many of the issues of citizenship and legal permanent residency."

Pg. 18: "The plaintiff's sons have a Florida State Court order stating their status as natural born

> to the Plaintiff and his wife; There is a Florida State Court order…, and the son's have resided in the United States for over three years and have attended three and one-half years of schooling in public schools—and, both parents are U.S. citizens."

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT FOR LACK OF JURISDICTION AND FOR FAILURE TO STATE A CLAIM, December 5, 2011. Doc.#16

> Pg. 4: The Plaintiff then sought relief from the Florida State Court and obtained a court order recognizing the overseas adoption of his sons and with a finding that his sons were equivalent to natural, blood-born children of the Plaintiff and his spouse, with all the rights, privileges and obligations as any other natural-born child to the Plaintiff and his spouse. Florida State also issued birth certificates showing the Plaintiff and his spouse as the parents of the Plaintiff's sons.

NOTE: A USCIS requirement was that "original birth certificates" must be provided. One of the purposes of the Florida State court ordered birth certificates was that the adopted children could use the Florida State Birth Certificate throughout their life and provide this birth certificate whenever they had to provide one. This would legally identify the adopting parents as "the parents" and completely

avoid any discrimination between Mr. Milakovich's natural-born children and his adopted sons, thus considering them as equals in conformance with Amendment 14. The USCIS action ignores all the benefits intended by the Florida State birth certificate under the "discretionary authority" of "for immigration purposes".

> Pg. 15: "Referring to Ms. Margaret Iglesias's statement that there were no remedies, the Florida State Court Order was dated 16 June 2009 and the meeting with Ms. Iglesias occurred on 15 October 2009. She might have acknowledged that the Florida State Court order established the family relationship and therefore created a corrective action to directly apply for a Certificate of Citizenship under Title 8, U.S.C. §1452, *Certificates of Citizenship or U.S. Non-Citizen National Status*; based on the Florida State Court order recognizing the Plaintiff's sons as natural, blood-born to the Plaintiff and his spouse, who were both U.S. citizens. Based on the court order, it is concluded that the Plaintiff's sons have derived U.S. citizenship. The Plaintiff is perplexed that this course-of-action was not identified by Ms. Margaret Iglesias. Please note the extracted text of Title 8, U.S.C. §1452 in Note #6. Again, for reasons unknown to the Plaintiff, the Defendants do not address the issue of the Florida State Court order and Title 8, U.S.C. §1452, where they state in their Motion to Dismiss in their Note 4, "Defendants do not

> concede that Plaintiff has standing to bring citizenship claims on behalf of his sons. However, in the interest of judicial economy, Defendants are not addressing the issue in this Motion to Dismiss." "

District Court, Magistrate's "REPORT AND RECOMMENDATION", March 13, 2012. Doc. 18.

> Pg. 7: "Milakovich also cites 8 U.S.C. § 1401, but this statue applies to citizens at birth, and he has not argued or shown evidence that any of the circumstance in this statue would apply to his adopted Children." COMMENTS: The Magistrates comments ignore the fact that Mr. Milakovich had made numerous references to the Florida State court order which specified that his son's were the same as "Blood-born" to him and his spouse.

PLAINTIFF'S RESPONSE TO COURT'S REPORT AND RECOMMENDATION TO THE UNITED STATES DISTRICT COURT, March 19, 2012. Doc. #19.

> Pg. 9: The District Court's Report and Recommendation addresses 8 U.S.C. § 1431, "Children born outside the United States and residing permanently in the United States; conditions under which…" The Plaintiff did invoke this statue for a very specific reason, namely that a Florida State Court order granted

> the Plaintiff's sons the status as the SAME AS natural born children to the Plaintiff and his spouse. Therefore, because of the Florida State Court order, the Plaintiff, in prior pleadings, invoked the provisions of 8 U.S.C. § 1431 and asserts his sons met the requirement to become U.S. Citizens as a result."
>
> Pg. 12: As a side note: The reference states "The Plaintiff's situation was created by mistakes made by USCIS in not processing the I-600 applications. Please note that the outcome of the processing was discretionary, but there were no expectations that the outcome would be anything other than favorable. COMMENT: The issue of the I-600s is not one of delay in processing, because they were NEVER accepted, they were rejected. Failure to accept the I-600s is a violation of Amendment 5, which concerns "due process" of law, which was denied to Mr. Milakovich and his sons.

MOTION TO ACCEPT ADDENDUM TO PLAINTIFF'S RESPONSE TO COURT'S REPORT AND RECOMMENDATION TO THE UNITED STATES DISTRICT COURT, April 19, 2012. Doc. #20.

> Pg. 6: Significantly, USCIS has consistently failed to address the Florida State court order. This is another example of prejudicial actions by USCIS, which are not in conformance to their

own procedures. The reason the Florida State court order is relevant is because it establishes the basis for Acquired Citizenship according to INA 301 and 8 USC § 1401, which both specify the requirements for persons to become citizens of the United States at birth. Since USCIS was well aware of the Florida State court order, it is obvious why the Defendants never addressed the Plaintiff's arguments based on the Florida State court order.

Pg. 6: The "Law of the Land" is recognized by government agencies and courts for matters legally addressed within the same geographical or judicial jurisdictions. The Florida State court order "created a relationship between the adoptees and the Petitioners and all relatives of Petitioners that would have existed if the adoptees were blood descendants of the Petitioners, born within wedlock". Succinctly applicable is the case of *Smith v. Bayer Corp*, Case No. 09-1205 (June 16, 2011), which was eventually heard in the Supreme Court. In a decision authored by Justice Kagan, all of the Justices agreed that the District Court had exceeded its authority in enjoining the State court action. All nine of the Justices agreed that the matter was subject to the Anti-Injunction Act, 29, U.S.C. § 2283, which prohibits Federal Courts from enjoining state proceedings except in rare cases. The Plaintiff is not aware of any "rare

cases" pertaining to the Plaintiff's QUEST for Citizenship for his sons.

Pg. 7: The Plaintiff notes the Supreme Court action, No. 10-694 in the *Matter of Judulang v. Holder*, in an opinion delivered by Justice Kagan that "When an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one. Here, the BIA has failed to meet it… We hold that the BIA's approach is "arbitrary and capricious" under the Administrative Procedure Act, 5." Please note that 5 USC Section 706, *Scope of Review* states:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;"

> Considering this ruling and the circumstances of the Plaintiff's Complaint, this Court's jurisdiction is appropriate.

RESPONSE TO PLAINTIFF'S OBJECTIONS AND ADDENDUM TO OBJECTIONS TO THE REPORT AND RECOMMENDATION, May 15, 2012, Doc. 23., Case No. 6:11-cv-1244-ORL-31KRS

> Pg. 4: Milakovich also claims that he could have stated a cause of action under the theory that his children have been citizens since birth because of Florida State adoption decree states that his children shall have all the same rights as natural born children. Thus, according to Milakovich, his children are entitled to an N-600 certificate of citizenship. Setting aside the issue of the Florida adoption decree, Milakovich admits never having applied for an N-600 Citizenship Certificate with USCIS and thus under 8 U.S.C. § 1503(a), he is forbidden from seeking a declaration of citizenship for his children until he exhausts his administrative remedies. NOTE: Milakovich did previously apply for a U.S. Passport for his sons based on the Florida State court order, and after initial acceptance, it was subsequently denied with a stated reason that his sons had entered the U.S. with Visitor Visas. More recently he did apply for the N-600 Citizenship Certificate with USCIS, based on the Florida State court order and it was categorically denied without a single word concerning the State court order.

Pg. 4: Milakovich appears to argue that the full faith and credit clause of the Constitution obligates USCIS to give legal effect to the Florida adoption decree. First, Milakovich never alleges having presented this decree to USCIS. Second, while the Florida adoption decree may state that his children shall have the same rights as natural born children, it is highly unlikely that the Florida adoption decree actually declared his children to have been born in the United States. Regardless, contrary to Plaintiff's assertions, the Florida state court does not provide the final work on whether Milakovich's children meet the criteria for adjustment of status or citizenship, See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982). Although it is well-established that there is no federal law of domestic relations, this does not mean that state law conclusively determines domestic relations issues in immigration cases. Rather, in the immigration context, both state and federal law must be consulted before a determination on family relationship can be made. NOTE: Florida State did NOT issue an adoption decree, it issued a Recognition of Foreign Adoption. The Florida State court order did NOT claim his children to have been born in the United States, recalling that the Defendant had a copy of the Florida State court order before they made their first filing in court, noting that the associated Florida State Birth Certificates clearly state in bold lettering that it does not

> constitute proof of United States citizenship. Also, it is well-established that any question on a State court order must be resolved in Federal court and that it is not singularly determined by any Federal agency. If there has been a determination, it is incumbent for the agency to provide a reference to any determination.

BRIEF OF PLAINTIFF-APPELLANT PRO SE, 12-12990. September 17, 2012. On Appeal from the United States District Court for the Middle District of Florida.

> Pg. 1: One of the Statement of Issues was: "Whether the District Court properly held that Mr. Milakovich's sons were not subjected to a deprivation of their Constitutional rights. Pet. 1a

NOTE: In retrospect, the Defendants and the lower courts never considered deprivation of Constitutional rights an issue, as evidenced by their minimal acknowledgement of them. The Constitutional issues being (1) Amendment 5, when USCIS refused to accept the I-600 form for adjudication, a due process issue, (2) Amendment 10, in which no deference was given to the Florida State court orders and birth certificates, and (3) Amendment 14, discriminating between Mr. Milakovich's children by creating two classes of children, those who were DNA natural-born and those who were adopted and given the status of same-as-blood-born by the Florida State court order.

Part Three

NOTE: This Section includes additional information which Mr. Milakovich believes will be of value to the Court.

The most significant aspect of the District Court Magistrate's Report and Recommendation is the complete lack of any reference to Mr. Milakovich's Florida State Court order, (Pet. 2a-18a). Mr. Milakovich had provided a copy of Florida State court order (Pet. 214a-220a) before the Defendant's counsel submitted their first filing. And while Mr. Milakovich repeatedly referenced the Florida State court order, he was extremely perplexed by the Defense, which did not address it. It was as if it were invisible and never brought to light by Mr. Milakovich. This "invisibility" was subsequently reflected by the lack of the Magistrates' acknowledgement of it, which was accepted by the District Judge. This was perplexing because Mr. Milakovich's arguments in many areas were based on the State court order, and the defenses case was largely build on the premise that it did not exist.

In his Circuit Court Brief, Mr. Milakovich addressed the Fifth and Fourteenth Amendments to the United States Constitution, Pet. 49a, and he also referred to procedural due process, which goes to the heart of Amendment 10 and failure to recognize the Florida State court order.

In his Circuit Court Brief, Mr. Milakovich addresses a number of United States Codes and U.S. Department of State Foreign Affairs Manual (FAM) sections related to "citizenship at birth" (Pet. 50a-56a). All of these are predicated on the status of the relationship between the child and the U.S. citizen, which in this case is established by the Florida State court order. The applications of the rules and policies contained in the U.S.C.s and FAM, in this case are based on the Florida State court order. Contrary to this is the USCIS absence of comments because they do not recognize the Florida State court order, "for immigration purposes".

Several times, the defense seemed to convey a lack of recognition of the Florida State court order. Contrary to these early assertions, Mr. Milakovich provided to the Defendant's attorney a complete copy of the Florida State court order, before they made their first filing. Mr. Milakovich provided a copy of the Florida State court order by an email, Subject "Milakovich v. USCIS Email #5", dated September 21, 2011, 1237 PM (Reference Doc. 12, pg. 2).

Issues of citizenship "at birth" were discussed by Defendants in their Circuit Court answering brief. (Pet. 112a-114a). In a rare case, the Defendants to make reference to Mr. Milakovich' citation of the Florida State "adoption decree", not referring to it as a "court order" and not referring to it by title, "Recognition of Foreign Adoption"—the children

were adopted overseas. The Defendants claim Mr. Milakovich cites this as a de facto attainment of U.S. citizenship, which is factually incorrect, as he never made this assertion. Furthermore, he has steadfastly agreed that a grant of U.S. citizenship is clearly in the domain of USCIS. Rather, he stated that the Florida State Court order provided a basis for subsequent attainment of citizenship which, in this case, can only be obtained through application to USCIS. It is significantly germane to note that USCIS did not address or argue the issue of a federal agency not accepting a state court order, but remained silent on this significant issue, which is the central hallmark of Mr. Milakovich's case.

In Mr. Milakovich's Circuit Court Reply Brief, he again raises the issue of "the validity and acceptance of a State court order in Federal Court…", and asks the question, "Does the Federal Court recognize and give full credit to the Florida State Court order pertaining to Mr. Milakovich and his sons?" Pet. 136a. The Circuit Court addressed the issue of citizenship citing 8 U.S.C. §1401 and other U.S.C.s without consideration of the Florida State court order, just as if it did not exist. (Pet. 146a-148a).

A disconcerting adjunct to the issue of USCIS acceptance of State court orders is that since they have largely remained silent and acted as if the State court order was of no consequence, might they have also been acting in a similar manner in other areas? For example, Mr. Milakovich, early in the

process, stated that his sons were in fact also DNA blood-related, in addition to being adopted, being full biological sons of Mr. Milakovich's spouse's (a U.S. citizen) deceased brother. According to the U.S. Office of Personnel Management, Title 5, Chapter I, Subchapter B, Part 630, Subpart H, 630.803—Definitions, "Immediate relative means an individual with any of the following relationship to the employee: (7) Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship. Since USCIS remained silent on this issue, Mr. Milakovich can't help but wonder if he was duped and the factual blood relationship was a pertinent factor, noting that is some courts and agencies, DNA blood relations have received special recognition in immigration proceedings.

ARGUMENTS / REASONS for GRANTING the WRIT

1. **Does USCIS, as an administrative agency, have the discretionary authority over duly constituted, judicial State courts and their orders, whereby they are not required to accept State court orders or any of the provisions in a State court order, noting that USCIS frequently asserts this authority by stating, "USCIS does not claim that the state court order was invalid, but rather that it was not 'acceptable' or not 'recognized for immigration purposes' "?**

It is appropriate to note that USCIS has not claimed that the Florida State Court Order was invalid, but rather that it was not "acceptable" or "recognized for immigration purposes. While District Court's rulings are not incumbent in other Districts, the Michigan District Court has some clear and relevant findings. Presented below will be a few significant features in *Stefano Messina and Maria Messina, Plaintiffs, vs. U.S. Citizenship and Immigration Services, Defendant*, February 16, 2006. Pet. 166a-167a and Pet.183a-200a.

Mr. Milakovich maintains that the USCIS cannot abrogate the Florida State Court order by any USCIS policy or directive. He also recognizes that the Supreme Court has held that federal courts are prohibited from enjoining state proceedings except in rare cases. Lacking any rare cases presented by the Defendants, the Florida State Court Order is not challenged, and remains valid with the full force of law, and all United States Codes shall be considered with the parent-child relationship established by the State Order. Pet.61a, 62a.

In *Gonzalez-Martinez v. Department of Homeland* Sec. 677 F. Supp.2d 1233 (2009), United States District Court, D. Utah, Central Division., September 1, 2009, it is noted:

> The C.I.S., as an agency of the United States and through it the Board of Immigration Appeals, engaging in quasi-judicial proceedings, are not

> free to ignore the provisions of 28 U.S.C. § 1738. It seems to the court that the quasi-judicial effort needs to reconcile the two provisions of federal law, namely the Immigration and Naturalization Act and the statutory full faith and credit provision. Pet. 210a … The decision also pays no deference to the policy of § 1738, favoring the recognition of state court proceedings in the federal system. Pet. 211a.

NOTE: Mr. Milakovich notes that the Defendant and lower courts barely acknowledge the existence of a State court order, the evidence is that the State court order has only been briefly addressed. Pet. 114a.

The Circuit Court ruled against Mr. Milakovich. In his Petition for Rehearing, Mr. Milakovich specifically asked "Whether there was a violation of the U.S. Constitution, 10th amendment, when USCIS did not accept the ruling of the Florida State court order, and merely acknowledged its existence but not accepting the provisions contained therein." Pet.155a. The only response from the court was their subsequent denial and filing of the court order. Pet. 172a–176a.

Mr. Milakovich notes the Defendant's citation of *Adams v. Howerton*, and believes this is another case where the Defendants have misconstrued and misapplied judicial matters and case law. The cited case concerns Congressional authority and

immigration issues. In one instance, the District Court notes, that "congress in its immigration statutes is not obligated to follow the law of the place where the marriage was contracted", apparently referring to State domestic issues. Mr. Milakovich sees no conflict. Please note that Anti-Injunction Act, 29, U.S.C. § 2283, which prohibits federal courts from enjoining state proceedings except in rare cases, and it is customary for the federal courts to accept State Court Orders, except in rare cases, thus not relinquishing any ultimate federal authority.

Mr. Milakovich has several times raised the issue of USCIS and the lower courts not giving any creditability to the Florida State court order. It is also relevant to note a substantiating case where USCIS has refused to recognize a valid State court order. During this protracted conflict in court, Mr. Milakovich submitted a N-600, Request for Certificate of U.S. Citizenship to USCIS, obediently submitting the application fee of $600 for each of his two sons. The sole basis for his justification was the Florida State court order. Pet. 214a-220a. USCIS denied the application citing various USCs, which are all clear and not ambiguous, with their obvious baseline that there was NO Florida State court order. Mr. Milakovich then appealed, again submitting the application fee of $600 for each son, asking USCIS to consider his sole justification of the Florida State court order, which they did not do with the original submission. In the appeal, Form I-290, Notice of Appeal or Motion, Part 3, Basis for the

Appeal or Motion, (Pet. 177a-182a), Mr. Milakovich provided a recitation of the factors, which are central to the case before the court now. Months have passed and Mr. Milakovich has not heard from USCIS on his appeal. This is another example of the continuing impact of the issue of State court orders concerning domestic matters, which are the domain of responsibility that resides with State courts, and the continuing cases where the state court orders are not recognized by the Federal government agencies.

Mr. Milakovich notes that "… an administrative agency may not "ignore evidence placed before it by interested parties." *Consumers Union of United States, Inc. v. Consumer Prod. Safety Comm'n,* 491 F.2d 810, 812 (2nd Cir. 1974). Pet.188a. *Stefano Messina and Maria Messina, Plaintiffs, vs. U.S. Citizenship and Immigration Services, Defendant*, February 16, 2006. Pet. 166a-167a and Pet.183a-200a.

Also in *Stefano Messina and Maria Messina, Plaintiffs, vs. U.S. Citizenship and Immigration Services, Defendant*, it is noted that the court's decision did not discuss the Italian adoption, which was central to that case, or make any finding regarding that adoption, and for this reason alone the finding was arbitrary and capricious under *Tourus Records, Hooker Chemicals, and Consumers Union*, supra. NOTE: Mr. Milakovich's Florida State court order was not an adoption order, but an order recognizing a Foreign Adoption, but similarly it was

not discussed by the Defendant or the lower courts. Pet.193a.

In the case of *Doris Amponsah, Petititioner v. Eric H. Holder, Jr., Attorney General, Respondent.,* U.S. Court of Appeals for the Ninth Circuit, filed March 22, 2013 there are some very relevant issues, which are important to note. Some of these are as follows:

> First, in the absence of a contrary intention expressed by Congress, any construction of the word "adopted" in § 1101(b)(1) must afford due deference to state law. As the Supreme Court explained in *De Sylva v. Ballentine*, 351 U.S. 570 (1956), "[t]he scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law." *Id.* at 580. "This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." *Id.* "*To determine whether a child has been legally adopted, for example, requires a reference to state law*." *Id.* (emphasis added). The BIA's blanket rule disregards this principle: Apori was, as a matter of Washington law, adopted at the age of 15. It is true, of course, that federal immigration law "exists independent of state family law," *Bustamante Barrera v. Gonzales*, 447 F.3d 388, 400 (5th Cir. 2006), but "where the term in question involves a legal

relationship that is created by state or foreign law, the court must begin its analysis by looking to that law," *Minasyan v. Gonzales*, 401 F.3d 1069, 1076 (9th Cir. 2005). The BIA's construction fails to recognize that "adopted" is a legal status defined by state law.

Second, the BIA's blanket rule affords no weight to the strong federal policy favoring federal recognition of valid state court judgments. This policy is exemplified by the Full Faith and Credit Act, which provides that the "records and judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. The BIA's categorical rule pays no heed to this important federal policy.

Third, rather than addressing the possibility of fraud on an individual basis, the BIA's blanket rule conclusively lumps all nunc pro tunc decrees together as invalid. This rule presumes that every nunc pro tunc decree is spurious, thus sweeping aside meritorious, nonfraudulent, nunc pro tunc adoption decrees that recognize a bona fide family relationship that actually existed before the child turned 16. *See Gonzalez-Martinez v. DHS*, 677 F. Supp. 2d 1233, 1237 (D. Utah 2009).

2. **When a Federal law and a State law are in direct conflict, without any ambiguity, the Principle of Supremacy applies and the Federal law prevails. If there is a challenge that the USCIS interpretation of law is not reasonable, should the USCIS interpretation always prevail or should it be resolved in Federal Court?**

In his request for Circuit Court hearing, Mr. Milakovich specifically raises germane issues related to the Florida State court order. Pet. 164a-168a. Several aspects are herein highlighted. The lower courts apparently consider USCIS mandate to administer all immigration and citizenship issues to include the discretionary authority of USCIS to accept or reject any State Court order, regardless of the circumstances, to include which U.S. Constitutional Amendments apply or do not apply, "for immigration purposes". This is contrary to past case law which provides there cannot be blanket rulings in such cases and if there is any question they must be resolved in Federal Court. In addition, it has been previously ruled that State Court orders must be accepted, except in "rare circumstances", which again, must be presented in Federal court for resolution. NOTE: And further, that when a Federal law and State law directly conflict, the Federal law will prevail, unless there is any ambiguity, which again, must be presented for resolution in Federal court.

A key issue to determine the sustainability of a blanket rule is the specific circumstances of a case. Pertinent is *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which establishes a two-step framework for reviewing agency interpretations of statutes they administer. Under the first step, it must be determined "whether Congress has directly spoken to the precise question at issue." If it has then the federal law clearly prevails. If there is ambiguity and the federal agency has given a reasonable interpretation, then it may prevail. If the federal agency interpretation exceeds the bounds of reasonableness, then it becomes capricious it does not prevail. The question in this case is first, is there a federal statute which directly conflicts with a state statute or court order? Mr. Milakovich's research has not identified any nor has the defendant or lower court presented any which would place the Florida State court order in conflict with any federal statute.

In the case of *Smith v. Bayer Corp*, Case No. 09-1205 (June 16, 2011), which was eventually heard in the Supreme Court, in a decision authored by Justice Kagan, all of the Justices agreed that the District Court had exceeded its authority in enjoining the state court action. All nine of the Justices agreed that the matter was subject to the Anti-Injunction Act, 29, U.S.C. § 2283, which prohibits federal courts from enjoining state proceedings except in rare cases.

3. Does USCIS have the discretionary authority based on "for immigration purposes", to ignore any or all nunc pro tunc provisions in a State court order?

The basic question is whether a U.S. Federal agency is required to give credence, sometimes called full faith and credit, to a nunc pro tunc state adoption decree. The simple answer is not always, but sometimes, to affect the purposes of the relevant federal statutes. Pet. 208a. *Gonzalez-Martinez v. Department of Homeland Sec.* 677 F. Supp.2d 1233 (2009), United States District Court, D. Utah, Central Division, September 1, 2009.

In *Doris Amponsah, Petititioner v. Eric H. Holder, Jr., Attorney General, Respondent.,* Argued and Submitted November 7, 2012—Seattle, Washington, U.S. Court of Appeals for the Ninth Circuit, Filed March 22, 2013, the following was noted:

> "We hold that the BIA's blanket rule against recognizing state courts' nunc pro tunc adoption decrees constitutes an impermissible construction of § 1101(b)(1)(E) under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The BIA's interpretation is unreasonable because it gives little or no weight to the federal policy of keeping families together, fails to afford deference to valid state court

> judgments in an area of the law—domestic relations—that is primarily a matter of state concern and addresses the possibility of immigration fraud through a sweeping, blanket rule rather than considering the validity of nunc pro tunc adoption decrees on a case-by-case basis.

In *Stefano Messina and Maria Messina, Plaintiffs, vs. U.S. Citizenship and Immigration Services, Defendant*, February 16, 2006. Pet. 166a-167a and Pet.183a-200a, several important and germane issues are discussed. These are now noted:

> "… and that the adoption would not be given "nunc pro tunc" effect, despite the clear wording of the amended order of adoption. The court finds this aspect of defendant's decision to be arbitrary, capricious and contrary to law, as well". Pet. 193a. *(NOTE: As has been noted elsewhere herein, the Florida State court order stated, "… that would have existed…" Pet.216a)*

> "Defendant's refusal to give effect to the state court order raises significant federalism and comity concerns. Defendant does not claim that the order is invalid, but rather that the order is not "acceptable" or "recognized" because it makes the adoption retroactive. Defendant cites no authority, and this court is aware of none, supporting the proposition that a federal agency may disregard a valid state court order—particularly where, as in the present case, the

> agency's decision is not supported by statutory authority". Pet.194a-195.

NOTE: In Mr. Milakovich's case, the date of adoption is not a factor, but the State court order, which states the adoptees are defined as "same as blood-born" to Mr. Milakovich and his spouse, which in effect is a "nunc pro tunc" of this specification to the date of his sons' birth, which means this was their status as if they had it upon entry to the United States and that USCIS should apply the immigration laws accordingly, unless they chose to challenge the State court order.

Again, in referring to *Stefano Messina and Maria Messina, Plaintiffs, vs. U.S. Citizenship and Immigration Services, Defendant*:

> 8 U.S.C. § 1101(b)(1)(E)(I), and does not rule out nunc pro tunc or retroactive adoptions. … 8 C.F.R. § 204.2(d)(2)(vii), is silent on the issue of nunc pro tunc or retroactive adoptions. In short, defendant's decision that "retroactive or nunc pro tunc adoptions are not acceptable for immigration purposes" is not authorized either by the statute or defendant's own regulation interpreting the statute. Pet. 195a.

NOTE: In Mr. Milakovich's case, the issue is the specification that his sons status as "same as blood-born" in the State court order is effective from birth as specified in the State court order.

An additional relevant issue in *Stefano Messina and Maria Messina, Plaintiffs, vs. U.S. Citizenship and Immigration Services, Defendant*, February 16, 2006. Pet. 166a-167a and Pet. 183a-200a is the following:

> Defendant's decision in the instant matter likewise offers no legal authority, other than Cariaga, for disregarding the "amended order of adoption nunc pro tunc" issued by the Macomb County Circuit Court. If defendant doubted the validity or correctness of the "nunc pro tunc" designation, defendant should have sought relief from the court that issued the order. Court orders are presumed valid, and it is beyond the province of an administrative agency to declare an order "unacceptable" and act as though the order did not exist. Defendant may challenge the validity of a court order in the proper forum, but it may not on its own motion declare the order invalid. Defendant, like any government entity or individual, is duty bound to follow the orders of validly constituted courts and may not reserve the right to follow only those orders with which it agrees. Defendant's disregard for the rule of law cannot be tolerated in a civilized society, which requires all citizens, including the government itself, to respect and abide by the law. Pet. 198a.

NOTE: As previously noted by Mr. Milakovich, Defendants have not offered any legal authority for

not accepting the Florida State court order or offered an explanation why they have ignored it.

4. **If a State court order specifies that adopted children are the same as "blood-born" in all regards to the adopting parents, so that there is no differentiation between natural, DNA-children of the adopting parents and the adopted children of the same parents, when the court has specified, in a court order, that they are the same as "blood born" children of the adopting parents, does USCIS have the authority to overrule the courts direction, "for immigration purposes".**

The States are responsible for family relations matters including adoptions. The Constitution Amendment 14 provides for equal treatment under the law.

To avoid discrimination between children of a marriage, specifically between DNA blood-born children of a marriage and a court mandated "same-as blood-born" children of a marriage, the children must be treated the same in all respects. USCIS by treating the "same as blood-born" adopted children of a marriage differently, are creating a new category of children which are a discriminated class of children, in violation of Amendment 14, which addresses protection of a person's life, liberty, or property, without due process of law… It is a fact that the children who are the subject of this case have not been able to obtain a Social Security

Number, have been denied Social Security benefits, have not been to work at summer jobs, and been denied other benefits and privileges that Mr. Milakovich's other natural-born children have been afforded and enjoy.

> Amendment 14, Section 1.: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In Mr. Milakovich's Circuit Court Opening Brief, he discussed the Florida State court order (Pet. 214a-220a) which recognized the Foreign adoption and directed that Florida State Birth Certificates (Pet. 221a-224a) be issued showing Mr. Milakovich and his spouse (both U.S. citizens) as the father and mother of the two minor children. It is also noted that the Florida State Court Order, Pet. 61a, 74a, 216a, stated, that the court order, "... creates a relationship that would have existed if the adoptees were blood descendants of the Petitioners...", thus clearly, without ambiguity, means that from the moment of birth, which can be construed as a "nunc pro tunc" specification.

As a result of the USCIS failure to accept the Florida State court order, and given the equal protection under the 14th Amendment, USCIS has created a new class of children, where one class is subject to discrimination compared to the other class. Namely, Mr. Milakovich's children who are DNA related and Mr. Milakovich's children who are not-DNA related. As a side note, it is coincidental that Mr. Milakovich's children who are not-DNA related to him, ARE in fact, DNA related to his spouse (a U.S. citizen), a fact which the defendants have continually ignored and never acknowledged, although there are other provisions which apply for DNA-related children.

Mr. Milakovich maintains that the USCIS cannot abrogate the Florida State Court order by any USCIS policy or directive. He also recognizes that the Supreme Court has held that federal courts are prohibited from enjoining state proceedings except in rare cases. Lacking any rare cases presented by the Defendants, the Florida State Court Order is not challenged, and remains valid with the full force of law, and all United States Codes shall be considered with the parent-child relationship established by the State Order. Pet.61a, 62a.

CONCLUSION

The Constitution of the United States is the supreme embodiment of the founding principles of our country and it has uniquely stood various assaults, which would weaken it. It is an object which reflects the hopes and prayers that our country will remain strong and righteous for our children, as it has for us who have been blessed with her bounty. Mr. Milakovich is concerned about the plethora of assaults upon the values of our country. It may seem inconsequential to many, to have a government agency act with apparent immunity and ignore duly adjudicated court orders, but he considers this a threat to our Constitution and way-of-life. Mr. Milakovich humbly prays that the U.S. Supreme Court will address this long-standing federalism issue concerning State court orders, and clearly establish the extend of the USCIS discretionary authority in ignoring State Court orders "for immigration purposes".

Certiorari should be granted to resolve the deep and entrenched conflict that has arisen between State courts and USCIS regarding the acceptance and enforceability of State court orders by federal agencies, the differences between Circuit courts in their acceptance of State court orders, and to resolve the issue of what are the bounds and limitations of USCIS discretionary authority over State court orders, specifically in regards to immigration and citizenship issues.

For the reasons set forth herein, Mr. Milakovich asks the U.S. Supreme Court to make a finding that USCIS will not have a blanket discretionary authority to disregard State Court orders and that they conduct their immigration and citizenship responsibilities giving full faith and credit to State court orders considering the factors addressed therein.

Respectfully Submitted
this 31st Day of May 2013

MARKO MILAKOVICH
5060 Harkley Runyan Rd.
St. Cloud, Florida 34771
(407) 361-5461

Plaintiff-Appellant Pro se

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARKO MILAKOVICH,

Plaintiff,

-vs- Case No. 6: I l-cv-1244-Orl-31KRS

USCIS ORLANDO, MARGARET IGLESIAS, and PAULINE MCGAHEY,

Defendants.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT:

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION:	DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT FOR LACK OF JURISDICTION AND FOR FAILURE TO STATE A CLAIM (DOC. No. 15)
FILED:	November 23, 2011

I. PROCEDURAL HISTORY

On July 27, 2011, Plaintiff Marko Milakovich filed a complaint seeking review of an administrative record regarding his application for adjustment of status of his two foreign-born adopted sons to that of permanent resident aliens in the United States. The complaint did not list any defendant. Doc. No. w. The complaint was dismissed without prejudice and Milakovich was given leave to file an amended complaint. Doc. No. 2.

Milakovich filed an amended complaint naming USCIS-Orlando and Margaret Iglesias and Pauline McGahey, individually, as defendants. Doc. No. 3. Before the defendants responded to that complaint, Milakovich filed a second amended complaint which named the same defendants. Doc. No. 8. Milakovich claims that Defendants had delayed the processing of I-600 forms[1] for his two internationally adopted sons. As a result, Milakovich was required to obtain visitor visas for his sons to come to the United States when Milakovich's military deployment ended. He alleges that the Defendant agreed to process the I-600 forms

[1] The I-600 form is entitled "Petition to Classify Orphan as an Immediate Relative." It cannot be filed for a child habitually residing in a Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (Hague Adoption Convention) country unless the adoption occurred before April 1, 2008 or other grandfathering provisions apply. *See* Instruction for Form I-600, found online at http://www.uscis.gov/files/form/i-600instr.pdf (last visited 3/12/2012).

after the family returned to the United States. Instead, he contends that the Defendants now refuse to process the I-600 forms because the children entered the United States pursuant to visitor visas, stating that there was no way to correct errors USCIS may have made in the advice given to Milakovich regarding whether the I-600 applications would be processed after the family arrived in the United States.

Milakovich alleges that the failure to process the I-600 forms has deprived his him of due process rights and social security and medical benefits for his sons. He requests that the Court grant his sons citizenship in the United States as of the date the I-600 forms should have been processed, August 19, 2008, grant social security benefits to his sons (including payment of lost benefits since the children's arrival in the United States) and issue them passports. In the alternative he requests a grant of permanent residency for his sons as of August 19, 2008, *Id.*

Defendants USCIS-Orlando, Iglesias and McGahey filed a motion to dismiss the first amended complaint, and Milakovich responded to the motion. Doc. Nos. 10, 12. The Court denied the motion to dismiss as moot. Doc. No. 13.

Defendants then filed the above-listed motion to dismiss. Doc. No. 15. They argue, among other things that the Court does not have jurisdiction to hear Milakovich's case and that Milakovich has not exhausted his administrative remedies because he

has not filed a Form I-130 and a Form I-485.[2] *Id.* Milakovich responded to the motion and also filed a Second Supplemental Pleading to the Court which added factual allegations to the complaint. Doc. Nos. 16, 17. The motion to dismiss was referred to me for the issuance of a report and recommendation and is now ripe for determination.

II. ALLEGATIONS OF THE COMPLAINTS.

Milakovich alleges that he adopted two boys in India with the goal of bringing them to the United States. Doc. No. 1 at 1; Doc. No. 8 at 2-1. While he was stationed overseas as a member of the United States Air Force, Milakovich tried to file a "Petition to Classify an Orphan as an Immediate Relative" (Form I-600) on behalf of the children. Doc. No. 8 at 1-2. McGahey initially would not process the forms because she said the boys were residents of a Hague Adoption Convention signatory country. *Id*, at 2.

---

[2] Form I-130 is a form for a citizen or lawful permanent resident of the United States to establish the relationship to certain alien relatives who wish to immigrate to the United States. *See* I-130, Petition for Alien Relative, found online at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6dla/?vgextoid=c67c7f9ded54d010VgnVCM10000048f3d6a1RCRD (last visited March 13, 2012). Form I-485 is an application to adjust a person's status to that of a permanent resident of the United States. Form I-485, found online at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6dla/?vgextoid=3faf2cla6855d010VgnVCM10000048f3d6a1RCRD&vgnexchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited March 13, 2012).

Milakovich alleges that the Hague Adoption Convention does not apply to his children. *Id.*

Later, McGahey agreed to process the forms but Milakovich was scheduled to soon depart the Middle East country where he was deployed and, therefore, McGahey suggested Milakovich try to obtain B-2 visitor visas for the children with the understanding that the I-600 "process" would occur after they arrived in the United States. *Id.* The visitor visas were granted on humanitarian grounds. *Id.* After Milakovich and the boys arrived in the United States, McGahey accepted the I-600 forms but then later returned them to Milakovich and stated they could not be processed because the children had entered under visitor visas. *Id.*

On October 15, 2009 Margaret Iglesias, Field Office Director of the Orlando USCIS office, told Milakovich that no relief was possible to correct McGahey's error and that he should file I-130 (petition for alien relative) and I-485 (adjustment of status application) applications. Doc. No. 8 at 2-3. Milakovich did not file the I-130 and I-485 applications because he felt the filing of the applications would "constitute a cover up of mistakes of USCIS-Orlando" and because there was no certainty that the filing of the forms would result in a favorable outcome. *Id.*

In his Second Supplemental Pleading to Court, Milakovich alleges that the Social Security Administration agreed to issue social security numbers and pay benefits to his sons as soon as USCIS issued a statement on the children's status. Doc. No. 17. He alleges that the USCIS issued a

status report that incorrectly states that the visitor visas issued to his sons expired February 18, 2009. Therefore, the Social Security Administration will not issue social security cards or pay benefits to Milakovich's sons. Milakovich states that he is seeking compensatory damages, punitive damages and such other and further relief as this Court deemed just and proper. *Id.*

III. ANALYSIS

In his Second Amended Complaint, Milakovich requests that his boys be granted lost social security benefits due to the denial of citizenship pursuant to 8 U.S.C. § 242.

Defendants assert that Milakovich has failed to state a basis for federal jurisdiction or a waiver of sovereign immunity. They also assert that Milakovich's complain fails to state a claim upon which relief can be granted.

A. 18 U.S.C. § 242.

Milakovich asserts that Defendants deprived him of due process in violation of 18 U.S.C. § 242. Section 242 provides as follows:

> Whoever, under color of any law, statue, ordinance, regulation, or custom, willfully subjects and person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution of laws of the United States, or to different punishments, pains, or penalties, on

> account of such person being an alien, or by reason of his color, or race, that are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Section 242 is a criminal statute that does not create a private right of action. *See Paletti v. Yellow Jacket Marina, Inc.* 395 F. App'x 549, 552 n.3 (11th Cir. 2010)(per curiam); *Cuyler v. U.S. Dist. Ct.*, No. 6:11-cv-1225-Orl-31-GJK, 2011 WL 5525935, *1 n.3 (M.D. Fla. Nov. 14, 2011). Accordingly 18 U.S.C. § 242 does not support exercise of federal jurisdiction over Milakovich's claims.

B. Portions of the Immigration and Nationality Act.

Milakovich also asserts various sections of the Immigration and Nationality Act, including 8 U.S.C.

§§ 1154, 1255, 1401, 1431 and 1449. In his complaint in support of jurisdiction. In addition, the Court notes that international adoption is governed under 8 U.S.C. § 1101. Defendants contend in their motion to dismiss that these statues do not create a private right of action, without further support or briefing.

The immigration and Nationality Act provides:

> Notwithstanding any other provisions of law (statutory or nonstatutory), including section 2241 of title 28 or any other habeas corpus provision and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceeding, no court shall have jurisdiction to review
>
> (i) any judgment regarding the granting of relief under section… 1255 of this title or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B). This statute prohibits a court from reviewing *any* discretionary decision or action of the USCIS. *Gupta v. Holder*, No. 6:11-cv-935-Orl-31GJK, 2011 WL 4460188, at *3 (M.D. Fla. Sept. 26, 2011)(citing *El-Khader v. Perryman*, 264 F. Supp. 2d 645, 649 (N.D. Ill. 2003); *Chaganti v. Chertoff*, No.

08 C 5768, 2008-WL 4663153. At *2 (M/D.Ill, Oct. 16, 2008)). The prohibition on judicial review for "this subchapter" includes decisions made under 8 U.S.C. §§ 1151 to 1378. *El-Khader*, 264 F. Supp. 2d at 648. Accordingly, from the plain text of the stature, this Court does not have jurisdiction over Milakovich's claim under 8 U.S.C. § 1255.

Several of the provisions of the Immigration and Nationality Act cited by Milakovich in his complaint give the Attorney General discretion to act and, therefore, decisions under these statutes are no subject to judicial review. See 8 U.S.C. 1154(a)(I)(J) ("In acting on petitions… or in making determinations the Attorney General shall consider any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within to sole discretion of the Attorney General."); 8 U.S.C. § 1255(a) (" The status of an alien… may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe….").

Milakovich also cites 8 U.S.C. § 1401, but this statue applies to citizens at birth, and he has not argued or shown evidence that any of the circumstances in this statue would apply to his adopted children. Milakovich also relies on 8 U.S.C. § 1449, which refers to the contents of a certificate of naturalization. Because Milakovich's boys were not naturalized, and the rights to this certificate are derivative of the naturalization determination, this statue is not applicable at this time.

Milakovich Also cites 8 U.S.C. § 1431, which does contain some mandatory language and provides

as follows" "A child born outside of the United States automatically becomes a citizen of the United States…" when certain conditions are fulfilled. The automatic citizenship provision applies to international adoptions if the requirements of 8 U.S.C. § 1101(b)(1) are met. Title 8 U.S.C. § 1101(b)(1) defines a "child" in relevant part as follows:

[A] child, younger than 16 years of age at the time a petition is filed on the child's behalf to accord a classification as an immediate relative under section 1151(b) of this title, who has been adopted in a foreign state that is a party to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, done at The Hague on May 29 1993, or who is emigrating from such a foreign state to be adopted in the United States by a United States citizen and spouse jointly or by an unmarried United States citizen who is at least 25 years of age, Provided, That –

(I) the Secretary of Homeland Security is satisfied that proper care will be furnished the child if admitted to the United States;

(II) the child's natural parents (or parent, in the case of a child who has one sole or surviving parent because of death or disappearance o, abandonment or desertion by, the other parent), or other persons or institutions that retain legal custody of the child, have freely given their written irrevocable consent to

the termination of their legal relationship with the child, and to the child's emigration and adoption;

(III) in the case of a child having two living natural parents, the natural parents are incapable of providing proper care of the child;

(IV) the Secretary of Homeland Security is satisfied that the purpose of the adoption is to form a bona fid parent-child relationship, and the parent-child relationship of the child and the natural parents have been terminated (and in carrying out both obligations under this subclause the Secretary of Homeland Security may consider whether there is a petition pending to confer immigrant status on one or both of such natural parents)….

8 U.S.C. § 1101(b)(1)(G). Thus, for a child to qualify for the automatic citizenship provisions in 8 U.S.C. § 1431, he first has to meet the definition of a child under 8 U.S.C. § 1101. This definition of who qualifies as a "child" under the statute. Because he Secretary of Homeland Security has discretion in determining if 8 U.S.C. § 1431 applies, the prohibition on judicial review of this decision prevents this Court from exercising jurisdiction over Milakovich's claim. Accordingly, the Court does not have jurisdiction over Milakovich's claims based on the Immigration and Nationality Act.

C. Other Possible Causes of Action.

Because Milakovich is proceeding *pro se*, I will discuss other possible jurisdictional bases for

Milakovich's complaint with respect to USCIS and the individual Defendants in their official capacities.

1. The Mandamus Act.

Milakovich's may be attempting to bring a claim pursuant to 28 U.S.C. § 1361 which states that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel and officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." However, "[m]andamus jurisdiction is appropriate only where (1) the defendant owes a clear nondiscretionary duty to the plaintiff and (2) the plaintiff has exhausted all other avenues of relief." *Lifestar Ambulance Serv., Inc. v. United States*, 365 F.3d 1293, 1295 (11th Cir. 2004) (citing *Heckler v. Ringer*, 466 U.S. 602, 615 (1984)).

Milakovich has not pointed to any nondiscretionary duty of USCIS to provide any of the relief he has requested. Instead, he asserts that due to the apparent delay in processing his I-600 which caused him to miss his window of opportunity to obtain nationalization of his adopted children, his children should be nationalized as of the time of his first I-600 application. However, there is no requirement that the Attorney General or Department of Homeland Security grant every petition with which they are presented nor has Milakovich shown that any statute or regulation required a certain outcome of his petition. In addition, he did not allege that the delay was unreasonable but that the urgency of the situation was because he was leaving the country where he was stationed quickly. Milakovich has not pointed to

any duty of USCIS to accelerate any action in these circumstances. In addition, Milakovich has not shown that he has exhausted all other avenues of relief. As an example he did not pursue the I-130/I-485 avenue which was recommended by USCIS. Accordingly, mandamus jurisdiction is not appropriate for Milakovich's case.

2. The Administrative Procedures Act.

The Administrative Procedures Act (APA) provides in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
> (1) compel agency action unlawfully withheld or unreasonably delayed;
> ***
> In making the foregoing determination, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (1). The APA further directs that "each agency shall proceed to conclude a matter presented to it … within a reasonable time." 5 U.S.C. § 555(b). However, the APA only empowers a court to compel an agency "to perform a ministerial or non-discretionary act," or "to take action upon a matter without directing how it shall act." *Norton v.*

Southern Utah Wilderness Alliance, 542 U.S. 55, 64 (2004).

First, as discussed above, the determination on the boys' citizenship is not a ministerial or non-discretionary act. The Attorney General and Secretary of Homeland Security are vested with discretion at many steps in the determination. Second, Milakovich is not requesting that the Court order USCIS to take action upon an application; he is requesting that the Court direct USCIS *how* to act, i.e. grant his adopted boys citizenship from a prior pint in time. Because Milakovich has not shown that he is requesting the performance of a ministerial or non-discretionary act or that he is only requesting that USCIS be directed to act instead of being told how to act, he has not shown that the APA provides jurisdiction over his claims.

3. The Declaratory Judgment Act.

The Declaratory Judgment Act, 28 U.S.C. § 2201, states that, "[i]n a case of actual controversy within its jurisdiction … any court of the United State … may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Under the Declaratory Judgment Act, Congress merely enlarged the range of remedies available in federal courts, but did not extend their jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 671 (1950). Thus, the Declaratory Judgment Act does not provide an independent basis for jurisdiction where the court does not otherwise have jurisdiction. Accordingly, the Declaratory

Judgment Act does not confer jurisdiction over Milakovich's claims.

4. Other Statutory Causes of Action.

Milakovich asserts in his response that his claims are brought pursuant to 42 U.S.C. § 14141. That section provides that the United States Attorney General may bring a suit to stop "any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, [from] engage[ing] in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 42 U.S.C. §14141. This statute only provides for a cause of action brought by the Attorney General and is not applicable to Milakovich's claims. *See Greer v. Hillsborough County Sheriff's Dep't*, No. 8:04-cv-2034-T-23MSS, 2005 WL 2416031, *3 (M.D. Fla. Sept. 30 2005) ("[N]o private right of action exists under 42 U.S.C. §14141 ….").

In his response, Milakovich also asserts that jurisdiction exists under 42 U.S.C. § 1988. Section 1988 provides for attorneys' fees for cases brought under other sections, and does not confer jurisdiction over Milakovich's claims.

D. Claims Against Defendants Iglesias and McGahey.

Defendants mention in their motion to Dismiss that Milakovich is suing Iglesias and

McGahey individually but that he did not allege that his case was brought pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In his response, Milakovich also mentions 42 U.S.C. § 1983 as a possible basis for jurisdiction over the individual defendants. *Bivens* provides a cause of action for constitutional violations against federal officials while § 1983 provides a parallel cause of action against state and local officials. *See Johnson v. Fanell*, 520 U.S. 911, 914 (1997). Because the individual Defendants are federal officials, *Bivens* rather than § 1983 would apply here.

Bivens does not provide for injunctive relief. Under *Bivens*, a "plaintiff may seek money damages from government officials who have violated h[is] constitutional or statutory rights." *Camreta v. Greene*, 131 S. Ct. 2020, 2030 (2011). In his supplemental complaint, Milakovich indicates that he is seeking money damages. Nevertheless, Milakovich's claim is due to be dismissed. "To establish a violation of due process, "a claimant must first establish that he had a property or liberty interest at stake." "No property of liberty interest can exist when the relief sought is discretionary. "*Mi Ah Kim v. United States*, 609 F. 2d 499, 508 (D. Md. 2009)(internal citations omitted). As discussed herein, because the actions of the individual Defendants were discretionary, no *Bivens* claim has been stated.

****

Because Milakovich has failed to show that his Court has jurisdiction over most of his state or

possible claims, and he does not allege facts sufficient to support a *Bivens* claim, his Second Amended Complaint and Second Supplemental Pleading to Court should be dismissed. Because the Court has already permitted Milakovich to file two amended complaints and a supplemental complaint, and he has been unable to plead a cause of action over which this Court has jurisdiction and which states a claim on which relief could be granted, it appears that dismissal with prejudice is appropriate.

IV. RECOMMENDATION.

Based on the foregoing, I respectfully recommend that Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint for Lack of Jurisdiction and for Failure to State a Claim.

Doc. No. 15, be **GRANTED** and that the Court **DISMISS** the case with prejudice. I further recommend that the Court direct the Clerk of Court to close the file.

Failure to file written objections to the proposed findings and recommendation contained in this report within fourteen (14) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Recommended in Orlando, Florida on March 13, 2012.

s/

KARLA R. SPAULDING
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Presiding District Judge
Counsel of Record
Unrepresented Party

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARKO MILAKOVICH,

Plaintiff,

-vs- Case No. 6: I l-cv-1244-Orl-31KRS

USCIS ORLANDO, MARGARET IGLESIAS, and PAULINE MCGAHEY,

Defendants.

ORDER

On March 13, 2012, Magistrate Judge Spaulding entered a Report and Recommendation (Doc. 18), recommending that Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 15) be GRANTED. Plaintiff filed timely objections to the Report (Doc. 19, 20). Defendant responded (Doc. 23). Upon *de novo* review of the above, the Court agrees that it lacks jurisdiction over the claims stated by the Plaintiff. It is, there

ORDERED that:

1. The Report and Recommendation of the Magistrate Judge is Confirmed and Adopted;

2. The Motion to Dismiss Plaintiff's Second Amended Complaint is GRANTED, and the Second

Amended Complaint (Doc. 15) is DISMISSED WITH PREJUDICE. The Clerk is directed to close the file.

DONE and ORDERED in Chambers, Orlando, Florida on May 23, 2012.

s/
GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Magistrate Judge
Counsel of Record
Unrepresented Party

Case No. 12-12990-F

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

MARKO MILAKOVICH

Plaintiff-Appellant,

v.

U.S.C.I.S -- ORLANDO
MS. MARGARET IGLESIAS, INDIVIDUALLY
MS. PAULINE MCGAHEY, INDIVIDUALLY

Defendants-Appellees

On Appeal from the United States District Court
For the Middle District of Florida
District Court Docket No: 6:11-cv-01244-GAP-KRS

BRIEF OF APPELLANT Marko Milakovich

Marko Milakovich
5060 Harkley Runyan Rd.
St. Cloud, Florida 34771-9538
Tel: (407) 361-5461

Pro Se Plaintiff/Appellant

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1, the undersigned certifies that, to the best of his knowledge, the following persons, firms, and associations are the only ones that may have an interest in the outcome of this case:

(A) Trial Judges

Karla R. Spaulding (Magistrate Judge)
Gregory A. Presnell (Presiding Judge)

(B) Plaintiffs and Associated Persons

Marko Milakovich (Plaintiff - Appellant)
Ghukhuli Z. Milakovich (Spouse of Plaintiff - Appellant)
Son of Plaintiff - Appellant, age 15 years old
Son of Plaintiff - Appellant, age 13 years old

(C) Counsel for the Defendants/Appellees

Tony West
Assistant Attorney General
United States Department of Justice, Civil Division
Office of Immigration Litigation, District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044

David J. Kline
Director
United States Department of Justice, Civil Division
Office of Immigration Litigation, District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044

J. Max Weintraub
Senior Litigation Counsel
United States Department of Justice, Civil Division
Office of Immigration Litigation, District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044

Lana L. Vahab
Trial Attorney
United States Department of Justice, Civil Division
Office of Immigration Litigation, District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 532-4067
Facsimile: (202) 305-7000
lana.vahab@usdoj.gov
Court ID. No. A5501370

(D) Defendants/Appellees

U.S.C.I.S
6680 Corporate Centre Boulevard
Orlando, Florida 32822

Ms. Margaret Iglesias
6680 Corporate Centre Boulevard
Orlando, Florida 32822

Ms. Pauline McGahey
6680 Corporate Centre Boulevard
Orlando, Florida 32822

/s/ Marko Milakovich .
MARKO MILAKOVICH
Pro Se Plaintiff/Appellant

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 28-1(b), Marko Milakovich provides the following statement identifying its parent corporations and any publicly held corporation that owns 10 percent or more of its stock.

Mr. Milakovich is an individual, Pro Se Litigant and there is no corporation, public or private, that is involved in this litigation.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a) and 11th Cir. R. 28 1(c), 34-3(c), Mr. Milakovich, Plaintiff-Appellant, respectfully requests oral argument. While the case seems simply to be about "Lack of Jurisdiction" and "Failure to State a Claim" at the District Court, there are distinctly different aspects, which pertain to these issues. These issues might have been negated by evidence presented in Court, but since the case was dismissed, they could not have been presented or considered. It is also opined that in the District Court Magistrate's Report and Recommendations, certain errors of fact occurred, which reflects the difficulty in understanding of all the case circumstances. Because this case involves the status and welfare of young children, and because of the nuanced nature of certain disputes it presents, Mr. Milakovich, the Plaintiff-Appellant, respectfully submits that oral argument will assist the Court in analyzing the complex facts and legal issues involved in this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

I. STATEMENT OF JURISDICTION

Appellant, Marko Milakovich, acting on behalf of his two, minor, adopted sons, filed this suit for deprivations of rights secured by the Fifth and Fourteen Amendments to the United States Constitution. The District Court dismissed this suit stating (1) Failure to State a Claim, and (2) Lack of Jurisdiction. Mr. Milakovich disagrees on both counts and in particular, believes the District Court has subject matter jurisdiction, and if this is substantiated through this appeal, the Circuit Court does therefore have jurisdiction. The District Court ORDER was dated May 23, 2012 (Doc. 24) and Mr. Milakovich filed a Notice of Appeal on June 1, 2012 (Doc. 25), within the 30-day time period provided by Fed. R. App. P. 4(a)(1)(A).

II. STATEMENT OF THE ISSUES

A. Whether the District Court properly held that Mr. Milakovich failed to state a claim that could be acted upon.
B. Whether the District Court properly held that Mr. Milakovich's sons were not subjected to a deprivation of their Constitutional rights.
C. Whether the District Court properly held that Mr. Milakovich did not pursue all the

administrative relief that was presented to him.

D. Whether the District Court properly held that many of Mr. Milakovich's
Claims were not valid because discretionary action by agencies are not subject to review by the court, or, if Mr. Milakovich's Claims did not involve statutes specifying discretionary authority by the Secretary of Homeland Security and the USCIS.

III. STATEMENT OF THE CASE

The genesis of the case starts with the events related to the nature of the adoption of Mr. Milakovich's two sons while he was serving under U.S. military orders in the Middle East. The actual adoption of his sons, who were "tribal hill people", occurred in India. His sons were the orphan sons of his wife's deceased brother. India is one of the countries who have adopted the Hague Convention on Protection of Children and Co-Operation in respect of Inter-country Adoption (Hague Adoption Convention), however there are exceptions to the applicability of the Hague Convention. The United States is also a signatory and requires adherence to the Hague Convention requirements. Not long after the adoption in India, Mr. Milakovich's sons joined him and his spouse in the Middle East, in an Arabic country that was not a signatory to the Hague Convention.

Mr. Milakovich submitted I-600 applications for an orphan adoption to USCIS-Orlando, which if

processed and approved would have resulted in U.S. citizenship for his sons upon entry into the United States. The applications were returned, unprocessed with an explanation that the I-600 applications were only for cases where the applicants were "habitual resident" in a country who had not agreed to the Hague Convention requirements for adoptions and that the I-800 was for adoptions in countries, which were signatory to the Hague Convention. Mr. Milakovich believes, without any doubt, that USCIS had erred because of the exceptions to the Hague Convention Articles. Eventually they recognized this but too much time had passed and Mr. Milakovich had to leave the country where he was stationed. The USCIS Adjudicating Officer had suggested Mr. Milakovich obtain Visitor Visas for his sons and stated the situation would be "straightened out" after arrival in the United States. Unfortunately it was not. Mr. Milakovich asked what could be done and the Adjudicating Officer stated that "nothing could be done". A period of uncertainty and limbo then followed. Later, the Field Operations Director of USCIS-Orlando met with Mr. Milakovich and she recommended he file forms I-130 (petition for alien relative, source cited in Doc. 18, pg. 3)) and I-485 (adjustment of statue application, source cited in Doc. 18, pg. 3)), which he chose not to do because it would make him a party to a cover-up of the USCIS mistakes and based on past events, that caused him to believe he was being treated in a hostile, discriminatory manner (reasons addressed in Doc. 12. Pg.11-13). She also stated that she didn't acknowledge any mistakes by USCIS and

that even if there had been "nothing could be done" about it.

Eventually, after being denied various benefits because his sons were not legal permanent residents, and because they were not U.S. citizens, Mr. Milakovich sought relief in the United States District Court, Middle District of Florida, believing that there had been a deprivation of his son's Constitutional rights. After almost one year, the case was dismissed for "Failure to State a Claim" and "Lack of Jurisdiction". Subsequently, Mr. Milakovich submitted his Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit.

IV. STATEMENT OF FACTS

A. Introduction

There are several fundamental issues which are reoccurring and foundational to this case, including failure to state a claim, lack of jurisdiction, use of *discretionary* authority precluding judicial review, and deprivation of Constitutional rights, all of which are related to the overseas adoption of two brothers by Mr. Milakovich and his spouse. The brothers were formally the biological sons of the brother of Mr. Milakovich's spouse (the brothers were his spouse's nephews). To establish a foundational baseline for these issues, the circumstances of the adoptions will first be described.

Mr. Milakovich is a retired USAF officer, a decorated Vietnam Veteran, and at the time of the

overseas adoptions was serving as a contract civilian, under military orders assigned to the 379th Expeditionary Communications Squadron in the Middle East, in the country of Qatar, an Arabic country. He was stationed at Al Udeid Air Base, headquarters of the United States Central Command, forward operating headquarters. His assignment started in April 2005 and extended to August 2008, a period of about 3 ½ years

Mr. Milakovich has been married to his spouse for ten years. She is of the Naga race of people, located mostly in India, who are an indigenous, tribal people, analogous to the Native American Indian. In a similar manner that specific U.S. laws that pertain solely to Native Americans; in India, there are specific laws which pertain solely to the Nagas. This is constitutionally addressed in the Indian Constitution, Article 371A which provides that all customary tribal laws and practices of the Nagas will be recognized by India. Therefore, there is a different system of law which applies to the Nagas. This is germane to the case as it pertains to the applicability of the Hague Convention Articles. Specifically, Article 31 states:

> "In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units – b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides".

After the boy's biological father died, and because their mother had contracted AIDS, they were separated and living with relatives. Mr. and Mrs. Milakovich first tribally adopted the boys, and then adopted them formally in the Judicial Court system of India, on January 5, 2007, under the provisions of the Indian Constitution, Article 371A, which states that India will recognize all customary tribal laws and practices of the Naga people. Several months later, on August 9, 2007, the boys joined Mr. and Mrs. Milakovich in the Middle East.

Mr. Milakovich submitted I-600 applications for his sons to USCIS-Orlando and they were received on May 29, 2008, but they were not accepted and were returned, unprocessed with a cover letter that stated the I-600 was not the proper application because the boys were "habitually resident" in India, a country which was a signatory to the provisions of the Hague Convention and therefore obligated to follow the Hague Convention rules. USCIS stated that as a consequence the I-800 application was the proper form and application process, which had a different set of requirements and mandated meeting all the requirements of the Hague Convention. It should be noted that the I-600, when approved results in an IR-3 Visa being issued by the U.S. Embassy or Consulate, which means that the holder becomes a United States citizen upon entry into the United States.

Mr. Milakovich informed the USCIS Adjudicating Officer, Ms. Pauline McGahey, that his sons were "habitually resident" in an Arabic country which was not a signatory to the Hague Convention,

in which case the I-600 was the correct application form (there were additional reasons why the Hague Convention rules did not apply to Mr. Milakovich's circumstances, which are addressed elsewhere in this Brief). This was not initially accepted and Mr. Milakovich then started a months-long process before he could obtain Government of Qatar official documents that his sons were subject to the laws of Qatar and therefore were "habitual residents" of Qatar. Mr. Milakovich made many trips to Qatar government offices and numerous translations from/to Arabic in the process of obtaining this "proof".

By now, Mr. Milakovich's duty assignment was near the end and he had a date of mandatory departure from Qatar, and that he and each member of his family would incur a daily fine for each day they remained in Qatar beyond that date. The USCIS Adjudicating Officer asked Mr. Milakovich to email the I-600 applications to her. Mr. Milakovich advised there were over 100 pages of supporting documentation, but she said to email everything. The USCIS server crashed and the Adjudicating Officer said to stop sending the documentation, which Mr. Milakovich complied. She then said there wasn't time to mail the I-600 applications and supporting documentation and she suggested Mr. Milakovich attempt to obtain Visitor Visas from the U.S. Embassy in Qatar and that after they arrived in the United States, everything would be "straightened-out".

Mr. Milakovich applied for Visitor Visas and was informed that based on the criteria for Visitor

Visa's the boys did not meet any of them (see below). The Embassy Counselor Officer understood the circumstances and that USCIS-Orlando had stated all would be "straightened-out" after arrival in the United States. Even so, to insure the validity of the request for Visitor Visas, the Consulate Officer spent over two hours examining the I-600 applications and all the supporting documentation. It should be noted that up until about one year previous, the Consulate Officer was responsible for adjudicating I-600s and was thus qualified to do so. Accordingly, there is every expectation that an adjudication by USCIS would also have been favorable. Mr. Milakovich's sons were issued Visitor Visas. The visas were issued with an issue date of 04 August 2008 and an expiration date of 02 August 2018. The requirements to obtain Visitor Visas are:

Reference
http://travel.state.gov/visa/temp/types/types_1262.html#3

- The purpose of their trip is to enter the U.S. for business, pleasure, or medical treatment;
- That they plan to remain for a specific, limited period;
- Evidence of funds to cover expenses in the United States;
- Evidence of compelling social and economic ties abroad; and
- That they have a residence outside the U.S. as well as other binding ties that will insure their return abroad at the end of the visit.

The Milakovich family arrived in the United States on August 19, 2008 and the boys Indian Passports received an I-94 stamp with a date of February 18, 2009. The USCIS-Orlando Adjudicating Officer had previously informed Mr. Milakovich that an updated Home Study was required and that as soon as he had obtained this he could resubmit the I-600 applications. The Home Study took a long time to complete, primarily because of the time it took to process the family's finger prints with the FBI. When the Home Study was completed, Mr. Milakovich personally met with the Adjudicating Officer at USCIS and handed her the I-600 applications. Several days later he was contacted and told to report to the USCIS-Orlando office to meet with the Adjudicating Officer, which he did. The Adjudicating Officer retuned the I-600 applications and supporting documentation to Mr. Milakovich and informed him they could not be processed because his sons had entered the United States on Visitors Visas, which she had previously suggested they obtain. She also said that nothing could be done to correct their status, leaving Mr. Milakovich with no further course-of-action. As a side note, since then, Mr. Milakovich has learned that there were a number of corrective actions that could have been taken in this situation, but none were offered.

At this point there seemed to be no avenue to resolve the status of Mr. Milakovich's sons. Many of the possible avenues of relief where not possible because of their entry on "Visitor Visas". Another reason was the boys had not been physically living

with him for two years, at this point, which was a requirement for some actions.

Mr. Milakovich went to the State Court of Florida to have the overseas adoption of his sons, officially recognized. The result was that on June 16, 2009, Florida State issued an order stating that his sons were recognized as legal heirs of the Milakovichs and that they now had a relationship the same as that which would have existed if the adoptees where blood descendants of the Petitioners, born within wedlock, entitled to all rights and privileges thereof, and subject to all obligations of children being born to Mr. Milakovich and his spouse. Subsequently, Florida State issued "Certificates of Foreign Birth" for his sons which showed Mr. Milakovich and his spouse as the father and mother.

Mr. Milakovich attempted to obtain U.S. passports for his sons, based on the Florida State Court order, but the applications were denied because the boys had entered the United States with Visitor Visas.

On October 15, 2009, Mr. Milakovich met with Ms. Margaret Iglesias, USCIS-Orlando Field Operations Director to discuss the situation. The Director did not acknowledge that any mistakes had been made and said that even if there had been, nothing could be done about it. Her only advice was to submit I-130 and I-485 applications, which Mr. Milakovich chose not to do for reasons explained later.

Mr. Milakovich's sons remained in a limbo status and because of the Visitor Visas, where not

able to get Social Security Numbers (SSNs). As a result, they were denied Social Security benefits, which they were authorized. After entry into the United States and with the Florida State Court order, Mr. Milakovich, who is retired military, applied for and received U.S. Department of Defense military dependent identification cards for his two sons, which allowed them to receive all the benefits of sons of a retired military veteran. Thus, a Federal Department recognized Mr. Milakovich's sons as bone fide dependents entitled to all the rights and privileges, the same as natural-born sons to him. However, there is a requirement that Social Security Numbers must be provided within four years of the date of issue, which will occur in the near future. Because they have not received their SSNs, they are now in jeopardy of losing their military healthy care at Military Treatment Facilities (MTFs) because they have not obtained SSNs. They have been denied SSNs because they entered the U.S. on Visitor Visas.

Unable to resolve his son's status, Mr. Milakovich filed a Complaint in the United States District Court , Middle District of Florida, Orlando Division. Eventually the Complaint was Dismissed on May 23, 2012 and Mr. Milakovich filed a Notice of Appeal on June 1, 2012.

B. Failure to State a Claim

The District Court Magistrate's Report and Recommendations states that Defendants "assert that Milakovich's complaint fails to state a claim upon which relief can be granted" (Doc. 18, pg 5). The Magistrates Report, which was adopted into the

Order to Dismiss, stated that "Based on the foregoing, I respectfully recommend that Defendant's Motion to Dismiss Plaintiffs' Second Amended Compliant for Lack of Jurisdiction and for Failure to State a Claim. (Doc. 18, pg 13.)

Federal Rule 12(b)(6) provides the basis that *a complaint should not be dismissed for failure to state a claim upon which relief can be granted* "unless it appears beyond a doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief". See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Neitzke v. Williams*, 109 S. Ct. 1827, 1832 (1989); *Little v. City of North Miami*, 805 F.2d 962,965 (11th Cir. 1986); and *Gomez v. Toledo* (1980, U.S.) 64 L Ed 2d 572, 100 S Ct 1920. (Referenced in Doc. 19, pg. 16)

In *Seymour vs. Union News Company*, 7 Cir., 1954, 217 F.2d 168; and see Rule 54c, demand for judgment, FRCP, 28 USCA: "…every final **judgment shall grant the relief** to which the **party** in whose favor it is rendered is entitled, **even if the party has not demanded such relief** in his pleadings." (Referenced in Doc. 19, pg. 5)

Failure to State a Claim under the equal protection clauses of the United States Constitution and the common law authorities was addressed in *Haines v. Kerner*, 404 U.S. 519, upon which the Supreme Court overturned the District Court and ruled that the Pro Se Plaintiff was entitled to an opportunity to offer proof and the case was remanded for further proceeding consistent herewith. (Referenced in Doc. 19, pg.3-4)

In *Platsky v. C.I.A.* 953 F.2d. 25, it was noted that the court errs if it dismisses the Pro Se litigant without instruction of how pleadings are deficient and how to repair pleadings. (Referenced in Doc. 19, pg.3-4)

C. Lack of Jurisdiction

The District Court Magistrates Report states that Defendants "assert that Milakovich's complaint fails to state a basis for federal jurisdiction or a waiver of sovereign immunity. (Doc 18, pg. 5), and refers to the Defendant's claim that the District "Court does not have jurisdiction to hear Milakovich's case and that Milakovich has not exhausted his administrative remedies because he has not filed a Form I-130 and a Form I-485" (Doc 18, pg. 3, provides references for these two forms).

Mr. Milakovich notes (Doc 20, pg. 2-3) that the USCIS Adjudicators Field Manual (AFM), Section 30.3 specifies that (1) if a person enters the United States with a B-2 Visitor Visa, and then starts to take educational classes, they are in most cases prohibited from filing a I-485 Change of Status application – Mr. Milakovich's sons have completed three (3) years of education in public schools; and (2) the AFM also specifies that "a person who enters the United States on a B-2 Visitor Visa with a preconceived intent to immigrate" (or do something other than being a bona fide visitor) is deportable and I-485 action to change status will be denied. The AFM 23.2, *General Adjustment of Status Issues*, cites the following case laws:

> *Matter of Ro* , 16 I. & N. Dec. 93 (BIA 1977) , A preconceived intent to remain permanently at time of arrival as a nonimmigrant was found to be sufficient reason to deny an adjustment application as a matter of discretion despite existence of favorable factors.
>
> *Matter of Baltazar* , 16 I. & N. Dec. 108 (BIA, 1977) . An application for adjustment was denied as a matter of discretion where the judge concluded that the applicant had (1) divorced his spouse in order to obtain immigration benefits and (2) entered the U.S. as a nonimmigrant with a preconceived intent to remain permanently
>
> *Matter of Ibrahim* , 18 I. & N. Dec. 55 (BIA 1981). Entry with a preconceived intent to remain was found to be a serious adverse factor.

Mr. Milakovich notes that the U.S. Embassy was aware of the boy's sole intent to immigrate, the Port of Entry Immigration Officer was informed of the boy's sole intent to immigrate, and USCIS-Orlando was fully aware that the boy's sole purpose in coming to the U.S. was to immigrate. All parties knew Mr. Milakovich's sons were immigrating to the United States, even though they entered with B-2 Visitor Visas. It is clear that Mr. Milakovich's sons entered the United States with a intent to immigrate.

Mr. Milakovich also notes that that "a party cannot be required to exhaust a procedure from which there is no possibility of receiving any type of relief." *Theodoropoulos v. INS,* 358 F.3d 162, 173 (2d Cir. 2004), *cert. denied,* 543 U.S. 823, 125 S.Ct. 37, 160 L.Ed.2d 34 (2004). (Referenced in Doc. 20, pg. 3)

The Defendants note (Doc. 23, pg. 3) that the USDOJ Foreign Affairs Manual, 9 FAM 40.63 N4.7-4, *After 60 Days*, states, "When violative conduct occurs more than 60 days after entry into the United States, the Department does not consider such conduct to constitute a basis for an INA 212(a)(6)(i) inadmissibility."

The Defendants note (Doc 23, pg. 3) that the USCIS manual "constitutes internal guidelines for agency personnel and does not establish judicially enforceable standards." And, that the manual "is intended solely for the training and guidance of USCIS personnel in performing their duties".

1) Discretionary Authority

Statute 8 U.S.C. § 1252(a)(2)(B) prohibits a court from reviewing any *discretionary* decision or action of the USCIS. *Gupta v. Holder*, No. 6:11-cv-935-Orl-31GJK, 2011 AL 4460188, at*3 (M.D. Fla. Sept. 26, 2011)(citing El-Khader v. Perryman, 2d 645, 649 (N.D. Ill. 2003); Chaganti v. Chertoff, No. 08 C 5768, 2008 WL 4663153, at *2(N.D. Ill. Oct 16, 2008)). (Referenced in Doc. 18, pg. 6)

The Immigration and Nationality Act provides:

> Notwithstanding any other provisions of law (statutory or nonstatutory),

> including section 2241 of title 28 or any other habeas corpus provision and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceeding, no court shall have jurisdiction to review (i) any judgment regarding the granting of relief under section… 1255 of this Title or (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this tile. (Noted in Doc. 18, pg. 6)

In Title 8 U.S.C. § 1154(a)(1)(J), it states that "in acting on petitions… or in making determinations, the Attorney General shall consider any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole *discretion* of the Attorney General". (Noted in Doc. 18, pg. 7)

In 8 U.S.C. § 1255(a), it states that "The status of an alien… may be adjusted by the Attorney General, in his *discretion* and under such regulations as he may prescribe…". (Noted in Doc. 18, pg. 7)

Please note that other statutory references to *discretionary* authority are identified in Paragraph IV(D)(3) below.

2) Failure to Exhaust all Administrative Remedies

The Adjudicating Officer, Ms. McGahey did not offer any administrative remedies.

The USCIS Field Operations Director, Ms. Iglesias, offered a single administrative remedy; that the I-130 and I-485 applications should be submitted. This suggestion occurred after Mr. Milakovich's sons had been living with him for two (2) years and after the Florida State court Order had been issued.

The USCIS Adjudicator's Field Manual (AFM), AFM 74.1, USCIS Form N-400 - Application for Naturalization, (b) (1) states; "if the applicant in ignorance or error overlooked a section of law favorable to him/herself, you are responsible for correcting that error", referring to the Adjudicating Officer. While this specifically refers to the N-400 process, it is logical that the same fundamental principal would also apply in general for all Adjudicating Officers in all immigration matters.

It was noted (Doc. 23, pg. 4) that Mr. Milakovich did not submit an N-600, which is an application for Certificate of Citizenship, and therefore, this possibly constituted a remedy which Mr. Milakovich did not take.

It was noted (Doc. 12, pg. 10) that Mr. Milakovich did apply for U.S. passports for his son's,

but the applications were denied because they had entered the United States on Visitor Visas.

D. Deprivation of Constitutional Rights

1) Constitutional Amendments

The Fifth and Fourteenth Amendments to the United States Constitution each contain a Due Process Clause. (http://en.wikipedia.org/wiki/due_process_clause). The Fifth Amendment provides: "nor shall any person… be deprived of life, liberty, or property, without due process of law…" and the Fourteenth Amendment provides "nor shall any state deprive any person of life, liberty, or property, without due process of law…"

Procedural due process, (http://en.wikipedia.org/wiki/Substantive_due_process) "aims to protect individuals from the coercive power of government by ensuring that *adjudication processes* under valid laws are fair and impartial (e.g., the right to sufficient notice, the right to an impartial arbiter, the right to give testimony and admit relevant evidence at hearings, etc.)"

2) Failure to Process

U.S.C. Title 28, Section 1361, *Action to compel an officer of the United States to perform his duty* states that "The District Courts shall have original jurisdiction of any action in the nature of Mandamus to compel an officer or employee of the Unites States or any agency thereof to perform a duty owed to the Plaintiff". (noted in Doc. 12, pg. 8)

Noted (Doc. 12, pg. 9) that U.S.C. Title 5, Section 702, *Right of Review,* states that "A person suffering legal wrong because of agency action, or

adversely affected or aggrieved by agency action with the meaning of a relevant statue, is entitled to judicial review thereof.

Additionally, U.S.C. Title 5, Section 706, *Scope of Review*, states that "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -- (1) compel agency action unlawfully withheld or unreasonably delayed; and…" (noted in Doc. 12, pg. 9)

The Administrative Procedures Act (APA) provides, in relevant part: The reviewing court shall – (1) compel agency action unlawfully withheld or unreasonable delayed. The APA further directs that "each agency shall proceed to conclude a matter presented to it… within a reasonable time" 5 U.S.C. Sec 555(b). However, the APA only empowers a court to compel an agency "to perform a ministerial or non-discretionary act," or "to take action upon a matter, without directing *how* it shall act." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). (Referenced in Doc. 18, pg. 10)

3) Citizenship at Birth

The District Court Magistrates Report (Doc. 18, pg 8) notes that 8 U.S.C. §1431, which does contain some mandatory language and provides as follows: "A child born outside of the United States automatically becomes a citizen of the United States…" when certain conditions are fulfilled. The automatic citizenship provision applies to

international adoptions if the requirements of 8 U.S.C. §1101(b)(1) are met (referring to when the child was adopted in a foreign state that is a party to the Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption done at The Hague on May 29, 1993), AND there are no exceptions to the Hague Convention Articles. Sub-paragraph (I) states "… the Secretary of Homeland Security is satisfied…."; and (IV) states "the Secretary of Homeland Security is satisfied…" (Referenced in Doc. 18, pg. 8) These sub-paragraph refer to a *discretionary* authority of the Secretary of Homeland Security.

In 8 U.S.C. §1101(b)(1)(G), it states that for a child to qualify for the automatic citizenship provisions in 8 U.S.C. §1431, he first has to meet the definition of a child under 8 U.S.C. §1101. It is noted that in some of the sub-paragraphs, there is *discretion* given to the Secretary of Homeland Security in making the determination of who qualifies as a "child" under the statute, but not in others where no *discretionary* authority is available.

Thus, in 8 U.S.C. §1101(b)(1)(C), "a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation."

Also, in 8 U.S.C. §1101(b)(1)(E)(i), a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has

resided with, the adopting parent or parents for at least two years…

Florida State Court Order, in the Circuit Court of the Ninth Judicial Circuit, in and for Osceola County Florida, Case Number 09-DR-2596-AD, Final Judgment of Recognition of Foreign Adoption, Ordered by Circuit Court Judge, 16th day of June, 2009, to include Report and Recommendation of General Magistrate, finds and adjudged that:

> The minor children… are declared to be the legal children of the Petitioners…
>
> The minor children shall be the legal heirs at law of the Petitioners and shall be entitled to all rights and privileges, and subject to all obligations of a child being born to Petitioners.
>
> The Decree of Recognition of Foreign Adoption creates a relationship between the adoptees and the Petitioners and all relatives of Petitioners that would have existed if the adoptees were blood descendants of the Petitioners, born within wedlock, entitled to all rights and privileges thereof, and subject to all obligations of a child being born to the Petitioners.
>
> The Deed of Adoption entered on January 5, 2007 in the country of India is hereby domesticated and all

of the rights and obligations of the parties in this adoption shall be determined as though the judgment were issued by a Court of this state.

This Decree of Recognition of Foreign Adoption creates a relationship between the adoptees and the Petitioners and all relatives of Petitioners that would have existed if the adoptees were blood descendants of the Petitioners, born within wedlock, entitled to all rights and privileges thereof, and subject to all obligations of a child being born to the Petitioners.

The Department of Health, Bureau of Vital Statistics, is hereby directed to prepare and register a Certificate of Foreign Birth (note: this was accomplished and the Certificates show Mr. Milakovich and his spouse as father and mother of their adopted sons)

Note: A full copy of the Florida State Court Order had been previously provided to the Defendant's Attorney. A copy of the court order and Birth Certificates were not included in the Record Excerpts to protect the identity of the minor sons of Mr. Milakovich.

The case of *Smith v. Bayer Corp*, Case No. 09-1205 (June 16, 2011), which was eventually heard in the Supreme Court, in a decision authored by Justice Kagan, all of the Justices agreed that the District Court had exceeded its authority in enjoining the state court action. All nine of the Justices agreed that the matter was subject to the Anti-Injunction Act, 29, U.S.C. § 2283, which prohibits federal courts from enjoining state proceedings except in rare cases.

The U.S. Department of State Foreign Affairs Manual (FAM) contains Departmental guidance in the matter of determining U.S. citizenship. Some of which follows:

> 7 FAM 1132.3(a) April 14, 1802: a. Section 4 of this Act (2 Stat. 153,155) stated, in part, that: —the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: Provided, That the right of citizenship shall not descend to persons whose fathers have never resided within the United States.
>
> 7 FAM 1132.4 February 10, 1855
>
> a. On this date, Congress enacted "An Act to Secure the Right of Citizenship to Children of Citizens of the United States Born Out of the Limits Thereof," (10 Stat.604).
>
> b. It stated, in part, that: —persons heretofore born, or hereafter to be born,

out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: Provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States.

c. The Act of February 10, 1855 did not repeal the Act of April 14, 1802.

7 FAM 1133.2-1 Section 301 Text as of October 25, 1994

a. As amended by Public Law 103-416 on October 25, 1994, section 301 states as follows with respect to persons born abroad:

—Section 301. The following shall be nationals and citizens of the United States at birth:

(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

7 FAM 1133.3-1 Requirements of Section 301 INA

a. Birth to Two Americans

(1) The content of Section 301(c) INA (formerly section 301(a)(3) INA) is

virtually identical to that of section 201(c) INA, which it replaced.

(2) A child born abroad to two U.S. citizens acquires U.S. citizenship at birth if, before the child's birth, one of the parents had a residence in the United States or its outlying possessions. No specific period of residence is required.

b. Birth to Citizen and National (1) To transmit U.S. citizenship to a foreign born child under section 301(d) INA (8 U.S.C. 1401(d)) (formerly section 301(a)(4) INA), a U.S. citizen parent married to a U.S. national (a person owing permanent allegiance to the United States who is neither a U.S. citizen nor an alien) must have been in the United States or an outlying possession for a continuous period of 1 year at any time before the child's birth.

Related to the issue of U.S. Citizenship and Social Security Benefits for Mr. Milakovich's sons, the following relevant information is noted, citing the Social Security Handbook:

SSHB101.2: Those eligible for Social Security benefits include (C) Spouse of retired work who has in care a child who is under age 16; and (F) Dependent child of retired worker under age 18.

SSHB1725.1: Evidence of U.S. Citizenship or lawful alien status is necessary.

Department of Defense (DoD) Military dependent Identification Cards, DD Form 1173, are issued to legal dependents of retired military personnel. To obtain the ID card the child(ren) must meet all the requirements identified in the "Defense Enrollment Eligibility Reporting System (DEERS)". Mr. Milakovich's sons were each issued a U.S. Department of Defense identification card.

United States Air Force Instruction 36-3026, Paragraph 15.9, *Criteria for Mandatory Collection of SSNs*, states "The following provides the criteria for mandatory collection of SSNs and applies to issue of the DD Form 1173 to family members and DEERS enrollment:" and shows in Table 15.6. *Criteria for Mandatory Collection of SSNs*, that a family member which has no SSN and is not eligible for an SSN, will have their medical benefit at a Military Treatment Facility terminated at the end of four (4) years, unless a SSN is obtained.

4) Color of Law

District Court Report (Doc 18, pg. 5) notes Milakovich's assertion that Defendants deprived him of due process in violation of 18 U.S.C. Section 242 which provides, in part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, will fully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien…..

While this Statute is criminal statute, a Civil Statute, Section 1983, is also cited in the District Court Report (Doc 18, pg. 12) which refers to the Color of Law in civil cases and in Doc. 12, pg 5. While "color of law" generally cannot be charged against the Federal Government, it can be brought individually. However a plaintiff may prevail only if he can demonstrate that he/she was deprived of rights secured by the United States Constitution or Federal Statutes.

In consideration of Mr. Milakovich's son's status concerning Social Security benefits; 20 CFR 416.1618, *When You are considered Permanently Residing in the United States Under Color of Law*, (noted in Doc. 3, pg. 1, and Doc. 8, pg. 1) provided that:

> (a) General. We will consider you to be permanently residing in the United States under color of law and you may be eligible for SSI benefits if you are an alien residing in the United States with the knowledge and permission of the Immigration and Naturalization Service and that agency does not contemplate enforcing your departure. The Immigration and Naturalization Service does not contemplate enforcing your departure if it is the policy or practice of that agency not to enforce the departure of aliens in the same category or if from all the facts and circumstances in your case it appears that the Immigration and Naturalization Service is otherwise permitting you to reside in the United States indefinitely. We make these

> decisions by verifying your status with the Immigration and Naturalization Service following the rules contained in paragraphs (b) through (e) of this section.
> (b)(17) Any other aliens living in the United States with the knowledge and permission of the Immigration and Naturalization Service and whose departure that agency does not contemplate enforcing.

In consideration of the preceding paragraph, it is noted that USCIS-Orlando Field Operations Director, did personally state to Mr. Milakovich that it was their policy not to subject young children, such as Mr. Milakovich's to deportation proceedings. Regardless, without written confirmation or an annotation into their computer system, the Social Security Administration denied Mr. Milakovich's requests for his son's benefits, again citing his son's status, as provided by USCIS-Orlando, and their entry into the United States on Visitors Visas.

The Defendants have noted that "*Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971) provides a cause of action for constitutional violations against federal officials while section 1983 provides a parallel cause of action against state and local officials. See *Johnson v. Fankell*, 20 U.S. 911, 914 (1997), and that because the individual Defendants are federal officials, *Bivens* rather that section 1983 would apply here. (noted in Doc. 18, pg. 12).

Mr. Milakovich notes (Doc. 16, pg 12-13) that Title 28 U.S.C. §1346(b) grants Federal District

Courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and "render[ed]" itself liable. *Richards* v. *United States*, 369 U. S. 1, 6 (1962). And further, that this category includes claims that are: "[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Also noted by the District Court Magistrate (Doc. 18, pg. 12) is that *Bivens* does not provide for injunctive relief. Under *Bivens*, a "plaintiff may seek money damages from government officials who have violated h(is) constitutional or statutory rights." *Camreta v. Greene*, 131 S. Ct. 2020, 2030 (2011)

V. SUMMARY OF ARGUMENT

One word has been repeatedly used in an attempt to refute many of Mr. Milakovich's claims, across a broad spectrum of rights. That word is *discretionary*! It conveys the indisputable, judicial mandate that when an action taken by a department or agency is *discretionary*, it is not reviewable by a District Court. Mr. Milakovich does not disagree with this judicial mandate. In fact, he is in 100% agreement with this judicial principle, which is codified in many of the United States Codes and

Federal Regulations. The reality is this mandate has been repeatedly used in an attempt to incorrectly negate many of Mr. Milakovich's claims. The reality is it has been fallaciously, wrongly and improperly applied to Mr. Milakovich's case. In each instance, there have also existed *non-discretionary* judicial mandates, which impose *non-discretionary* duties upon USCIS. In this light, the issues related to the Defendants claim of "Lack of Jurisdiction" become inapplicable and moot. In the same clarity, the various deprivations of constitutional rights and abrogation of benefits claimed by Mr. Milakovich are supported and justified – Mr. Milakovich acting on behalf of his sons. It may also be noted that the Defendants claim (Doc. 18, pg. 11) that Mr. Milakovich is asking the District "Court direct USCIS *how to act"*, is not true. That would only be the case if the action was *discretionary*. Mr. Milakovich seeks *non-discretionary* action – *to act*, not *how to act*.

Another major argument in this case is the question of the Florida State Court Order, which the Defendants have curiously not addressed until their last filing (Doc. 23, pg. 4). This order (see para. IV(D)(3) in this Brief) domesticates the relationship between Mr. Milakovich and his sons and it creates a relationship "that would have existed if the adoptees were blood descendants" of Mr. Milakovich and his spouse. This State Order has a direct bearing on the applicability of the various U.S.C.s, which pertain to U.S. citizenship by birth. Mr. Milakovich maintains that the USCIS cannot abrogate the Florida State Court order by any USCIS policy or directive. He

also recognizes that the Supreme Court has held that federal courts are prohibited from enjoining state proceedings except in rare cases. Lacking any rare cases presented by the Defendants, the Florida State Court Order is not challenged, and remains valid with the full force of law, and all United States Codes shall be considered with the parent-child relationship established by the State Order.

The Defendants have also claimed Mr. Milakovich has "failed to state a claim". Mr. Milakovich refutes this challenge and notes the Supreme Court ruling cited below (para. VI(B)(3)), which discounts a challenge of this nature and allows the case to be heard in court.

VI. ARGUMENT

A. Introduction

Note: The Arguments in this section are based on the Statement of Facts in Section IV. Each Argument is constructed from the logical conclusions that are descendent from those Facts. Each sub-paragraph in "VI. Arguments" corresponds to a like-named sub-paragraph in "IV. Statement of Facts". Special note is needed to clarify that while the Facts were presented as neutral, it does not necessarily remain a Fact until logically or properly applied to the specific circumstances of this case. No matter how powerful or persuasive an argument may appear, if it does not apply to the specific

circumstances of this case, it will only serve to confound and misdirect the decision to sustain or dismiss this Appeal.

Considerable confusion was created by the Defense over the issue of "habitually resident" of a Hague Convention signatory country. If the child applicant for entry into the U.S. is "habitually resident" of a Hague Convention signatory country the I-800 application process is proper and not the I-600 application process. Mr. Milakovich submitted I-600 applications on behalf of his sons, which were returned by USCIS – not accepted and not processed, and therefore not adjudicated, which is the genesis of the problems giving rise to Mr. Milakovich's Complaint. The I-600 application was the proper method of application because:

1) Mr. Milakovich's sons were habitually resident in Qatar, NOT India. His sons were residing in Qatar, an Arabic country which was not a signatory to the Hague Convention. Mr. Milakovich obtained Qatar Government documents attesting to their being "habitually resident" in Qatar.

2) Mr. Milakovich adopted his sons under a different legal system in India (Indian Constitution Art. 371A) from the rest of the country, a circumstance which was an exception to the Articles of Hague Convention (specifically, Article 31), and therefore the Hague Convention did not apply.

3) Mr. Milakovich's adoption of his sons occurred before April 1, 2008 and therefore were "grandfathered", making the I-600 process the correct process. (R, pg. 2)

B. Failure to State a Claim

1) The Defense has failed to address Mr. Milakovich's reference to Federal Rule 12(b)(6) which provides that a basis for a complaint should not be dismissed on a technicality if it appears all the pertinent information for a claim is present, which is supported by the cited case law.

2) The District Court Magistrate's Order (Doc. 18) did not identify any deficiency concerning Mr. Milakovich's claims. In *re Platsky*, the court errs if it dismisses the Pro Se litigant (Mr. Milakovich is a Pro Se litigant) Complaint without instruction of how pleadings are deficient and how to repair pleadings. To merely state they are deficient is not sufficient. In *re Anastasoff:* litigants' constitutional rights are violated when courts depart from precedent where parties are similarly situated. All litigants have a constitutional right to have their claims adjudicated according the rule of precedent. See *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000). (*re Platsky* and *re Anastasoff* , noted in Doc. 19, pg 4)

3) The Supreme Court has ruled in *Haines v. Kerner*, that the Pro Se Plaintiff was entitled to an opportunity to offer proof and the case was remanded for further proceedings consistent herewith.

Conclusion: The Defense has not presented sufficient argument or evidence to dismiss Mr. Milakovich's Complaint on the grounds of failure to state a claim.

C. Lack of Jurisdiction

1) DiscretionaryAuthority

The statutory restriction that when a department or agency has legislative *discretionary* authority, the decisions subsequently made under that authority are not subject to review by a District Court. The reasons are obvious and compelling. The Defense has used this powerful argument to challenge many of Mr. Milakovich's legal arguments. Mr. Milakovich agrees completely that an agency action is not reviewable by a District Court if it was taken based on *discretionary* authority. Specifically, the Defense applies this argument to Mr. Milakovich's I-600 not being approved, which they maintain was an action under *discretionary* authority. This is profoundly not true. The I-600 applications were submitted to USCIS but they were returned, unaccepted, meaning they never entered into the system and were not acted upon and were not adjudicated. Thus they were not denied (or approved), which would have been a *discretionary* action – they were not accepted. Therefore, all the arguments on lack of jurisdiction because the USCIS "decision" was not subject to review are fallacious and erroneous. In fact, because the I-600s were returned without being accepted, this action constituted a constitutional deprivation of rights, as addressed in Argument "VI (D)(1)".

Additionally, the same misapplication of *discretionary* authority was committed by the Defense as related to the issue of U.S. Citizenship for Mr. Milakovich's sons, as was addressed in the Statement of Facts (Paragraph IV (D)(3)). In this case, the Defense "cherry-picked" the paragraphs in 8 U.S.C. §1101(b)(1) , citing some specific

paragraphs that identified the *discretionary* authority provided to the Secretary of Homeland Security (subparagraph "G" and also "F9i", which was not cited by the Defense). Conspicuously absent were other paragraphs in the same 8 U.S.C. §1101(b)(1), concerning children and citizenship, which provided criteria which did not involve the Secretary of Homeland Security in any way (subparagraphs "C" and "E"), either directly or through inference.

Another example of the Defense mis-applying the principle of *discretionary* authority, which was mentioned in the Statement of Facts, Paragraph "IV(D)(3)", references 8 U.S.C. §1431, concerning automatic U.S. citizenship and certain requirements specified in 8 U.S.C. §1101(b)(1), which has the provision that "the Secretary of Homeland Security is satisfied…", meaning *discretionary* authority is invoked. As identified in the previous paragraph, other sub-paragraphs in the same U.S.C. do not contain this requirement. In addition, the entire paragraph is incorrect because Mr. Milakovich's sons were NOT subject to the provisions and rules of the Hague Convention, as addressed elsewhere in this Brief (see Argument paragraph VI(A)).

2) Failure to Exhaust all Administrative Remedies

It is well-established that if a Plaintiff did not exhaust all administrative remedy options at the agency level, the Plaintiff's complaint cannot be heard at District Court. The Defense has maintained that since the I-130/I-485 applications were offered as a remedy, and since Mr. Milakovich

did not submit these applications he did not exhaust all administrative remedies.

First, the I-130/I-485 applications were not applicable until Mr. Milakovich's sons had been living with him for two (2) years. Thus from the time of entry in to the U.S. on August 19, 2008 until August 20, 2009, a period of 12 months, this unquestionably was not a possible remedy.

Second, the Adjudicators Field Manual (AFM) identifies specific circumstances which obligate the Adjudicating Officer NOT to approve an I-485 application (referenced in Paragraph IV(c) above). Thus, the I-485 application is not reasonably expected to be an administrative remedy, which means that according to USCIS, there were no further administrative remedies, noting that this was the only administrative remedy they cited (which was not a true statement as addressed elsewhere in this Brief).

Third, while it was recently suggested that the N-600 application for Certificate of Citizenship may be an option (Doc. 23, pg. 4), this was never made known to Mr. Milakovich, especially by the USCIS-Orlando Field Director who met with Mr. Milakovich after the Florida State Order was issued. As noted in the previous paragraph, according to the USCIS AFM, it is responsibility to inform the applicant if he/she overlooked any section of law, which would be favorable to him/her. It should be noted that the Defendants state (Doc. 23, pg. 4):

> Milakovich also claims that he could have stated a cause of action under the theory that his children have been citizens since birth

> because a Florida State adoption decree states that his children shall have all the same rights as natural born children. Thus, according to Milakovich, his children are entitled to an N-600 certificate of citizenship. Setting aside the issue of the Florida adoption decree Milakovich admits never having applied for an N 600 Citizenship Certificate with USCIS and thus under 8 U.S.C. § 1503(a) he is forbidden from seeking a declaration of citizenship for his children until he exhausts his administrative remedies.

This is a case of the proverbial "Catch-22". USCIS is obligated to inform me of administrative remedies but they did not inform me about submitting an N-600, which should have been appropriately done by the USCIS-Orlando Field Operations Director during the meeting with Mr. Milakovich, which was after the Florida State Court Order was issued. If this had been done, Mr. Milakovich would have submitted the N-600, but the Field Director's only stated remedy was for him to submit the I-130 and I-485 applications. If Mr. Milakovich had been informed of the N-600 remedy and if he had pursued it, would it have been approved? While it is only speculation, if it had been submitted and approved, there would not have been a Complaint at the District Court and there would not have been an Appeal to the dismissal of Mr. Milakovich's Complaint. However, since Mr. Milakovich is now aware of the N-600 possible remedy, does this now constitute a "failure to take

all administrative remedies" (in the past), thereby negating this specific challenge to "Lack of Jurisdiction"? Or, is this a case of artistic legalese? Regardless, the deprivation of constitutional rights still remains. Mr. Milakovich would like to inform this Court that he has almost completed preparation of an N-600 application and it will be submitted to USCIS within the next 30 days. Regardless of the outcome, important issues still remain valid before the court.

Fourth, it is noted that while there were other administrative remedies available to USCIS to provide relief and correct situation with Mr. Milakovich's sons, he was unaware of these since they were never presented to him. In fact, USCIS never acknowledged their existence. These remedies are contained in CFRs and the USCIS AFM and include some of the following, which were possible. It is also reasonable to expect that USCIS could have first examined the boy's I-600 applications and all the supporting documentation to gain confidence that everything was factual and met the customary criteria for approving an I-600 application.

1) An annotation in the Mr. Milakovich's son's passport, explaining the situation of the Visitor Visas and giving them the status of Legal Permanent Residents.

2) A letter from USCIS explaining the situation and giving them the status of Legal Permanent Residence.

3) A letter from USCIS stating that USCIS would take no action to deport them, which would overcome many of the impediments of the Visitor

Visa. Note. The USCIS Field Director, Ms. Iglesias had stated, orally, they would not do this.

4) Apply provisions in the AFM which allow the Adjudicating officer to enter a status of presumption of Legal Permanent Residence by approval of a virtual I-485, without actually submitting one. Per the AFM, "It is important to understand that this process does not involve a granting of adjustment of status, but rather a recognition of a status." And, "there is no need for any alien who is eligible for presumption of lawful admission to obtain a waiver of inadmissibility. In short, it is more of a verification process than an adjudication process." As a side note, if this status had been entered into the USCIS system, the Social Security request for status on Mr. Milakovich's sons would have resulted in granting of benefits to Mr. Milakovich's sons.

D. Deprivation of Constitutional Rights

1) Constitutional Amendments

Mr. Milakovich maintains that there has been a deprivation of his Constitutional rights, under the Fifth and Fourteenth Amendments. He believes that he was denied "procedural due process" because the submission of his sons I-600 applications were barred from the USCIS adjudication processes, which were established by valid laws.

2) Failure to Process

Mr. Milakovich's submitted his son's I-600 applications to USCIS-Orlando. They were returned to him with a cover letter, which stated,

"The USCIS Orlando Field Office has received your I-600, Petition to Classify Orphan as an immediate Relative, on May 29, 2008." The letter also stated they would not process them because of the Hague Convention requirements (which do not apply, as specified by the Hague Convention Article 31), and because it was received after April 1, 2008, the date the Hague Adoption Convention entered into force by the United States (the Hague Convention doesn't apply, as addressed elsewhere). It may also be noted that the District Court Magistrate's Report and Recommendations state that the Hague Adoption Convention rules do not apply if "the adoption occurred before April 1, 2008" (Doc. 18, pg. 2). Since the final adoption occurred on January 5, 2007, the I-600 remains the proper application Form, as Mr. Milakovich has consistently maintained, yet surprisingly, this simple comparison of dates was apparently never performed. Please note that the source of their information is most likely the USCIS Interoffice Memorandum, HQ DOMO 70/6.1.1-P, AFM Update AD 09-26, which states, "The child's adoption and immigration are not governed by the Hague Adoption Convention if the citizen adoptive parent completed the adoption before April 1, 2008".

At the request of the USCIS Adjudicating Officer, Mr. Milakovich electronically emailed the I-600 applications, with supporting documentation, but again, no action was taken.

After arrival in the United States, and after an updated Home Study was completed, Mr. Milakovich personally delivered the I-600 applications to the USCIS Adjudicating Officer, as

she had requested. After three days she arranged a meeting with Mr. Milakovich and returned the I-600 applications stating they could not be processed because his sons had entered the United States with Visitor Visas (a result of her advice), and furthermore, that nothing could be done. Mr. Milakovich notes that if the I-600s had been processed and approved while he and his sons were overseas, his sons would have been issued IR-3 visas, which would have granted them U.S. citizenship upon entry into the United States. While Mr. Milakovich did not expect the I-600 applications to be processed for the obvious reason that his sons were already in the United States, all of the supporting documentation would have substantiated the validity of his son's situation and any of a number of corrective actions could then have been taken – recalling the Adjudicator Officer's promise that all would be "straightened out" after arrival in the United States.

The USCIS Adjudicators Field Manual, Section 21.2 states, that "Regardless of the action taken at the point of receipt by the USCIS employee or contractor, the Adjudicating Officer has full responsibility for determining the petitioner's status and standing at the time of adjudication. In Mr. Milakovich's case he provided the I-600 on three different occasions, where it was in the possession of the USCIS Adjudicating Officer and each time it was returned without acceptance for adjudication. It might be conjectured that since she did not accept it for adjudication, she therefore had no responsible. Mr. Milakovich considers the refusal to accept the I-

600s to be a deprivation of his son's constitutional rights.

It should be noted that 8 CFR 103.2(b)(17) allows for verification of claimed LPR status through USCIS records "at the discretion of the Adjudicating Officer, and 8 CFR 103.2(b)(18) allows a USCIS Field Operations Director to authorize withholding adjudication, but as has been emphasized, the I-600 applications were refused and therefore were never accepted for adjudication – obviously, there was no delay in adjudicating the I-600s if they were never accepted.

Therefore, considering the above, Mr. Milakovich's sons were deprived of their Constitutional rights for procedural due process. Because of the Constitutional issues, in addition to others, the District Court has Jurisdiction for Mr. Milakovich's Complaint.

3) Citizenship at Birth

First, Mr. Milakovich would like to note that he is a United States citizen by birth and his spouse is a United States citizen by naturalization.

The basic issue concerning citizenship at birth for Mr. Milakovich's sons is the parent-child relationship established by the Florida State Court Order, of which relevant portions were quoted in paragraph IV(D)(3) above. A critical issue is the recognition of this State Court Order in the Federal Courts and also by the Secretary of Homeland Security and the USCIS.

The Florida State Court Order "created a relationship between the adoptees and the

Petitioners and all relatives of Petitioners that would have existed if the adoptees were blood descendants of the Petitioners, born within wedlock". Applicable is the case of *Smith v. Bayer Corp.*, Case No. 09-1205 (June 16, 2011), which was eventually heard in the Supreme Court. In a decision authored by Justice Kagan, all of the Justices agreed that the District Court had exceeded its authority in enjoining the state court action. All nine of the Justices agreed that the matter was subject to the Anti-Injunction Act, 29, U.S.C. § 2283, which prohibits federal courts from enjoining state proceedings except in rare cases. Therefore, lacking rare cases, the Florida State court order creating a "blood descendant" relationship prevails. Mr. Milakovich would like to again note that any USCIS policy cannot overrule a U.S.C. and cannot hold a power greater than a U.S.C. which it may be implementing.

In like-numbered paragraphs, INA 301 and 8 U.S.C. 1401 both specify that the following shall be national and citizens of the United States at birth:

> (c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;
>
> (d) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically

> present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;
> (e) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

There are a variety of other references applicable to citizenship at birth. Some of these are specifically addressed by the U.S. Department of State Foreign Affairs Manual (FAM) who frequently addresses these issues for children born overseas to U.S. citizen parents. Some of these were identified in paragraph IV(D)(3) above and will not be repeated here. Please note that Mr. Milakovich is not asking for citizenship for his sons starting from their date of birth, but starting at the time they entered the United States, which is the same date that they would have become U.S. citizens if USCIS had adjudicated and approved their I-600 applications.

The Defendants state (Doc. 23, pg. 4) that:

> "First, Milakovich never alleges having presented this decree to USCIS. Second, while the Florida Adoption decree may state that his children shall have the same rights as

> natural born children, it is highly unlikely that the Florida Adoption decree actually declared his children to have been born in the United States". Regardless, contrary to Plaintiff's assertions, the Florida state court does not provide the final word on whether Milakovich's children meet the criteria for adjustment of status or citizenship. See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982)... Similarly, even assuming that the Florida adoption decree declared Milakovich's children to have been born in the United States, this legal fiction could not trump a federal statute that requires a parent of an adopted child to go through a series of steps to adjust that child's status to that of a lawful permanent resident and eventually to that of a U.S. citizens. See 8 U.S.C. § 1154"

Mr. Milakovich takes umbrage to these statements and is compelled to respond. First, a complete copy of the Florida State Court Order was provided to the Defendant's attorney in an attachment to an email, Subject "*Milakovich v. USCIS Email #5*", dated September 21, 2011, 1237 PM (Reference Doc. 12, pg. 2). Second, the Florida State Court Order does NOT say his children were born in the United States; in fact, the Florida State Statute 63.192, *Recognition of Foreign Judgment or Decree Affecting Adoption*, clearly specifies a foreign adoption (not born in the United States); nor has Mr. Milakovich implied this obvious-to-validate implied assertion. Third, the Florida State Court Order

makes no mention or implication that U.S. citizenship is involved. Additionally, the Florida State issued Birth Certificates are titled "Certificate of Foreign Birth" and in bold lettering state "THIS CERTIFICATE IS NOT EVIDENCE OF UNITED STATES CITIZENSHIP FOR THE CHILD OR PARENTS NAMED ABOVE". This is in compliance with Florida Statute, 382.017, *Foreign Births*.

Mr. Milakovich notes the Defendant's citation of *Adams v. Howerton*, and believes this is another case where the Defendants have misconstrued and misapplied judicial matters and case law. The cited case concerns Congressional authority and immigration issues. In one instance, the District Court notes, that "congress in its immigration statutes is not obligated to follow the law of the place where the marriage was contracted", apparently referring to State domestic issues. Mr. Milakovich sees no conflict. As he has noted in paragraph IV(D)(3) above, referring to Anti-Injunction Act, 29, U.S.C. § 2283, which prohibits federal courts from enjoining state proceedings except in rare cases, it is customary for the federal courts to accept State Court Orders, except in rare cases, thus not relinquishing any ultimate federal authority. The Defendants seem to create an illusion that State Court Orders are of no consequence in federal cases – this is not true.

Furthermore, Mr. Milakovich notes Defendant's the inappropriate reference to 8 U.S.C. § 1154, *Aliens and Nationality*, which in paragraph (a)(iv) defines alien as "An alien who is the spouse, intended spouse, or child living abroad of a lawful

permanent resident…" Mr. Milakovich's sons are not living abroad. In addition, paragraph (k)(1) states, "…based on a parent of the son or daughter being an alien lawfully admitted for permanent residence…". As has been previously noted, Mr. Milakovich's sons entered the United States with B-2 Visitor Visas. This Statute clearly does not apply, contrary to what the Defendants have implied.

Conclusion: Mr. Milakovich continues to believe that the Florida State Court Order has full force of law at the federal level, as to pertains to any I.N.A. or U.S.C. issue which pertains to immigration, unless there is a rare case where circumstance might dictate federal action to negate the effect of a State action. Mr. Milakovich is not aware of any rare case circumstances, nor has the Defendants offered any rare case circumstances.

4) Color of Law

Mr. Milakovich obediently accepted the counsel of the USCIS Adjudicating Officer that nothing could be done to correct the situation that Mr. Milakovich's son's endured after entry into the United States. It would seem likely that the Adjudicating Officer would be trained, experienced, and knowledgeable of the various corrective actions that were available, especially since the USCIS Adjudicators Field Manual is a comprehensive compendium of applicable laws, codes, statutes, regulations, and case histories relevant to the issue of immigration. Yet, the Adjudicating Officer chose not to offer any avenue of relief, as it was her responsibility per the USCIS AFM.

Later, the USCIS-Orlando Field Operations Director said the only avenue of relief was to file I-130/I-485 applications, even though the USCIS AFM specifically cited circumstances for which the I-485 application would be denied, for which circumstances matched Mr. Milakovich's case. While there were other avenues of relief, at the time unknown to Mr. Milakovich, no others were offered by the Field Operations Director.

As a result of the actions of the Adjudicating Officer and the Field Operations Director, Mr. Milakovich's sons were unable to obtain Social Security Numbers (SSNs) from the Social Security Administration and as a result were denied authorized Social Security benefits. In addition, because of SSNs could not be obtained, Mr. Milakovich's sons will soon exceed the time requirement to provide the SSNs to the U.S. Department of Defense for their military medical benefits and they will soon cease to be authorized medical treatment at Military Treatment Facilities (MTFs). (Reference paragraph IV (D)(3))

The individual actions, while on-duty, of the USCIS Adjudicating Officer and the Field Operations Director, demonstrated that their conduct was "arbitrary, or conscience shocking, in a constitutional sense" (due process) and it violated provisions governed by their own Adjudicators Field Manual. As a result, Mr. Milakovich's children were denied rights and benefits, which were authorized by federal statutes. It is noted that in federal court, exhaustion of judicial remedies is not a prerequisite to relief in section 1983 action; see

Monroe v. Pape, 365 U.S. 167, 183 (1961) and *Patsy v. Florida Board of Regents*, 457 U.S. 496, 501 (1982).

The Defendants have noted that "*Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971) provides a cause of action for constitutional violations against federal officials. Mr. Milakovich would also like to note the Supreme Courts comment in the *Bivens* case; namely, that "it is well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." (noted in Doc. 19, pg. 13-14)

In further referring to the *Bivens* case and monetary damages, the District Court Magistrate has noted (Doc. 18, pg. 12, also cited above in paragraph IV(D)(4) above) that "To establish a violation of due process, 'a claimant must first establish that he had a property or liberty interest at stake.' 'No property or liberty interest can exist when the relief sought is *discretionary*.'" First, as has been addressed elsewhere in this brief, no *discretionary* relief is being sought by Mr. Milakovich. Second; SSA monetary benefits and U.S. military medical treatment are benefits at stake. Thirdly is the question of *liberty*. Mr. Milakovich, is a retired USAF Officer, decorated Vietnam combat veteran (recipient of two Bronze Stars) and notes that the "price of freedom" and the liberties we enjoy in the United States of America, is "written on the wall" (Vietnam Memorial in Wash.

D.C.). Our liberty was paid for with the blood of our veterans and that United States Citizenship is a treasure to be honored and respected. Mr. Milakovich has sought citizenship for his sons through submission of the I-600 applications and his efforts were in vein. The applications were not accepted. While it may be a *discretionary* act to delay the adjudication of the applications, it is not *discretionary* to refuse to accept them. Mr. Milakovich maintains it was his son's constitutional right to apply for U.S. citizenship through the I-600 process and since the applications were refused, they were deprived of the opportunity to achieve the liberties enjoyed by being a citizen of the United States of America.

VII. STANDARD OF REVIEW

Mr. Milakovich notes the Supreme Court action, No. 10-694 in the *Matter of Judulang v. Holder*, in an opinion delivered by Justice Kagan that stated, "When an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one." (Doc. 18, pg. 7)

The Citizenship and Immigrations Services Ombudsman Recommendation, *"Special Immigrant Juvenile Adjudications: An Opportunity For Adoption of Best Practices"*, dated April 15, 2011, states, "If problem areas such as delayed, or inappropriately denied, adjudications and inappropriate interview techniques are not properly

addressed, eligible applicants may be discouraged from seeking a benefit specifically designed to help abused, abandoned and neglected immigrant children rebuild their lives in the United States." (Doc. 18, pg. 8-9)

The Case before this Court contains multi-dimensional considerations which make it difficult to obtain a clear, cogent understanding of the inter-related issues. This is due, in part, because of the number of allegations and the lack of discovery or evidence. The matter before this Court is the Dismissal of the Complaint presented by Mr. Milakovich at the District Court. Mr. Milakovich asks this Court for a de novo judgment in this matter.

VIII. CONCLUSION

Marko Milakovich believes that significant errors have been made by the District Court in considering his Complaint. He respectfully requests that this Court reverse the District Court's Dismissal of his Second Amended motion and remand the case for trial.

Dated: July 16, 2012

Respectfully submitted

s/

Marko Milakovich
Plaintiff/Appellant

5060 Harkley Runyan Rd.
St. Cloud, Florida 34771-9538
Tel: (407) 361-5461
Pro Se Plaintiff/Appellant

IX. CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,779 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and it complies with the typeface requirements of Fed. R. App. P. 32(a)(5), because it has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14 point, Times New Roman font.

Dated: July 16, 2012, 2012

s/
Marko Milakovich
Pro Se Plaintiff/Appellant

X. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was served by U.S. Mail on the parties' counsel of record his 16th day of July 2012, as follows:

Lana L. Vahab
Trial Attorney
United States Department of Justice, Civil Division
Office of Immigration Litigation, District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044

Counsel for the Defendants/Appellees

Dated: July 16, 2012

s/
Marko Milakovich
Pro Se Plaintiff/Appellant

12-12990-F

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

MARKO MILAKOVICH

Appellant,
v.

MARGARET IGLESIAS, et al.,

Appellees,

ON APPEAL FROM A DECISION OF THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA
Case No. 6:11-cv-01244-GAP-KRS
Judge Gregory A. Presnell

ANSWERING BRIEF FOR APPELLEES

STUART F. DELERY
Acting Assistant Attorney General
Civil Division

AARON S. Goldsmith
Senior Litigation Counsel
Office of Immigration Litigation
District Court Section

LANA L. VAHAB
Trial Attorney
U.S. Department of Justice
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Phone: (202) 532-4067
Fax: (202) 305-7000

Attorneys for Appellees

CERTIFICATE OF INTERESTED PERSONS –
Milakovich v. Iglesias, No. 12-12990

Pursuant to 11th Cir. R. 26.1 to 26.1-3, Appellees declare that the following person may have an interest in the outcome of this case:

1. Marko Milakovich, Pro-Se Appellant, 5060 Harkley Runyan Rd., St. Cloud, Florida 34771;

2. Eric H. Holder, Jr., Appellee, United States Attorney General;

3. Janet Napolitano, Appellee, Secretary of the United States Department of Homeland Security;

4. Alejandro Mayorkas, Appellee, Director, United States Citizenship and Immigration Services;

5. Margaret Iglesias, Appellee, Field Office Director, Orlando Field Office, United States Citizenship and Immigration Services;

6. Pauline McGahey, USCIS Adjudicator, Orlando Field Office, United States Citizenship and Immigration Services;

7. United States Citizenship and Immigration Services;

8. David J. Kline, Director, Office of Immigration Litigation, District Court Section, Civil Division, U.S. Department of Justice;
9. Stuart F. Delery, Acting Assistant Attorney General, Civil Division, U.S. Department of Justice;

10. The Honorable Karla Spaulding, United States Magistrate Judge, Middle District of Florida;

11. The Honorable Gregory A. Presnell, United States District Court Judge, Middle District of Florida;

12. J. Max Weintraub, Senior Litigation Counsel, Office of Immigration Litigation, District Court Section, U.S. Department of Justice, Washington, D.C.;

13. Jeffrey S. Robins, Assistant Director, Office of Immigration Litigation, District Court Section, U.S. Department of justice, Washington, D.C.; and

14. Lana L. Vahab, Trial Attorney, Office of Immigration Litigation, District Court Section, Civil Division, U.S. Department of Justice.

s/

Lana L. Vahab
Trial Attorney
U.S. Department of Justice
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044

Phone: (202) 532-4067
Attorneys for Appellees
Dated: September 6, 2012

STATEMENT REGARDING ORAL ARGUMENT

Although the Plaintiff-Appellant has requested oral argument, Defendants-Appellees believe that the issues raised on appeal can be resolved by well-established Circuit Court and Supreme Court precedent and, therefore, resolution of this appeal does not require oral argument.

/s/ Lana L. Vahab
LANA L. VAHAB

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

FEDERAL STATUTES

REGULATIONS

OTHER

INTRODUCTION

Mr. Milakovich seeks citizenship or permanent resident status for his two adopted children who were born overseas. But Mr. Milakovich steadfastly refuses to file the proper petition with USCIS to make this goal a reality. His children are currently living with him in the United States, having entered in visitor visas (B-2 visas) on August 19, 2008. Because his children are here in the United States, he is barred by regulation from filing an I-600 application on their behalf. See 8 C.F.R. § 204.3(k)(3). Instead, as he has been told by the USCIS Field Office Director Margaret Iglesias, Mr. Milakovich must instead file an I-130 petition, to classify the boys as immediate relatives, followed by a Form I-485 to adjust their status to that of lawful permanent residents. Mr. Milakovich has refused to do so based on his contention that doing so would constitute a "cover-up" of USCIS mistakes. Milakovich Brief at 3.

The district court properly dismissed this action for lack of jurisdiction dismissed this action for lack of jurisdiction because Mr. Milakovich has failed to cite any legal basis for his claims and it is unclear what relief he is even seeking. To the extent that he seeks to compel agency action, he has failed to point to any nondiscretionary duty. To the extent he seeks a judicial authority to do so where the statutory requirements of naturalization have not been me. See *INS v. Pangilinan*, 486 U.S. at 883 ("the power to make someone a citizen of the United

States has not been conferred upon the federal courts … as one of their generally applicable equitable powers.")

I. COUNTERSTATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Subject matter jurisdiction is the primary issue in this appeal because the District Court dismissed this action based on a lack of subject matter jurisdiction.[1] The District Court did not reach Defendants' other arguments. To the extent that this Court deems it necessary to look beyond the District Court's ground for dismissal, it may "affirm the district court's dismissal on any ground found in the record." *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1218 n.11 (11th Cir. 1999).

On June 1, 2012, Milakovich filed a timely notice of appeal of the district court's decision. *See* App. R. 4(a)(1)(B). This court has jurisdiction to consider Plaintiffs' appeal under 28 U.S.C § 1291.

II. COUNTERSTATEMENT OF THE ISSUES

A. Under certain circumstances, a litigant can compel an agency to act when it has a nondiscretionary duty to act and has failed to do so.

---

[1] In his Statement of Jurisdiction, Mr. Milakovich claims that the District Court reached the failure to state a claim ground of dismissal, but this is not correct. Plaintiff-Appellants' Brief ("Milakovich Brief") at 1, 11, and 30-31.

Here, Milakovich failed to allege that USCIS did not perform a nondiscretionary duty. Did the district court err in dismissing his claim?

B. A federal court lacks the equitable power to make an individual a U.S. citizen through equity. Milakovich's children are not U.S. citizens either by birth or naturalization. Did the district court err in refusing to declare them U.S. citizens?

C. A "*Bivens* action" provides an action for damages to vindicate a constitutional right when a federal government official has violated such a right. Milakovich has failed to allege a violation of any constitutional right. Did the district court err in finding that Milakovich did not state a claim under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

III. COUNTERSTATEMENT OF THE CASE AND THE FACTS.

A. Statutory and Regulatory Background

A foreign national child adopted by a U.S. citizen can obtain lawful status in the United States on one of several ways. Before turning to the specific ways n which a citizen's adopted foreign national child may be able to immigrate to the United States, it is important to note that there is no statutory mechanism by which the mere adoption of a foreign national child automatically makes that child a U.S. citizen or a lawful permanent resident. In fact, under every available method of obtaining lawful status for a foreign national child, the U.S. citizen

parent must first file a petition or an application with USCIS.

One method of obtaining lawful status for a foreign national child who has been adopted by a U.S. citizen parent(s) may be used if certain requirements, in addition to the adoption itself, are met. Under this method, the adopting parent must first show that the child meets the Immigration and Nationality Act's (INA) definition of child as outlined in 8 U.S.C. § 1101(b)(1)(E). Under this definition, the child must have been adopted before age sixteen, and must be in the legal custody of and residing with, the adopting parent for at least two years. *See* 8 U.S.C. § 1101(b)(1)(E)(i).[2] If the foreign national child meets this definition, the parent may file a Petition for Alien relative (Form I-130) to classify the adopted child as an immediate relative. See 8 U.S.C. § 1151. Simultaneously with the Form I-130, the parent may also file an application to adjust the child's status to that of a lawful permanent resident (Form I-485), if the child is already present in the United States. See 8 U.S.C. §§ 1151, 1154, 1255. If the child is residing abroad, approval of the Form I-130 permits the child to obtain an immigrant visa from the U.S. Consulate abroad, with which the child can travel to the United States and seek admission as a lawful permanent resident.

If the adjustment of status application is approved (for a child already in the United States), or the child is admitted with an immigrant visa,

---

[2] Under certain circumstance, the custody and residence requirement can be waive for certain abused children.

before the child's eighteenth birthday, and the child then resides in the United States with the citizen parent, the child will automatically become a U.S. citizen by operation of law. *See* 8 U.S.C. § 1431.

In many, and perhaps most cases, these requirements – including the establishment of a residence in the United States – are met at the moment f admission (via arrival on an immigrant visa or adjustment to lawful permanent residence); in such cases, the child is deemed to acquire citizenship from the moment admission. The child becomes a citizen by naturalization, since citizenship is not as of the date of birth. 8 U.S.C. § 1101(a)(23). But the child does not need to file an individual application to naturalize. Even if he or she never applies for a passport or certificate of citizenship, the child is still a citizen if the requirements of Section 1431 are met. If, by contrast, the adjustment of status application (I-485) is approved, or the child is admitted with an immigrant visa, after the child's eighteenth birthday, the child would not become a derivative naturalized citizen under Section 1431. Instead, the child would remain a lawful permanent resident, but could file a naturalization application (Form N0400) on his own behalf after, after among other things, showing that he or she has been a lawful permanent resident for at least five years. See 8 U.S.C. § 1427.

Alternatively, if the foreign national child is living outside the United States, and the U.S. citizen parent wants the child to immigrate before the two years' custody and residence requirements of Section 1101(b)(1)(E) are met, the U.S. citizen parent can

use one of two different methods to obtain lawful status for the child depending on the child's country of residence. Compare 8 U.S.C. §§1101(b)(1)(F) and 1101 (b)(1)(G).

First, if the child is a resident of a non-Hague Adoption Convention Country, the parent can file a Petition to Classify Orphan as an Immediate relative (Form I-600) upon the satisfaction upon satisfaction of certain conditions.[3] *See* 8 U.S.C. §§ 1151, 1101(b)(1)(F); *see also* 8 C.F.R. §204.3. Among other things, the parent must show: (1) that the child is an "orphan" in the strict legal sense of Section 1101(b)(1)(F) and 8 C.F.R. § 204.3; (2) that the child has been adopted abroad or that the parent has custody that permits him or her to bring the child to the United States for adoption in this country; and (3) a determination, based on a valid home study, that the parent is a suitable adoptive parent. See 8 U.S.C. §§1151, 1101(b)(1)(F); *see also* 8 C.F.R. § 204.3. The Form I-600 *cannot* be filed *after* the child has already been admitted to the United States. See 8 C.F.R. § 204.3(k)(3).

Once USCIS approves the Form I-600, the child needs to be processed for an immigrant visa by the U.S. Consulate abroad. *See* 8 U.S.C. § 1255(a)(3) (requiring immediate availability of a visa). Upon admission to the United States, with an immigrant visa, the child is considered a lawful permanent

---

[3] The full name of the convention is the Convention on Protection of Children and Cooperation In Respect of Intercountry Adoption, signed at the Hague Adoption Convention on May 29, 1993.

resident of the United States. See 8 U.S.C. § 1255(a). As with a Form I-130 case, if the foreign adoption was completed abroad, and the child is admitted with an immigrant visa before the child's 18th birthday, and the child then resides in the United States with the citizen parent, the child becomes a U.S. citizen by operation of law. As with Form I-130 cases, if these requirements are all met at the moment of admission, the child becomes a citizen upon admission to the United States. *See* 8 U.S.C. §§1431; 1101(b)(1)(F). If the adoption of the child is to be completed in the United States, the child automatically becomes a U.S. citizen upon completion of the adoption, if the final adoption takes place before the child's 18th birthday. *Id.* If the child is admitted after his or her 18th birthday, or the adoption is not completed until after the 18th birthday, then the child remains a lawful permanent resident but can file an individual naturalization application once he or she has been a lawful permanent resident for at least five years.

The second method for obtaining lawful status for an adopted child living outside the United States, applies to those children who are habitual residents of a country that is a signatory to the Convention on Protection of Children and Cooperation In Respect of Intercountry Adoption, signed at the Hague Adoption Convention on May 29, 1993 ("Hague Adoption convention").[4] Under the statute implementing this convention – 8 § 1101(b)(1)(G) – the child can be classified as an immediate relative

[4] India is a signatory to the Convention.

by filing a Petition to Classify Convention Adoptee as an Immediate Relative (Form I-800). See 8 U.S.C. §§ 1151, 1101(b)(1)(G). If the parent can show that the conditions of Section 1101(b)(1)(G) are met and the Form I-800 is approved, the process for bringing the child to the United States and obtaining lawful permanent resident status for the child is the same as it is for child immigrating from a non-Hague Convention Country.

For the I-800 Petitions, similarly, as with Form I-130 and orphan cases, if the adoption is completed abroad, and the child is admitted with an immigrant visa before the child's 18th birthday, and the child then resides in the United States with the citizen parent, the child automatically becomes a U.S. citizen. As with Form I-130 and orphan cases, if all of these requirements are met at the moment of admission, the child becomes a citizen upon admission to the United States. See 8 U.S.C. §§ 1431, 1101(b)(1)(G). If the adoption is to be completed in the United States, the child will automatically become a U.S. citizen upon completion of the adoption, if the final adoption takes place before the child's 18th birthday. *Id.* If the child is admitted after his or her 18th birthday, or the adoption is not completed until after the 18th birthday, then the child remains a lawful permanent resident but can file an individual naturalization application once he or she has been a lawful permanent resident for at least five years.

B. Factual Background[5]

Mr. Milakovich stated that he adopted two boys in India with the goal of bringing them to the United States. R.E. at Tab 8 at 2-3. Plaintiff alleges he attempted to file a "Petition to Classify an Orphan as an Immediate relative" (Form I-600) on behalf of each boy. *Id.* at Tab 8 at 1. According to Milakovich, USCIS refused to process these petition and instead "returned" the petitions to him. *Id.* at Tab 8 at 2. Despite this refusal, Plaintiff seems to have been able to bring the children to the United States on B-2 visitor visas, and he admits that they are and have been residing with him in Florida since August 19, 2008. *Id.*

Plaintiff stated that on October 15, 2009, he met with Margaret Iglesias, Field Office Director of the Orlando USCIS office. *Id.* Mr. Milakovich admits that Ms. Iglesias told him that she could not correct the errors of Plaintiff's previous applications, but instead suggested that he submit a Form I-130 (a petition for alien relative) and a Form I-485 (adjustment of status application) to obtain lawful stats for his sons. *Id.* Plaintiff chose to disregard this advice from the Field Office Director because, according to him, following it would constitute "a

---

[5] For purposes of this appeal, Defendants assume as true all the facts in Mr. Milakovich's complaint below. Mr. Milakovich has sought to introduce many new facts in his opening brief that he did not present to the district court. These facts are largely irrelevant to the key issues in this case. For purposes of this appeal, however, Defendants-Appellees will simply relay on the facts n Milakovich's Second Amended Complaint. R.E. at Tab 8.

cover-up of mistakes by USCIS-Orlando," *Id.* at 2. Instead, Mr. Milakovich filed the instant lawsuit.

C. Procedural History.

On July 27, 2011, Mr. Milakovich, a pro se plaintiff, filed his initial complaint in this case. *See* Record Excerpts ("R.E.") at Tab "Docket Sheet," The complaint did not list any defendant and the district court dismissed it without prejudice. R.E. at Tab 18 (Report and Recommendation (R & R) at 1). Mr. Milakovich was given leave to file an amended complaint, which he did. R.E. at Tab 3. The amended complaint listed USCIS-Orlando and Margaret Iglesias and Pauline McGahey, in their individual capacities, as defendants. Before Defendants responded, Mr. Milakovich filed a second amended complaint on October 27, 2011. R.E. at Tab 8. In his Second Amended Complaint, Mr. Milakovich sought (1) a "grant of citizenship to the Plaintiff's sons;" (2) "grant of all lost Social Security benefits;" or "in the alternative for a grant of the status of Permanent Resident (sic) backdated to August 19, 2008." *Id.* at 3-4.

On November 23, 2011, Defendants filed a motion to dismiss the Second Amended Complaint for lack of jurisdiction and for failure to state a claim. R.E. at Tab 15 (Motion to Dismiss Second Amended Complaint, "Motion"). In their Motion, Defendants argued that Milakovich failed to allege a basis for the district court's jurisdiction and that Mr. Milakovich also failed to state a claim. R.E. at Tab 15.

Mr. Milakovich opposed the motion to dismiss on December 5, 2011. R.E. at Tab 16. And on

January 5, 2012, Mr. Milakovich filed a supplement to his Opposition. R.E. at Tab 17. Having considered Defendants' Motion to Dismiss as well as both Mr. Milakovich's Opposition and the Supplement to is Opposition, the Magistrate Judge issued a Report and Recommendation (R & R) on March 13, 2012.

The R & R recommended a dismissal of Plaintiff's complaint for lack of jurisdiction. R.E. at Tab 18. The Magistrate Judge addressed each on Mr. Milakovich's claims and bases for jurisdiction. *Id.* Because of Mr. Milakovich's status as a *pro se* litigant, the Magistrate Judge also address "Other Possible Causes of Action," that Mr. Milakovich could have alleged but did not. *Id.* At 9. The Magistrate Judge discussed why none of the alleged bases of jurisdiction, nor the "possible one Mr. Milakovich *could* have alleged gave rise to the district court's jurisdiction over his claims. R.E. at Tab 18.[6]

---

[6] In his Opening Brief, Mr. Milakovich claims that the district court dismissed his complaint for failure to state a claim, but that is not the case. *See* Milakovich at 1,11. Mr. Milakovich's misapprehension appears to stem from the fact that on the last page of the Report and Recommendation, the Magistrate Judge stated that he recommends that "Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint for Lack of Jurisdiction and for Failure to State a Claim [] be GRANTED and that the Court DISMISS the case with prejudice." R.E. at Tab 18 (Report and Recommendation at 13-14). Mr. Milakovich appears to have interpreted the citation to the name of Defendant's motion to mean that the magistrate judge reached both of Defendant's motion to mean that the Magistrate Judge made clear that it was dismissing based on Mr. Milakovich's

On March 19, 2012 and April 9, 2012 respectively, Milakovich filed his Objection to the R & R, followed by a Supplement to the Objection. R.E. at Tabs 19 and 20. On May 15, 2012, Defendants also filed a Response to the R & R. R.E. at Tab 23.

On May 23, 2012, the district court, upon *de novo* review of the Report and Recommendation, as well as Plaintiff's Objections and Defendants' Response, found that it "lack[ed] jurisdiction over the claims stated by the Plaintiff." R.E. at Tab 24 ("Order"). On June 1, 2012, Mr. Milakovich filed a timely notice of appeal. R.E. at Tab 25.

IV. STATEMENT OF THE STANDARD OF REVIEW.

This Court reviews a district court's dismissal of a case for lack of subject matter jurisdiction *de novo*. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1249, 1255 (11th Cir. 2003). The Court reviews the district court's jurisdictional fact-finding, for clear error. *See Amos v. Glynn County Bd. Of Tax Assessors*, 347 F.3d 1249, 1255 (11th Cir. 2003). The clearly erroneous standard is "highly deferential" and requires this Court to uphold the district court's factual determinations so long as they are "plausible in light of the record viewed in its entirety." *Carmichael v. Kellogg, Brown & Root Serv.s Inc.*,

---

failure "to show that this Court has jurisdiction over most of his stated or possible claims." *Id.* (Report and Recommendation at 13).

572 F.3d 1271, 1280 (11th Cir. 2009) (internal citations and quotation marks removed).

The Supreme Court has made it "absolutely clear" that "administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vt. Yankee Nuclear Power Corp. v. Natural Res Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965)). In this vein, reviewing courts have been cautioned against "engrafting their own notions of proper procedures upon agencies entrusted with substantive function by Congress." *Vt. Yankee*, 435 U.S. at 525.

Judicial deference is "especially appropriate in the immigration context, in which officials "exercise especially sensitive political functions that implicate questions of foreign relations," *INS v. Aguirre-Aguirre*, 526 U.S. 415, 415, 425 (199) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

V. ARGUMENT

The district court correctly dismissed the Mr. Milakovich's complaint for lack of jurisdiction. First Mr. Milakovich has not alleged a nondiscretionary duty on behalf of USCIS such that a district court could compel the agency to carry out a ministerial act. Second, the district court correctly found that having failed to satisfy the statutory requirements of any citizenship statue, it lacked jurisdiction to equitable declare Mr. Milakovich's sons U.S. citizens or order their naturalization. Finally, Mr. Milakovich has failed to state a *Bivens* claim against

individual Defendants Iglesias and McGahey because he has not alleged a violation of sons' constitutional rights.

A. Plaintiff cannot state a claim under the Mandamus Act or the APA to compel agency action because he has failed to allege that USCIS failed to perform any nondiscretionary duty.

In his opening brief, Mr. Milakovich claims that he has properly raised a claim under APA and the Mandamus Act for failure to perform a nondiscretionary duty. Milakovich Brief at 28 (explains that he is seeking an order to compel the agency "*to act*, not *how to act*.")(emphasis in original). The party seeking mandamus has the burden of demonstrating that its right to issuance of the writ is clear and indisputable." *In re Bell South Corp.*, 334 F.3d 941, 953 (11th Cir. 2003)).

Both the APA and the Mandamus Act, require that a plaintiff identify a nondiscretionary duty. R.E. at Tab 18 at 9-10 (citing *Lifestar Ambulance Servs.*, Inc. v. U.S., 365 F.3d 1293,1295 (11th Cir. 2004) and *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)). Because Mr. Milakovich failed to identify any nondiscretionary duty that USCIS failed to perform, the District Court properly dismissed Mr. Milakovich's APA and the Mandamus Act claims.

Milakovich does not, for example allege that he has filed an applicant with USCIS that has been pending for an unreasonable long period of time. Milakovich Brief at 40. In fact, Milakovich concedes

that he has no application pending with USCIS and that he has in fact refused to file the applications that he has been advised to file by Defendant Margaret Iglesias. Milakovich Brief at 3, 10, 13, and 40.

To the extent that Mr. Milakovich's request can be construed as asking the Court to compel Defendants to accept Mr. Milakovich's I-600 application, this request must be denied because 8 C.F.R. § 204.3(k)(3) prohibits the processing of I-600s on behalf of children already living in the United States. Mr. Milakovich appears to be aware of this regulation as he admits that he "did not expect the I-600 applications to be processed for the obvious reason that he[his] were already in the United States." Milakovich Brief at 39.

Instead, Mr. Milakovich argues that USCIS adjudicators owed him a non-discretionary duty to suggest "corrective actions" because they had earlier promised him that everything would be "straightened out" upon his return to the United States. Milakovich Brief at 39. Despite the fact that Margaret Iglesias suggested that Mr. Milakovich file I-130s and I-485s on behalf of his children, Mr. Milakovich still claims that USCIS did not comply with its alleged nondiscretionary duty to "suggest corrective actions." Milakovich Brief at 37-45.

According to Milakovich, this non-discretionary duty to suggest "corrective actions" comes from the Adjudicators Field Manual (AFM). Chapter 1 one of the AFM contains a notice which specifically states that "nothing in the manual shall be construed to create any substantive or procedural

right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." USCIS ADJUDICATOR'S FIELD MANUAL, § 1.1. This section further states that the manual "is intended solely for the training and guidance of USCIS personnel in performing their duties." *Id.* In other words, the language of the AFM indicates that its guidance is not intended to be a legislative rule with binding effect. But rather is nothing more than an internal policy guide. *See, e.g.*, *Vietnam Veterans of America v. Secretary of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988)("A binding policy is an oxymoron.")

Furthermore, because the alleged duty of suggesting "corrective actions" requires the interpretation of facts and the use of judgment, it cannot be considered "nondiscretionary" even if he AFM were binding on the agency. See Wilbur v. United States, 281 U.S. 206, 218-19 (1929) (a ministerial duty is one that is "so plainly prescribed as to be free from doubt and equivalent to a positive command.... Where the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment, or discretion which cannot be controlled by mandamus."). The very fact that Mr. Milakovich takes issue with the corrective action that was suggested to him (and instead insists that other actions should have been suggested), proves that this alleged duty by definition not "free from doubt and equivalent to a positive command." *Id.*

B. Plaintiff is not entitled to a declaration that his children are U.S. citizens because federal courts lack the equitable authority to make someone a U.S. citizen.

Relying on an inapplicable statute in the INA, Mr. Milakovich claims that his children may already be U.S. citizens. Mr. Milakovich is incorrect. Because Mr. Milakovich does not contend that his children are entitled to U.S. citizenship by birth or at birth, they like all individuals who seek citizenship through naturalization, are bound by the rules set forth by Congress. *See Rogers v Bellei*, 401 U.S. 815, 828 (1971) (noting that "naturalization by descent" is "dependent upon statutory enactment"). And such citizenship is available "only upon terms and conditions specified by Congress;" *INS v. Pangilinan*, 486 U.S. 875, 883-884 (1988) ("the power to make someone a citizen of the United States has not been conferred upon the federal courts… as one of their generally applicable equitable powers.")[7]

Mr. Milakovich does not claim to have filed a naturalization application for his children under any possible naturalization statue (such as 8 U.S.C. § 1433 or § 1427). Nor have his children met the derivative citizenship requirements of 8 U.S.C. § 1431 because having entered on visitor visas and having never adjusted their status, Mr. Milakovich's children have never become lawful permanent

[7] See also 8 U.S.C. § 1421 (d) ("A person my only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this title and not otherwise.").

residents.[8] See 8 U.S.C. § 1431(a)(3) (requiring residence in the United States "pursuant to a lawful admission for permanent resident"). Thus, because Mr. Milakovich has not shown that his children have met the prerequisites of any applicable naturalization statute, the district court lacks the power to either declare them U.S. citizens or order their naturalization.

Failing to appreciate the need for his children's naturalization (automatic or by application), Mr. Milakovich point to 8 U.S.C. § 1401, a statute entitled "National and citizen of United States at birth." Mr. Milakovich argues that his children, who according to him were the biological children of two Naga Indian parent, have in fact already acquired U.S. citizenship through this statue by virtue of having been adopted years after their birth by Mr. Milakovich and his wife. Milakovich Brief at 41-42. But Section 1401 only applies to children born outside of the United States who at the *time of their birth* had a least one U.S. citizen parent. *See Marquez-Marquez v. Gonzales*, 455 F.3d 548, 560 (5th Cir. 2006) (giving such retroactive effect to a later adoption is obviously contrary to section 1401(g) which, without any mention of adoption, confers citizenship "at birth" to those "born" abroad "of" and alien and a citizen parent….").

---

[8] Had Mr. Milakovich filed the forms I-130 and I-485 as was advised to him by Margaret Iglesias, if approved his children would have become lawful permanent residents and would have derived U.S. citizenship from him and his wife under 8 U.S.C. § 1431.

In *Marquez-Marquez*, that court held that a person born of unwed Mexican parents in Mexico did not become a United States citizen by virtue of her later adoption by a United States citizen, who was married to neither of her parents at the time of her birth. *Id.*

Mr. Milakovich cites the Florida State adoption decree and insists that the Courts must give full effect to this decree by declaring his children U.S. citizens. Milakovich Brief at 9-10, 20-21. But the fact that Mr. Milakovich has adopted his sons as a matter of state law does not automatically render them U.S. citizens as a matter of federal law. *See Marquez-Marquez*, 455 F.3d 559 ("[w]e do not doubt that [the alien] became [the U.S. citizen's] "child" by the 1980 adoption, but that has no bearing on whether [the alien] obtained citizenship under [Section 1401]").

In sum, Mr. Milakovich has admittedly refused to follow the steps necessary to allow them to derive citizenship (automatically naturalize) through him and his wife by first filing a Form I-130 concurrently with, or followed by a Form I-485.

C. The District Court correctly ruled that Mr. Milakovich failed to state a claim against any individual defendant.

In adopting the Magistrate Judge's R & R, the district court did not expressly address the Magistrate Judge's determination that Mr. Milakovich did "not allege facts sufficient to support a claim under *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971). (R.E. at Tab 18)." R.E.

at Tab 24. Instead, the Court simply found "upon *de novo* review" that it lacked "jurisdiction over the claims stated by Plaintiff." *Id.* This ruling is correct because there is no legal or factual basis for Mr. Milakovich to assert a *Bivens* claim.

Mr. Milakovich asserts that Defendants Iglesias and McGahey violated his sons' constitutional rights when they failed to suggest "corrective measures" to him after his arrival in the United States. At the same time, Mr. Milakovich admits that Ms. Iglesias did advise him on steps he needed to take in order to obtain lawful status for is his children. Specifically, Mr. Milakovich admits that Ms. Iglesias suggested that he file a Form I-130 and a Form I-485, which if approved would together have the effect of making his children lawful permanent residents and then automatically citizens under 8 U.S.C. § 1431.

In addition to the internal contradiction of Mr. Milakovich's assertions, the alleged failure to suggest corrective measure cannot give rise to a *Bivens* claim because Mr. Milakovich cannot point to a constitutional violation. *Rauschenberg v. Williamson*, 785 F.2d 985, 987 (11th Cir. 1986) ("A 'Bivens action' provides an action for damages to vindicate a constitution right when a federal government official has violated such a right."). In the absence of a constitutional violation, no *Bivens* action lies.[9]

---

[9] The Magistrate Judge also addressed a number of other INA provisions in the R & R, explain why they do not provide a cause of action. On appeal, Mr. Milakovich does not appear to

CONCLUSION

The District Court properly concluded that it lacked jurisdiction because Mr. Milakovich failed allege a violation of a nondiscretionary duty which would all the District Court to order the agency to act. A District Court does not have the equitable authority to make someone a U.S. citizen other than on the statutory grounds explicitly prescribed by Congress. This Court should affirm the District Court on that basis, or on one of the several additional bases found in the record.

---

challenge this ruling and therefore, Defendants/Appellees do not address these arguments here. The Magistrate Judge also make reference to 8 U.S.C. § 1252(a)(2)(B)(ii). Because USCIS never adjudicated an application filed by Mr. Milakovich on discretionary grounds, 8 U.S.C. § 1252(a)(2)(B)(ii) does not preclude judicial review of a discretionary adjudication by USCIS. This, this provision is not directly implicated in this case.

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

JEFFREY S. ROBINS
Assistant Director

_____s/_____
LANA L. VAHAB
Trial Attorney
U.S. Department of Justice
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Phone: (202) 532-4067

Attorneys for Appellees

Dated: September 6,2012

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 5, 270 words (exclusive of the cover, table of contents and table of authorities).

In addition, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Red. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Time Roman, 14 pt.

/s/Lana L. Vahab
Lana L. Vahab

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September 2012, one copy of this ANSWERING BRIEF FOR APPELLEES, was served on Appellant Marko Milakovich, by USPS, addressed to:

Marko Milakovich
5060 Harley Runyan Rd.
St. Cloud, FL 34771-9538

/s/Lana L. Vahab
Lana L. Vahab
Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Phone: (202) 532-4067
Fax: (202) 305-7000

12-12990-F

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

MARKO MILAKOVICH

Plaintiff-Appellant,

v.

U.S.C.I.S – ORLANDO,
MARGARET IGLESIAS, individually,
PAULINE MCGAHEY, individually,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

REPLY BRIEF OF PLAINTIFF-APPELLANT PRO SE

Marko Milakovich
5060 Harkley Runyan Rd.
St. Cloud, Florida 34771-9538
Tel: (407) 361-5461

Plaintiff-Appellant Pro Se

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER

I. ARGUMENTS

ARGUMENT: INTRODUCTION

The "ANSWERING BRIEF FOR APPELLEES" contains many erroneous and inaccurate statements. While Mr. Milakovich is motivated to response to each "inaccuracy", one by one, he foregoes this approach in the interests of brevity and will mostly focus on the broader issues, which are addressed below.

ARGUMENT: DISCRETIONARY AUTHORITY

Mr. Milakovich has NEVER disagreed with the principle that a government agency, which has been given judicial-based discretionary authority, cannot have their decisions challenged in a District Court. The logic is sound and obvious. To restate, Mr. Milakovich completely agrees and supports this well-established principle, contrary to the Appellees' frequent assertions otherwise.

The Appellees have attempted to use "sleight-of-hand" and "bait and switch" and "mis-direction" arguments, implying that the USCIS action was discretionary, and therefore was not subject to the jurisdiction of the Court. As previously noted in Mr. Milakovich's Brief:

1) The I-600 applications were NEVER accepted by USCIS and therefore were never eligible for any adjudication by USCIS, and therefore were never

subjected to any "discretionary action" by USCIS. On the contrary, by refusing to accept the I-600s submitted by Mr. Milakovich, two different times (prior to his sons' arrival in the U.S.), his sons were deprived of their U.S. Constitutional rights under the 5th and 14th Amendments for procedural due process. It has been repeatedly stated by the Appellees that the I-600 is only applicable for applicants that are overseas and may NOT be used for applicants already in the United States (Answering Brief, p. 7), and have implied that Mr. Milakovich was asking USCIS to accept the I-600 for processing after he and his sons were in the United States. This is patently FALSE and NOT TRUE. Pertinent to note is that Mr. Milakovich was directed by USCIS, for reasons unknown, to bring the I-600s to the USCIS Field Office after his arrival in the United States, and he complied. However, since the I-600 contains a plethora of supporting documentation, the documentation could readily be used by USCIS to assuage any concerns as to the authenticity of the adoption and could be a springboard to mitigate the errors made by USCIS prior to any corrective action.

2) The Appellees have stated that Mr. Milakovich has complained that the I-600 processing was delayed. While Mr. Milakovich has noted that an elapsed time of over 120 days (Doc. 12, p. 4) occurred from when the I-600s were first submitted until he again gave them to USCIS after arrival in the U.S., Mr. Milakovich notes the USCs only address (Doc. 12, p. 4) a delay of over 120 days for the adjudication, and that any delay during that 120 day

period is discretionary. The USC addressing the 120 day delay criteria has no relevance if the I-600 applications were never accepted into the USCIS system for adjudication. Thus there is no discretionary "delay" and the issue remains a deprivation of constitutional rights of due process, under the 5th and 14th Amendments – the I-600s were never accepted (Doc. 12, p. 17-18 and Doc. 16, p. 10). Also relevant is the issue of "nondiscretionary duty" to Mr. Milakovich, namely to accept an I-600 application for adjudication, recalling that USCIS rejected the application for erroneous reasons – as addressed elsewhere in this Reply Brief (Doc. 19, p. 9-10).

3) USCIS selectively identified subparagraphs in the law, which specified USCIS action and thus their authority for discretionary action, which as a consequence, would not be subject to District Court review (Milakovich Brief, p. 32). This action was capricious and an overt, biased act to circumvent honorable and just action by an agency of the United States Government. This is clearly apparent because in the SAME USC paragraph cited by USCIS for discretionary actions, other subparagraphs did not contain this stipulation and therefore no discretionary action by USCIS was mandated and did not apply, contrary to the Appellees manipulative attempt to prove otherwise. Therefore, action could be taken without USCIS involvement or discretionary action and thus, such action would be under the District Court's jurisdiction for review – discretionary authority was not involved or required by the cited USC.

ARGUMENT: DEPRIVATION OF CONSTITUTIONAL RIGHTS

Mr. Milakovich notes that the District Court has not addressed the interpretation or applicability of the Constitutional issue of due process under the 5th and 14th Amendments, which was an issue before the court (Doc.16, p.10). Specifically, that the I-600 applications submitted for processing were denied and that by not accepting the bona fide applications submitted by a United States citizen, on behalf of his two minor adopted sons, Mr. Milakovich was denied his Constitutional rights of due-process. Reference is made to 5 USC § 706 - SCOPE OF REVIEW, which states:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

In addition, Mr. Milakovich would like to note that his Complaint is also against the Defendants-Appellees individually and that one, Ms. Iglesias, the USCIS-Orlando Field Operations Director, has an overall managerial/supervisory responsibility. Also noted; "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983" *McKinnon, supra, 568 F. 2d at 934*. And also, that Section 1983 "imposes liability for 'conduct which subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws." *Rizzo v. Goode*, 423 U.S. 362, 370-71, 96 S.Ct. 598, 604, 46 L.Ed.2d 561 (1976). Also, a supervisory official may be liable because he or she created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue, *McCann, supra,* 698

F.2d at 125. Please recall that Mr. Milakovich has asked for compensatory and punitive damages. A defendant may be personally involved in a constitutional deprivation in several ways: (1) direct participation; (2) failure to remedy the wrong after learning about it; (3) creation of a policy or custom under which unconstitutional practices occur; or (4) gross negligence in managing subordinates who caused the violation. *Williams v. Smith,* 781 F.2d at 323-24. Addressing these elements specifically: Concerning (1) above; the Appellee, Field Operations Director may have been approached by the Appellee USCIS Adjudicating Officer for guidance, because the Adjudicating Officer suddenly changed her administration of the case (she first asked for the I-600 and said "it" would be straightened out, then returned the I-600 stating nothing could be done). At the very least, the Adjudicating Officer should have followed the directives in the Adjudicator's Field Manual, for which the Field Operations Director was responsible to administer, as well as being responsible for training of the Adjudicating Officers. Therefore, "direct participation" is a matter which is probable and would be substantiated during discovery. Concerning (2) above; the Field Operations Director knew of the mistakes, if through no other avenue, then by Mr. Milakovich personally informing her. As addressed elsewhere in this brief, no "corrective action" was offered, but a "course of action" was suggested, which did not recognize the wrongful acts. Concerning (3) above; it is unknown if there was a policy, formalized or "understood", about mistakes. What is indisputable, is that there were

mistakes and that a denial of due-process did occur. Concerning (4) above; the well-established "duck principle" applies (looks like, sounds like, walks like, ergo, it is a duck) applies in that the elements of gross negligence are present, specifically referring to a supervisor's management of subordinates who caused the violation.

Mr. Milakovich has repeatedly made Complaint of deprivations and the Defendant-Appellee has steadfastly refused to acknowledge any "wrongs" and has repeatedly said that even if there had been a mistake, nothing could be done about it. The question of the I-600s not being accepted for due process is irrefutable. Mr. Milakovich adamantly maintains that testimony in court will validate his complaint that USCIS failed to remedy the wrongs and that remedies were readily available, most of which would be a mere notation in a computer file, annotation in a Passport, or a simple letter. Does the District Court have jurisdiction over these Constitutional issues? Mr. Milakovich believes the answer is YES.

ARGUMENT: USCIS MISTAKES AND RECOMMENDED "CORRECTIVE ACTION"

The Appellees have repeated stated that they have cited the I-130/I-485 as a "corrective action" recommended to Mr. Milakovich to pursue Citizenship for his sons. Mr. Milakovich takes umbrage with this statement and does not recognize it as "corrective action", but stresses that "course-of-action" is a more appropriate term to describe the

USCIS recommendation. The definition of "corrective" includes terms such as rectify and remedial. In other words, to "correct a mistake". A number of "corrective" actions could have been considered and implemented by USCIS, but none were every identified. Instead, they recommended a "course of action", which was to submit I-130/I-485 applications, as a path or procedure to an end result and not to correct a mistake. USCIS has been unwavering in their denial of any mistake. To refresh the court on the original mistake: the I-600 submissions were rejected because of the USCIS claim that Mr. Milakovich's sons were under Hague Convention rules: (1) they were NOT because they were habitually resident in a non-Hague Convention country, (2) they had originally been in a Hague Convention Country but under a different legal system and therefore were NOT subject to the Hague Convention rules, and (3) their adoption was full and final prior to the U.S. enforcement date of the Hague Convention. Three independent and different criteria why USCIS made a mistake in rejecting the I-600s, which is the genesis of Mr. Milakovich's Complaint. The Adjudicating Officer, Ms. McGahey, an Appellee, clearly is responsible for this mistake and the USCIS Field Director, Ms. Iglesias, is responsible for the training and actions of her Adjudicating Officers, and specifically, not correcting this mistake.

ARGUMENT: APPLICABILITY OF THE USCIS ADJUDICATOR'S FIELD MANUAL (AFM)

Mr. Milakovich has citied guidance in the USCIS Adjudicator's Field Manual (AFM) to support his arguments. The Defendants-Appellees have correctly pointed out that the AFM does not have the force of law as would a Public Law (PL), United States Code (USC), or Code of Federal Regulations (CFR)(Answering Brief, p.17). In fact, the AFM contains a disclaimer, cautionary statement to this effect. The Defendants-Appellees believe that any of Mr. Milakovich's reference to the AFM is therefore not applicable, invalid, and should be discounted. Mr. Milakovich refutes these arguments for two reasons:

1) Logically, the AFM must reflect the lawful statutes and Federal Codes, which USCIS is obligated to apply. To categorically state that the AFM is not applicable for any consideration is to "in effect" leave all applications and interpretations of the law to individual Adjudicating Officers without any Agency oversight for consistent and equitable application and enforcement of U.S. law. This is not logical and the consequences of no oversight or training would be chaos.

2) The USCIS is tasked with providing a consistent application of the U.S. Law and the AFM is a means to provide guidance and training to achieve this objective. And, the Field Director of a USCIS office is specifically charged with the responsibility to assure training objectives are fully satisfied and subordinates are managed. It is inconceivable that

the USCIS would not train their personnel in the proper application of USCs and CFRs within the context of their mission. For the Defendants-Appellees to assert that the AFM has no bearing or relevance (Answering Brief, p.17) is a vain effort to present a case contrary to established practice – namely, the AFMs have relevance and Mr. Milakovich's reference to specifics in the AFMs is appropriate and germane. It is also poignant to note that USCIS "Policy Memorandums" (PM) are a means to disseminate policy and guidance to USCIS personnel and that usually, these PMs precede and identify updates to the Adjudicator's Field Manual (AFM). Each USCIS PM has a SCOPE paragraph, which typically contains a statement such as the following examples;

> "Unless specifically exempted herein, this PM applies to and binds all USCIS employees who adjudicate petition and applications…" and, "This PM applies to and is binding on all domestic U.S. Citizenship and Immigration Services (USCIS) employees and offices".

The importance, weight, and applicability of the PMs and AFM in administering and implementing the law is clearly conveyed by these directives, even if they are "nothing more than an internal policy guide" (Answering Brief, p. 17).

Mr. Milakovich has noted the Supreme Court action and opinion delivered by Justice Kagan, *No. 10-694, Joel Judulang, Petitioner v. Eric H. Holder, Jr., Attorney General, December 12, 2011*: (Milakovich Brief, p.48)

> "When an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one. Here, the BIA has failed to meet it… We hold that the BIA's approach is "arbitrary and capricious" under the Administrative Procedure Act, 5. The BIA's approach therefore cannot pass muster under ordinary principles of administrative law." (underline added)

Mr. Milakovich would like to note that the USCIS Adjudicator's Field Manual (AFM) is a compendium of USCIS policies and cannot be arbitrary dismissed as the opposition is proposing. Specific reference is made to Mr. Milakovich stating that submission of an I-485, according to guidance in the AFM, would be denied (Milakovich Brief, p. 13-14), therefore the I-485 could not expected to be an administrative, "corrective action". It is further noted that the Appellees have never provided "a reasoned explanation for its action" in not following their own policies concerning the I-485, specifically, why an I-485 must be submitted (according to them), when the AFM states it will be denied, given the circumstances of Mr. Milakovich.

ARGUMENT: ANY AVENUE OF REDRESS?

Mr. Milakovich has on multiple occasions tried to address the USCIS mistakes with USCIS without success. He has previously contacted three

different governmental oversight agencies, including the USCIS Ombudsman, in an effort to address the USCIS mistakes, all to no avail (silence). The question is; when a government agency makes a mistake, acts inappropriately or acts with neglect or abuse, is there any avenue for redress? To quote the Appellee, Ms. Iglesias, "We don't admit to any mistake, and even if there had been, there is NOTHING that can be done about it". Mr. Milakovich hopes and prays she is wrong. Is the government always assumed to be right and the citizen wrong? Or, is it possible for David to prevail over Goliath?

ARGUMENT: FLORIDA STATE COURT ORDER

The Appellees have stated, "But the fact that Mr. Milakovich has adopted his sons as a matter of state law does not automatically render them U.S. Citizens as a matter of federal law" (Answering Brief p. 20). Mr. Milakovich has never asserted this and such an allegation misdirects attention from the real issue, namely the validity and acceptance of a State Court order in Federal Court, and this, is the issue addressed by Mr. Milakovich (Milakovich Brief, p. 28, 40-44). Does the Federal Court recognize and give full credit to the Florida State Court order pertaining to Mr. Milakovich and his sons? This is the germane issue.

ARGUMENT: U.S. CITIZENSHIP

"It is important to note that there is no statutory mechanism by which the mere adoption of a foreign national child automatically makes that child a U.S. citizen or a lawful permanent resident" (Appellee Brief, p. 3-4). Mr. Milakovich has never challenged this. However, the Appellees seem intent to portray that he is making this claim for his sons' citizenship. Again, Mr. Milakovich notes that States have NO right or authority in this regard and that U.S. Citizenship is strictly within the domain of Federal action – period. However, a state court order can establish the basis to meet Federal statutory requirements for citizenship and use the court order as a basis in an application for U.S. Citizenship, to Federal agencies. It is perplexing to Mr. Milakovich why the Appellees continue to address this topic when it is not an issue.

The Appellees properly state that according to 8 U.S.C. § 1431, "If the adjustment of status application is approved…. The child will automatically become a U.S. citizen by operation of law" (Appellee Brief, p. 5 and p. 7). Mr. Milakovich humbly notes that, as he has previously explained (Milakovich Brief, p. 36-37), adjustment of status (without I-485 application) was one of the administrative "corrective actions" available to USCIS. If this "corrective action" had been taken, the mistakes by USCIS would have been corrected and Mr. Milakovich's sons would have each "become a U.S. Citizen by operation of law".

ARGUMENT: MR. MILAKOVICH'S GOOD NAME AND CHARACTER

Mr. Milakovich has been disheartened and dismayed by the lack of honest legal arguments and neutral presentation of "facts". He is also distressed at the veiled attempts to besmirch and cast dispersions on his good name, honesty and integrity. Some examples include the following: 1) "Plaintiff seems to have been able to bring the children to the United States on B-2 visitor visas, (Appellee's Answering Brief , page 10) , one of repeated comments implying he somehow obtained Visitor Visas for his sons fraudulently, even though, factually, he was following directions given by USCIS and that the U.S. Embassy was 100% knowledgeable of all the circumstances, including the USCIS promise "to straighten out" after arrival in the United States; 2) that the adoptions of his sons were alleged (Doc. 10, p. 2), even though opposing counsel had a copy of the Decree of Adoption in her possession; 3) that Mr. Milakovich was asking that the I-600 be processed after his sons were in the United States, which he did not; 4) that he "implied" to the Field Operations Director that USCIS commit an act violating the law on his behalf, which is too offensive and reprehensible to even comment upon; 5) that Mr. Milakovich has asked for alleged "corrective actions" to mitigate mistakes by USCIS, actions clearly identified in the AFM, for which USCIS is silent on their existence; 6) the repeated refrain by the Appellees that Mr. Milakovich is asking the Court to exercise

jurisdiction over USCIS discretionary domain, which he is absolutely not doing, and has not done or attempted to do -- ever; 7) the blatant assertion that Mr. Milakovich claims U.S. citizenship was granted through the Florida State Court Order, which is absurd, ridiculous and not true; 8) Mr. Milakovich allegedly submitted the I-600s and they were allegedly not accepted and "returned" – ugh! (Appellee Brief, p.9); a plethora of references to Mr. Milakovich "admits" instead of "stated"; and other actions. The deliberate actions demeaning Mr. Milakovich are particularly repugnant considering that Mr. Milakovich is in reality, Major Marko Milakovich, USAF (Retired), a decorated Vietnam Veteran who voluntarily served his Country and more recently has served under USAF military orders for 3 ½ years in the Middle East – all honorable service to protect and safeguard our freedoms and way of life in the United States. Mr. Milakovich has noted the legalese posturing, finessing and tiptoeing which may trump his simplistic and honest efforts to obtain justice for his sons. As a consequence, it leaves him wondering if the concept of the "spirit of the law" and attainment of justice has been supplanted by the goddess of procedural artistry, manipulation, and subterfuge by "big brother". He hopes and prays this isn't the case.

ARGUMENT: MR. MILAKOVICH'S SONS' FUTURE

As a final comment, Mr. Milakovich reminds the court that this case concerns the future of his

two adolescent, adopted sons, formerly the sons of Mrs. Milakovich's deceased brother; boys who are being subjected to deprivations, including loss of benefits, that would not have occurred if USCIS had not made mistakes, or had corrected them, for which the boys are suffering as a consequence. Both Mr. and Mrs. Milakovich are U.S citizens, and their sons should be, but are not; but would have been, were it not for the mistakes by USCIS. Both of Mr. Milakovich's sons are proud members of the U.S. Army Junior ROTC in their school.

II. CONCLUSION

The Appellees have asked this Court to "Affirm the District Court on that basis, or on one of the several additional bases found in the record" (Answering Brief, p. 22). Mr. Milakovich disagrees that it is necessary for this Court to only affirm one of the issues to rule against Mr. Milakovich. Instead, Mr. Milakovich asks this Court to find at least one of the rulings by the District Court to be in error to grant Mr. Milakovich's petition before this Court. While Mr. Milakovich has presented a number of issues, he believes the District Court has erred upon perhaps the most salient issue before this Court; namely, the claim of deprivation of his United States Constitutional rights of due process of law under the 5th and 14th Amendments, which the District Court has the jurisdictional authority to address.

Dated: September 17, 2012

s/

Marko Milakovich
Pro Se Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,779 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and it complies with the typeface requirements of Fed. R. App. P. 32(a)(5), because it has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14 point, Times New Roman font.

Dated: September 17, 2012

s/
Marko Milakovich
Pro Se Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was served by U.S. Mail on the parties' counsel of record his 17th day of September 2012,as follows:

Lana L. Vahab
Trial Attorney
United States Department of Justice,
Civil Division
Office of Immigration Litigation,
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Counsel for the Defendants/Appellees

Dated: September 17, 2012

s/
Marko Milakovich
Pro Se Plaintiff/Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 12-12990
Non-Argument Calendar

D.C. Docket No. 6:11-cv-01244-GAP-KRS

MARKO MILAKOVICH

Plaintiff-Appellant

versus

USCIS-ORLANDO,
MARGARET IGLESIAS,
individually,
PAULINE MCGAHEY
individually,

Defendants-Appellees.

Appeal from the United States District Court
For the Middle District of Florida

(December 11, 2012)

Before MARCUS, MARTIN and FAY, Circuit Judges. PER CURIAM:

Marko Milakovich, proceeding pro se, appeals the district court's grant of the defendants' motion to dismiss for lack of jurisdiction and failure to state a claim, in an action alleging violations of the fifth and Fourteenth Amendments, various provisions of the Immigration and Nationality Act ("INA"), and 18 U.S.C. § 242. On appeal, Milakovich argues that: (1) the district court incorrectly concluded that it lacked jurisdiction over: (a) his claim that the U.S. citizenship and Immigration Services ("USCIS") violated his and his foreign-born adopted sons' due process rights by failing to process Forms I-600 that he filed on behalf of his sons; (b) his request for a grant of citizenship to his sons, under 8 U.S.C. §§ 1401, 1431, and 1449; (c) his request for a grant of "all lost Social Security benefits" resulting from improper USCIS actions; and (d) his alternate request for a grant of legal permanent resident ("LPR") status to his sons, under 8 U.S.C. § 1255; and (2) the district court improperly dismissed his claim against two USCIS employees under Bivens V. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), and erroneously failed to give him an opportunity to repair any deficiencies in his pro se pleadings. After careful review, we affirm.

When evaluating a district court's conclusions on a motion to dismiss for lack of subject matter jurisdiction, we review the district court's legal conclusion de novo and its factual findings for clear

error. Zinni v. ER Solutions, Inc., 692 F.3d 1162, 1166 (11th Cir. 2012). We review de novo a dismissal for failure to state a claim, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1275 (11th Cir. 2012). Although pro se briefs are to be liberally construed, a pro se litigant who offers no substantive argument on an issue in his initial brief abandons that issue on appeal. See Timson v. Sampson, 518 F.3d 870, 874 (11th Cir. 2008).[1] We may affirm on any ground that appears in the record, whether or not it was relied upon or considered by the district court. Lanfear, 679 F.3d at 1275. A complaint is subject to dismissal for failure to state a claim if it does not state a plausible claim for relief on its face. Id. The allegations in the complaint must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true. Id.

First, we are unpersuaded by Milakovich's argument that the district court erred in dismissing his claims again the USCIS. In order for a person to be deemed a U.S. citizen at birth under § 1401, the person must have been (a) born either in the United States or to at least one U.S. citizen; or (b) found in the United States while under the age of five. 8 U.S.C. §1401. In order for a child adopted by a U.S.

[1] As a result, Milakovich has abandoned any claims he raised before the district court but failed to raise on appeal, including those under the Administrative Procedure Act. See Timson, 518 F.3d at 874.

citizen parent to automatically acquire citizenship under § 1431. The child must be admitted as an LPR. 8 U.S.C. §1431(a)(3),(b). Section 1449 identifies the information that should be included in a certificate of naturalization. 8 U.S.C. § 1449. The status of an alien admitted into the United States may be adjust to that of an LPR by the Attorney General, at his discretion. 8 U.S.C. §1255(a). With the exception of the decisions related to applications for asylum, federal courts lack jurisdiction to review a decision or action of the Attorney General or the Secretary of Homeland Security, the authority for which is specified to be in the discretion of either official. See 8 U.S.C. § 1252(a)(2)(B); see also 8 U.S.C. 1158(a). Finally, § 242 is a criminal stature that provides no basis for civil remedies. See Hann v. Home Ins. Co., 281 F.2d 298, 303 (5th Cir. 1960);[2] see also Otero v. U.S. Att'y Genl, 832 F.2d 141, 141 (11th Cir. 1987) (holding that a private citizen has no judicially cognizable interest in the prosecution or non-prosecution of another).

To begin with, regardless of whether the district court had jurisdiction over Milakovich's claims under §§ 1401, 1431, and 1449, he failed to state a claim under any of those statutes. His sons were not born either in the United States or to a least one U.S. citizen; nor were they found in the United States while under the age of five. Accordingly, Milakovich failed to show that his sons

[2] In Bonner v. city of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

were U.S. citizens under §1401. See 8 U.S.C. § 1401; Lanfear, 679 F.3d at 1275. Because his sons were not LPRs, Milakovich failed to show that his sons were eligible for automatically acquired citizenship under § 1431. See 8 U.S.C. §1431(a)(3), (b). Because his sons had not yet received certificates of naturalization, he failed to establish a right to relief under § 1449. See 8 U.S.C. § 1449.

The district court also properly dismissed Milakovich's claim under § 1255, because the authority to grant an adjustment to LPR status is vested in the Attorney General, and federal courts lack jurisdiction to review this discretionary determination. See 8 U.S.C. §§ 1252(a)(B), 1255(a). Because he alleged no facts establishing hat his sons were eligible for social security benefits that were denied to them, he district court also properly denied relief on this claim. See Lanfear, 679 F.3d at 1275.

To the extent that Milakovich sought relief under 242, that statute is a criminal statute that provides no basis for civil remedies. See Otero, 832 F.2d at 141; Hanna, 281 F.2d at 303. Similarly Milakovich identified no authority for the proposition that the defendants' alleged violations of 20 C.F.R § 416.1618 or the USCIS Adjudicator's Field Manual provide a basis for judicially cognizable relief. Finally, to the extent that Milakovich sought relief with respect to the handling of his son's I-600 applications, he has alleged no facts suggesting that, had the defendants processed the applications more quickly, he or his sons would have received benefits to which they were constitutionally entitled, and he does not dispute that he was no

longer entitled to file the applications after his sons arrived in the United States.

Next, we reject Milakovich's claim that the district court erred in dismissing his Bivens cause of action. Bivens allows for a claim against a federal agent who, while acting under color of federal law, has violated the constitutional rights of an individual. See Hardison v. Cohen, 375 F.3d 1262, 1264 (11th Cir. 2004).

A party may amend its pleading once as a matter of course within 21 days after serving it, or, if the pleading is one to which a responsive pleading is required, 21 days after the earlier of service of a responsive pleading or of a motion under Fed.R.Civ.P. 12(b), (e), or (f). Fed.R.Civ.P. 15(a)(1). In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave, which should be freely given if the underlying facts or circumstance relied upon by a plaintiff may be a proper subject of relief. See Fed.R.Civ.P. 15(a)(2); Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1262 (11th Cir. 2004). A party ordinarily must be given at least on opportunity to amend before the district court dismisses the complaint. Corsello v. Lincare, Inc., 428 F.3d 1008, 1014 (11th Cir. 2005). A district court need not, however allow an amendment where it would be futile, i.e., where the complaint as mended would still be subject to dismissal. Hall, 367 F.3d at 1262-63.

In this case, Milakovich has not alleged facts sufficient to establish that either individual defendant violated his or his sons' constitutional

rights. As we've discussed above, he does not dispute that he was not entitle to file I-600 applications after his sons arrived in the United States, and he has failed to explain how any delay in processing the applications while he was overseas violated his or his sons' constitutional rights. To the extent that he sought relief for the defendant's alleged failure to inform him of "corrective measures," this claim is refuted by his own admission that, after he and his sons arrived in the United States, he was instructed to file additional forms, but declined to do so.

Milakovich's argument that the district court should not have dismissed his Bivens claims without giving him another opportunity to repair deficiencies in his pro se pleading in a third amended complaint is meritless. He has not indicated how he would have cured the remaining deficiencies in his complaint, had he been permitted to do so, and nothing in the record suggests that another amendment would not have been futile. See Hall, 367 F.3d at 1262-63

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Case No.: 12-12990-F

MARKO MILAKOVICH Plaintiff-Appellant v. USCIS-ORLANDO, MS. MARGARET IGLESIAS ,individually, MS. PAULINE MCGAHEY, individually, Defendants-Appellees.	)

APPELLANT MARKO MILAKOVICH'S PETITION FOR REHEARING

Marko Milakovich
5060 Harkley Runyan Rd.
St. Cloud, Florida 34771-9538
Tel: (407) 361-5461

Pro Se Plaintiff/Appellant

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1, the undersigned certifies that, to the best of his knowledge, the following persons, firms, and associations are the only ones that may have an interest in the outcome of this case.

(A) Trial Judges
Karla R. Spaulding (Magistrate Judge)
Gregory A. Presnell (Presiding Judge)

(B) Plaintiffs and Associated Persons
Marko Milakovich (Plaintiff-Appellant)
Ghukhuli Z. Milakovich (Spouse of Plaintiff-Appellant)
Son of Plaintiff-Appellant, age 15 years old
Son of Plaintiff-Appellant, age 13 years old

(C) Counsel for the Defendants/Appellees
Tony West
Assistant Attorney General
United States Department of Justice, Civil Division
Office of Immigration Litigation,
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044

David J. Kline
Director

United States Department of Justice, Civil Division
Office of Immigration Litigation,
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044

J. Max Weintraub
Senior Litigation Counsel
United States Department of Justice, Civil Division
Office of Immigration Litigation,
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044

Lana L. Vahab
Trial Attorney
United States Department of Justice, Civil Division
Office of Immigration Litigation,
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 532-4067
Facsimile: (202) 305-7000
lana.vahab@usdoj.gov
Court ID. No. A5501370

(D) Defendants/Appellees

U.S.C.I.S
6680 Corporate Centre Boulevard
Orlando, Florida 32822

Ms. Margaret Iglesias
6680 Corporate Centre Boulevard

Orlando, Florida 32822

Ms. Pauline McGahey
6680 Corporate Centre Boulevard
Orlando, Florida 32822

s/
MARKO MILAKOVICH
Pro Se Plaintiff/Appellant

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 28-1(b), Marko Milakovich provides the following statement identifying its parent corporations and any publicly held corporation that owns 10 percent or more of its stock.

Mr. Milakovich is an individual, Pro Se Litigant and there is no corporation, public or private, that is involved in this litigation.

CERTIFICATION OF COUNSEL UNDER RULE 35-5

I believe, based on a reasoned, studied and researched judgment, that the Court decision is contrary to the following decision of the Supreme Court of the United States and that rehearing by the court is necessary to secure and maintain uniformity of decision in this Court. I further believe, based on a reasoned, studied and researched judgment, that this appeal involves three questions of exceptional importance.

1. Whether the U.S. Supreme Court ruling in the matter *Haines v. Kerner, 404 U.S. 509* applies to this case as concerns an alleged failure to state a claim.

2. Whether it is a clearly established Fifth Amendment violation of due process by USCIS not accepting properly submitted applications.

3. Whether there was a violation of the U.S. Constitution, 10th amendment, when USCIS did not accept the ruling of the Florida State court order, and merely acknowledged its existence but not accepting the provisions contained therein.

s/
MARKO MILAKOVICH
Pro Se Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ISSUES FOR REHEARING

1. Concerning failure to state a claim; the U.S. Supreme Court ruled that in a case, which was substantially equivalent to Mr. Milakovich's case, the plaintiff should be allowed to be heard in court and that he was not to be denied based on the oppositions filing that the plaintiff failed to state a claim. It is a fact the court has not addressed Mr. Milakovich's case in light of the U.S. Supreme court ruling. At issue is the applicability of the cited U.S. Supreme Court's case as it may pertain to Mr. Milakovich's case.

2. Concerning deprivation of U.S. Constitutional rights, specifically in regard to the 5th Amendment, which addresses due process; it is a fact that Mr. Milakovich submitted two I-600s applications to USCIS, that were fully complete with comprehensive supporting documentation and that USCIS did not accept them for processing. The processing was not delayed, because they were not accepted for processing – processing was refused. At issue is the reason why refusal to accept Mr. Milakovich's properly submitted applications may not meet the standards of "failure to provide due process.

3. Concerning deprivation of U.S. Constitutional rights; specifically in regard to the 10th Amendment[1], it is a fact that Mr. Milakovich

[1] "The powers not delegated to the United States by the Constitution, more prohibited by it to the States, are reserved

relied on the Florida State court order as a basis for many of his claims. It is also a fact that the U.S. District Court and this Court has not recognized the Florida State Court order as valid and has discounted and ignored the tenants of this State Court order. At issue is why the Florida State Court Order is not accepted when the Supreme Court Ruling would apparently provide that the State court ordered must be accepted.

PROCEDURAL HISTORY

The original Complaint was filed by Plaintiff-Appellant, Mr. Milakovich, a pro-se litigant on 17 August 2012, in the Middle District Court, for complaints of deprivation of certain Constitutional rights and other deprivations. The District Court finding was to dismiss the case. Mr. Milakovich then filed an appeal in the U.S. 11th Circuit Court of Appeals on 1 June 2012. The court preliminary finding was to uphold the District Court case and that the case would be dismissed.

STATEMENT OF FACTS.

---

to the States respectively, or to the people. Also note; that although the 10th Amendment was not referred to by its numerical designation in Mr. Milakovich's brief, it was referred to by its definition more than once.

Mr. Milakovich's sons were fully adopted in India and then joined him and his spouse, in the Middle East country of Qatar, where Mr. Milakovich was stationed with the USAF. Mr. Milakovich submitted I-600s to USCIS who did not accept them for processing. USCIS told Mr. Milakovich to get Visitor Visas for his son's and "it" would be straightened out after they arrived in the United States.

After Mr. Milakovich and his family had arrived in the U.S. they were told by USCIS that nothing could be done about his son's status since they had arrived with Visitor Visas, with the only course of action to file I-130/I-485 applications, which ignored the mistakes USCIS made in refusing to accept the I-600 while he was overseas serving with the U.S.A.F., in the Middle East.

Mr. Milakovich filed a Complaint in U.S. District Court, which was denied. He then filed an appeal in the 11th Circuit Court of Appeals.

ARGUMENT

I. The Courts Opinion Conflicts With The Supreme Court's Ruling In Haines v. Kerner, 404 U.S. 519.

Failure to State a Claim under the equal protection clauses of the United States Constitution and the common law authorities was addressed in *Haines v. Kerner*, 404 U.S. 519, upon which the Supreme Court overturned the District Court and ruled that the Pro Se Plaintiff was entitled to an opportunity to offer proof and the case was

remanded for further proceeding consistent herewith. (Referenced in Doc. 19, pg. 3-4)

In *Platsky v. C.I.A.* 953 F.2d. 25, it was noted that the court errs if it dismisses the Pro Se litigant without instruction of how pleadings are deficient and how to repair pleadings. (Referenced in Doc. 19, pg. 3-4)

There is also a conflict with Federal Rule 12(b)(6), which provides the basis that *a complaint should not be dismissed for failure to state a claim upon which relief can be granted* "unless it appears beyond a doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief". See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Neitzke v. Williams*, 109 S. Ct. 1827, 1832 (1989); *Little v. City of North Miami*, 805 F.2d 962,965 (11th Cir. 1986); and *Gomez v. Toledo* (1980, U.S.) 64 L Ed 2d 572, 100 S Ct 1920. (Referenced in Doc. 19, pg. 16). Furthermore, that in *Seymour vs. Union News Company*, 7 Cir., 1954, 217 F.2d 168; and see Rule 54c, demand for judgment, FRCP, 28 USCA: "…every final **judgment shall grant the relief** to which the **party** in whose favor it is rendered is entitled, **even if the party has not demanded such relief** in his pleadings." (Referenced in Doc. 19, pg. 5)

II. The Court's Opinion Conflicts With The U.S. Constitution Amendment 5, which states: "…nor be deprived of life, liberty, or property, without due process of law;".

It is a fact that USCIS twice refused to accept the I-600 applications that were submitted to them. It is also a fact that this was a non-discretionary act.

What is unknown is the standard the District Court and this Court deems the USCIS act not to rise to the definition of failure to provide "due process".

The Eleventh Circuit Court had several findings concerning deprivation of constitution rights. In the current case of Milakovich, Mr. Milakovich had addressed some of this same issues in the District Court. However, since his case was dismissed, he could not obtain testimony to substantiate his complaints. This is a case of "Catch-22" and as a consequence Mr. Milakovich could not present his case. In Mr. Milakovich's case, the substantiation of refusing to accept his twice submitted I-600 applications which were refused to be accepted in a similar situation[2]. Regardless, the question still remains, why does refusal to accept the application of no consequence concerning denial of Due Process as provided by the Fifth Amendment?

---

[2] Sanders v. Henry County, D.C. Docket No. 1:10-cv-02616-RLV, p. 4: § 1983 liability on a county, a plaintiff must show: (1) that his constitutional rights were violated; (2) that the county had a policy or custom that constituted deliberate indifference to those constitutional rights; and (3) that the policy or custom caused the violation. *Id.* We have also held that a policy or custom may be shown by inadequate training of its employees. *Id.* at 1291. This is because "where a [county]'s failure to train its employees in a relevant respect evidences a deliberate indifference to the rights of its inhabitants [the county's failure to train its employees] can be properly thought of as a city policy or custom that is actionable under § 1983." *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489- 90 (11th Cir. 1997)

In Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992), it was held that; "A finding that a right merits substantive due process protection means
that the right is protected against government actions regardless of the procedures the government employs. In this case, USCIS did not accept the I-600 applications, ergo violation of due process. If USCIS had accepted the applications and denied them, the denial is within the context of their authority as a "discretionary action"
8 U.S.C. § 1252(a)(2)(B)(i).

Although the INA precludes judicial review of the discretionary denial of an application for adjustment of status, it does not preclude review by an appellate court of non-discretionary legal decisions that pertain to constitutional issues or statutory eligibility for discretionary relief. 8 U.S.C. §1252(a)(2)(D); see also Chacon-Botero v. U.S. Att'y Gen., 427 F.3d 954, 957 (11th Cir. 2005). In the case of Mr. Milakovich, USCIS performed a non discretionary act of refusing to accept his submitted I-600 applications for processing.

III. The Court's Opinion Conflicts With The U.S. Constitution Amendment 10, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".

Again, Mr. Milakovich would like to note that in his brief to this court that while he did not state the term "10th Amendment", he did refer to it by its

definition, namely[3]; Also, Mr. Milakovich has noted the Supreme Court action and opinion delivered by Justice Kagan, *No. 10-694, Joel Judulang, Petitioner v. Eric H. Holder, Jr., Attorney General, December 12, 2011*: (Milakovich Brief, p. 48)[4]

The Federal Courts have recognized and give full credit to the Florida State Court order pertaining to Mr. Milakovich and his sons. This is the germane issue. USCIS and the Court apparently relies on the USCIS definition of Discretionary Authority to decide which U.S. Constitutional Amendment and laws do not apply "for immigration purposes". The only way USCIS cannot accept the Florida State court order if there are "rare circumstances" and this must be judged in a Federal Court. Apparently USCIS has not done this? If they have, they should

---

[3] The case of *Smith v. Bayer Corp*, Case No. 09-1205 (June 16, 2011), which was eventually heard in the Supreme Court, in a decision authored by Justice Kagan, all of the Justices agreed that the District Court had exceeded its authority in enjoining the state court action. All nine of the Justices agreed that the matter was subject to the Anti-Injunction Act, 29, U.S.C. § 2283, which prohibits federal courts from enjoining state proceedings except in rare cases. (Milakovich Brief p. 22, p. 41, p. 43)

[4] "When an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one. Here, the BIA has failed to meet it… We hold that the BIA's approach is "arbitrary and capricious" under the Administrative Procedure Act, 5. The BIA's approach therefore cannot pass muster under ordinary principles of administrative law." (underline added).

identify the relevant court citations. If not, USCIS policy is void under the U.S. 10th Amendment.

It is appropriate to note that USCIS has not claimed that the Florida State Court Order was invalid, but rather that was not "acceptable" or "recognized for immigration purposes. While District Court's ruling are not incumbent in other Districts, the following case in a District Court in Michigan is cited for its relevancy[5].

---

[5] UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION February 16, 2006
STEFANO MESSINA AND MARIA MESSINA, PLAINTIFFS, v.
U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DEFENDANT.

In this case, a child entered the U.S. on a Visitor Visa and later the State issued an adoption order and later amended the order to indicate that the adoption was entered Nunc Pro Tunc, retroactive to the minor's date of birth. A major point of contention is that while the USCIS specifically stated that "retroactive or nunc pro tunc adoption are not acceptable for immigration purposes", the complaining party disagrees. Both parties agree that the agency's decision may be reversed only if the court finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and that review is limited to the information contained in the administrative record. USCIS stated that the amended adoption, in which the wording of the State court order was clear, would not be given the effect of "nunc pro tunc". And furthermore, stated that based on two decisions of the Board of Immigration Appeals, that "retroactive adoptions are not recognized for immigration purposes despite any retroactive effect given the adoption by the issuing court." USCIS did not claim that the order was invalid, but rather that it was not "acceptable" or "recognized" because it makes the

The convening Court held that USCIS "had no legal basis for disregarding the Michigan court's order of adoption that is retroactive to the date of her birth." A plain language understanding of the Michigan court order is

---

adoption retroactive. USCIS cited no authority, and "this court is aware of none, supporting the proposition that a federal agency may disregard a valid state court order -- particularly where, as in the present case, the agency's decision is not supported by statutory authority".

While decisions of the BIA are binding on officers and employees of the Department of Homeland Security, that body is nothing more than an administrative court created by the Department of Justice principally to review decisions of immigration judges. See 8 C.F.R. § 1003.1(b), (g). And while the BIA may interpret the Immigration and Nationality Act and implementing regulations, it has no law-making or rule-making authority. At most, the BIA may comment on the meaning of immigration regulations, but it may not create or amend the regulations.

The District Court noted that: "If defendant doubted the validity or correctness of the "nunc pro tunc" designation, defendant should have sought relief from the court that issued the order. Court orders are presumed valid, and it is beyond the province of an administrative agency to declare an order "unacceptable" and act as though the order did not exist. Defendant may challenge the validity of a court order in the proper forum, but it may not on its own motion declare the order invalid. Defendant, like any government entity or individual, is duty bound to follow the orders of validly constituted courts and may not reserve the right to follow only those orders with which it agrees."

As is well known, while the ruling in another District Court are not binding on cases within this District, is generally held that they are persuasive in their effect.

that if you do not accept the provisions of a State court, you cannot accept its validity.

Please note that the Florida State Court Order has the status and enforceability the same as a Federal Court Order IF and WHEN the issue is removed from a State to a Federal Court. Until it is removed to a Federal Court, and the Federal Court acts upon the State court order, it stands in full force, which in this case it must be accepted by USCIS and the USCIS policy of not accepting a State court order for "immigration purposes" has NO force of law.

It may also be noted that USCIS, the District Court and this Court have expounded on the many USCs why Mr. Milakovich's sons do not qualify for U.S. Citizenship. Mr. Milakovich is very familiar with these and has NEVER disagreed. As a consequence it can only be construed as a "smoke screen" to provide an appearance of disqualification. As has been repeatedly stated by Mr. Milakovich, his actions are based on the Florida State court order, which then evokes a different set of USCs qualifying Mr. Milakovich's sons as eligible for citizenship. Please note that Mr. Milakovich has NEVER asserted that the State Court can confer U.S. Citizenship, even though the Appellees have incorrectly claimed this, with the obvious intent to give the appearance that Mr. Milakovich is ill-informed and ignorant of the applicable statutes. This is plainly a subterfuge to avoid the U.S. 10th Amendment.

GENERAL COMMENTS

To understand some of the reasons why USCIS acts for self-promoting ways and seemingly acts in ways contrary to justice, one only has to understand that Unlike most other federal agencies, USCIS is funded almost entirely by user fees. Under President George W. Bush's FY2008 budget request, direct congressional appropriations made about 1% of the USCIS budget and about 99% of the budget was funded through fees. The total USCIS FY2008 budget was projected to be $2.6 billion. (http://en.wikipedia.org/wiki/United_States_Citizenship_and_Immigration_Services) While this court case is not the forum to address these type of problematic issues, it has been Mr. Milakovich's personal experience that this is a reasonable explanation why USCIS has acted as it has concerning many of the issues pertaining to Mr. Milakovich – to the tune of thousands of U.S. dollars, with many more thousands expected in the future – through application fees. It should be noted that Congress mandates that USCIS be self-funded. This funding model is akin to "having the dog watch the hamburger", with every expectation that their actions will be governed more based on this incentive that the goal of impartial decisions and processing.

It is patently clear and obvious that USCIS and the Courts do not recognize a State court order which forms the basis of many of Mr. Milakovich's

actions, even though State courts orders must be accepted in Federal matters, UNLESS, the specific issued is presented for a ruling in a Federal court. Mr. Milakovich is unaware that this has occurred and therefore the State court order stands as complete and valid. This is patently clear and obvious under the U.S. 10th Constitutional Amendment. USCIS has NO AUTHORITY, to ignore the Florida State Court order which is so critically germane to Mr. Milakovich's case, and which the Courts have failed to address. It is patently clear and obvious that failure to address this issue is absolutely contrary to U.S. Supreme Court rulings.

The *Defendants-Appellees* and the District Court have all cited a plethora of citations why Mr. Milakovich's sons do not qualify for citizenship. Wow! How could Mr. Milakovich be so ignorant not to know of these citations. The answer is he is fully aware of them and completely agrees with them. Yet he is repeatedly quoted these citations as if he knows not of their existence or import. Mr. Milakovich has repeated made his claim for his son's US citizenship based on the Florida State Court order which is being ignored. Please note he has never claimed the State court order has conferred citizenship to his sons. Why is the issue of the validity of the State court not addressed? Why is this issue of its acceptance by USCIS not being addressed. Clearly this issue had been directly examined by the U.S. Supreme Court in the light of the U.S. 10th Constitutional Amendment.

Mr. Milakovich is a realist and has no expectation of plain, common sense justice in the courts. The courts goal appears to be maintaining the sanctity of the process of the judicial system as the goal, to the exclusion of principled justice which holds the ideals of right and wrong and impartial application of the law as sacrosanct. He can only conclude that Lady Justice does not wear a blindfold.

CONCLUSION

Mr. Milakovich*, the Plaintiff-Appellant,* respectfully requests a rehearing because the Courts opinion appears to be in conflict with The U.S. Supreme Court ruling on Failure to State a Claim and with the U.S. Constitutional 5th and 10th Amendments. Of these three issues, the most poignant and critical issue is the failure to accept the Florida State Court order, which is mandated by the 10th Amendment, and that the Florida State Court order stands as valid unless there are "rare circumstances" which might apply, and if there are, the issue must be addressed in Federal Court.

Dated: January 18, 2013

Respectfully submitted,

s/

Marko Milakovich
5060 Harkley Runyan Rd.
St. Cloud, FL 34771-953
Tel: (407) 361-5461
Pro Se Plaintiff-Appellant

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

March 05, 2013

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 12-12990-FF
Case Style: Marko Milakovich v. USCIS, et al
District Court Docket No: 6:11-cv-01244-GAP-KRS

The enclosed order has been entered on petition(s) for rehearing:

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Janet K. Spradlin, FF
Phone #: (404) 335-6178

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-12990-FF

MARKO MILAKOVICH,
Plaintiff – Appellant,

versus

USCIS – ORLANDO
MARGARET IGLESIAS, individually,
PAULINE MCGAHEY, individually,
Defendants – Appellees.

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

BEFORE: MARCUS, MARTIN and FAY,
Circuit Judges

PER CURIAM:

The petition for panel rehearing filed by Appellant Marko Milakovich is DENIED

ENTERED FOR THE COURT:
_____s/_____
UNITED STATES CIRCUIT JUDGE
ORD-41

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

March 19, 2013

Sheryl L. Loesch
U.S. District Court
401 W CENTRAL BLVD
ORLANDO, FL 32801

Appeal Number: 12-12990-FF
Case Style: Marko Milakovich v. USCIS, et al
District Court Docket No: 6:11-cv-01244-GAP-KRS

The enclosed judgment is hereby issued as the mandate of this court.

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being mailed to counsel and pro se parties. A copy of the court's decision was previously mailed to counsel and pro se parties on the date it was issued.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Janet K. Spradlin, FF
Phone #: (404) 335-6178

Enclosure(s)
MDT-1 Letter Issuing Mandate

IN THE UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 12-12990-FF

MARKO MILAKOVICH,
Plaintiff – Appellant,

versus

USCIS – ORLANDO
MARGARET IGLESIAS, individually,
PAULINE MCGAHEY, individually,
Defendants – Appellees.

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

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: December 11, 2012
For the Court: John Ley, Clerk of Court
By: Djuanna Clark

Issued as Mandate:

March 19, 2013

NOTE: *Mr. Milakovich submitted an N-600, Application for Certificate of Citizenship based on the Florida State Court Order for each son. The Applications were denied without any comment on the State Court Order. Mr. Milakovich then appealed using the Form I-290B. The following is the information he provided in Part 3 of the form.*

OMB No. 1615-0095; Expires 11/30/2014

Department of Homeland Security
U.S. citizenship and Immigration Services

Form I-290B, Notice of Appeal or Motion

Part 3. Basis for the Appeal or Motion

Appeal: Provide a statement explaining any erroneous conclusion of law or fact in the decision being appealed.

The USCIS decision being appealed **is wrong** because it does not consider the Florida State court order, which was the basis for submitting the N-600 applications for Certificate of Citizenship. Specifically, the USCIS decision is **WRONG** because it violates the U.S. Constitution, Amendment 10. By Force of Law there is **NO BASIS** for USCIS to discount and ignore the Florida State court order. And while USCIS has stated it will not accept State court orders for "immigration purposes", this is an

assumption of power not granted to USCIS. YES, the USCIS has been granted certain discretionary authority to establish needed administrative practices and procedures to accomplish its mission, but it **DOES NOT** have the authority to violate the US Constitution and US Supreme Court rulings and choose which laws to obey and which laws to ignore.

My cover letter for the N-600s, which were denied, specifically addressed the issue of the Florida State court order and provided justification why it must be accepted, by Force of Law and why it provided the basis for US Citizenship for my sons. Strangely, USCIS has ignored this and evaluated the N-600s as if the Florida State court order, in essence, did not exist. I have attached a copy of my N-600 cover letter with applicable portions highlighted. I will not repeat all the information in my cover letter. I do note, however, that the information is an overwhelming, preponderance of legal justification why USCIS must accept the Florida State court order and why USCIS cannot ignore it.

Imminently pertinent is the U.S. Constitution, Tenth Amendment, which states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Succinctly applicable is the case of *Smith v. Bayer Corp.*, Case No. 09-1205 (June 16, 2011), which was eventually heard in the Supreme Court. In a decision authored by Justice Kagan, all of the

Justices agreed that the District Court had exceeded its authority in enjoining the state court action. All nine of the Justices agreed that the matter was subject to the Anti-Injunction Act, 29, U.S.C. § 2283, which prohibits federal courts from enjoining state proceedings except in rare cases. Therefore, lacking "rare cases", the Florida State court order creating a "blood descendant" relationship prevails.

NOTE: Mr. Milakovich maintains that his son's Certificate of Citizenship should be dated effective 19 August 2008, the date they entered the United States as a reasonable course-of-action considering the circumstances. This is often referred to as a "nunc pro tunc" relief.

RETROACTIVE RELIEF, INTERIM DECISION #3268

NOTE: This Interim Decision addresses retroactive relief through the action of "nunc pro tunc. Basically it confirms that "there had long been an administrative practice of granting such relief", "And in 1954, the Attorney General ruled that there was no reason to reverse this practice following the enactment of the 1952 Act."

USCIS stated that the amended adoption, in which the wording of the State court order was clear, would not be given the effect of "nunc pro tunc". And furthermore, stated that based on two decisions of the Board of Immigration Appeals, that "retroactive adoptions are not recognized for immigration

purposes despite any retroactive effect given the adoption by the issuing court." USCIS did not claim that the order was invalid, but rather that it was not "acceptable" or "recognized" because it makes the adoption retroactive. USCIS cited no authority, and "this court is aware of none, supporting the proposition that a federal agency may disregard a valid state court order -- particularly where, as in the present case, the agency's decision is not supported by statutory authority".

While decisions of the BIA are binding on officers and employees of the Department of Homeland Security, that body is nothing more than an administrative court created by the Department of Justice principally to review decisions of immigration judges. See 8 C.F.R. § 1003.1(b), (g). And while the BIA may interpret the Immigration and Nationality Act and implementing regulations, it has no law-making or rule-making authority. At most, the BIA may comment on the meaning of immigration regulations, but it may not create or amend the regulations.

The District Court noted that: "If defendant doubted the validity or correctness of the "nunc pro tunc" designation, defendant should have sought relief from the court that issued the order. Court orders are presumed valid, and it is beyond the province of an administrative agency to declare an order "unacceptable" and act as though the order did not exist. Defendant may challenge the validity of a court order in the proper forum, but it may not on its own motion declare the order invalid. Defendant,

like any government entity or individual, is duty bound to follow the orders of validly constituted courts and may not reserve the right to follow only those orders with which it agrees."

As is well known, while the ruling in another District Court are not binding on cases within this District, is generally held that they are persuasive in their effect.

The convening Court held that USCIS "had no legal basis for disregarding the Michigan court's order of adoption that is retroactive to the date of her birth."

NOTE: A major point of contention is that while the USCIS specifically states that "retroactive or nunc pro tunc adoption are not acceptable for immigration purposes". However, Mr. Milakovich's sons' adoption was not retroactive. The State Court Order was a formal recognition of a foreign adoption and provided a declaration of the family relationship of that adoption. Further, this is rightfully within the legal purview of the State Court, and is not trumped, voided or avoided by USCIS action. Further, that while the BIA may interpret the Immigration and Nationality Act and implementing regulations, it has no law-making or rule-making authority. Therefore, a federal government agency "is duty bound to follow the orders of validly constituted courts and may not reserve the right to follow only those orders with which it agrees." Therefore, the provisions of this Florida State Court order establishing the relationship between Mr. and Mrs. Milakovich and their sons STAND AS VALID.

Please note that in addition to these comments, which are a part of the I-290B, (1) I have provided a copy of the USCIS letter of denial, which contain my comments (which are highlighted) to various paragraphs and (2) a copy of my Cover Letter to the N-600 applications, which were submitted, and on this Cover Letter, have added highlights to succinctly relevant information. I have also provide an article on "Revisiting Messina vs. USCIS by Yosef Yacob, JD, LLM, PHD, which has a plethora of relevant information.

Also, please note that a Cashier's Check, in the amount of $630.00, serial number 6659900434 from Wells Fargo Bank, dated December 21, 2012 is attached.

s/
Marko Milakovich

STEFANO MESSINA AND MARIA MESSINA, PLAINTIFFS, vs. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DEFENDANT.

Civil Action No. 05-CV-73-409-DT

UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2006 U.S. Dist. LEXIS 10292
February 16, 2006, Decided

COUNSEL: [*1] For Stefan Messina, Maria Messina, Plaintiffs: Herman S. Dhade, Steven M. Garmo, Garmo Assoc., Farmington Hills, MI.

For Department of Homeland Security, United States Citizenship and Immigration Services. Defendants: L. Michael Wicks, United States Attorney's Office, Detroit, MI.

JUDGES: Bernard A. Friedman, CHIEF UNITED STATES DISTRICT JUDGE

OPINION BY: Bernard A. Friedman

OPINION:

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT and DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is presently before the court on cross motions for summary judgment. Plaintiffs seek review of a decision of defendant U.S. Citizenship and Immigration Services. Pursuant to E.D. Mich. LR 7.1(e)(2), the court shall decide these motions without oral argument.

The facts of the case are essentially undisputed. The plaintiffs are Stefano Messina and his adopted daughter, Maria Messina. n1 Stefano and his wife, Caterina, were married in Italy in 1964 and came to the United States shortly thereafter. Stefano became a naturalized U.S. citizen in 1971 (Tr. 1).

> n1 Throughout this opinion, the court refers to plaintiffs and other individuals by their first names simply for ease of identification.

Maria Messina (nee Maria Rosanna DiDia) was born in Italy on July 5, 1983 (Tr. 1). Her mother was Laura DiDia (Tr. 15). When Maria was born, Laura had been separated from her husband for ten months and Maria's father was someone other than Laura's husband (Tr. 15). On July 14, 1983, Laura petitioned a local judge to issue a passport to Maria to enable her to migrate to the United States with Stefano and Caterina, who had traveled from the United States to Italy for this purpose (Tr. 15). In this petition, Laura stated that she was giving "permanent custody" to Stefano and Caterina who "have accepted the custody." On July 22, 1983, the judge issued the passport, finding "that the

expatriation of the minor in the custody of Messrs. Messina is for her best interest" (Tr. 15). On August 2, 1983, Stefano and Caterina brought Maria to the United States on a visitor's visa (Tr. 28). On June 26, 2002, the Family Division of Macomb Circuit Court issued an Order of Adoption indicating that Stefano and Caterina were the adoptive parents of Maria (Tr. 32). On November 10, 2004, that court issued an Amended Order of Adoption Nunc Pro Tunc ordering that "the Order of Adoption dated June 26, 2002 is amended to indicate that the adoption was entered Nunc Pro Tunc, retroactive to the minor's date of birth July 5, 1983."

In September 2002, Stefano filed an I-130 "Petition for Alien Relative," requesting that the Immigration and Naturalization Service (INS) adjust Maria's status to allow her to remain in the country permanently (Tr. 1-2). On this petition, Stefano indicated that Maria was his child by adoption (Tr. 1). In August 2004, the successor agency to INS (Department of Homeland Security, U.S. Citizenship and Immigration Services) denied the petition on the grounds that Maria was not Stefano's "child" under the Immigration and Nationality Act because she was not adopted before her sixteenth birthday (Tr. 9-10). The decision cited § 101(b)(1) of the act, which defines "child" as "an unmarried person under twenty-one years of age who is . . . (E) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years." Defendant's

decision also cited 8 C.F.R. § 204.2(d)(2)(vii)(C), which states that "the child must have been under 16 years of age when the adoption is finalized."

Stefano twice requested reconsideration, arguing that he adopted Maria in Italy shortly after her birth and that the nunc pro tunc order of adoption related back to her date of birth (Tr. 12-32; 38-67). These motions were denied for the same reason stated initially, namely, that Maria was over the age of sixteen when she was adopted (Tr. 36-37, 135-37). The agency also specifically stated that "retroactive or nunc pro tunc adoptions are not acceptable for immigration purposes" (Tr. 136).

Cross Motions for Summary Judgment

Both parties seek summary judgment. The parties agree that the agency's decision may be reversed only if the court finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and that review is limited to the information contained in the administrative record.

The parties agree that the critical issue in this case is whether Maria was, or was not, adopted by Stefano and Caterina before her sixteenth birthday. The Immigration and Nationality Act permits a United States citizen to file an immigrant petition on behalf of his/her child, see 8 U.S.C. § 1154(a)(1)(A)(i), and the statutory definition of "child" includes "a child adopted while under the age of sixteen years if

the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years." 8 U.S.C. § 1101(b)(1)(E)(i). Defendant's regulation requires that "the adoption took place before the beneficiary's sixteenth birthday" and that "[a] copy of the adoption decree, issued by the civil authorities, must accompany the petition." 8 C.F.R. § 204.2(d)(2)(vii).

Having reviewed the record and the parties' briefs, the court is persuaded that defendant's decision in this matter, which concluded that Maria's adoption did not occur until after her sixteenth birthday, is arbitrary, capricious, and contrary to law. The record clearly indicates that Stefano and Caterina adopted Maria in Italy shortly after Maria's birth. Were there any doubt about the effectiveness of the adoption in Italy, the record clearly indicates that Maria was adopted again in Michigan and that the Michigan order of adoption was made nunc pro tunc to the date of Maria's birth. Both adoptions satisfy the statute as well as the regulation. n2

> n2 The parties have not briefed the question of whether defendant's regulation is entitled to deference. Generally, an agency's interpretation of a statute it is charged with implementing is entitled to deference provided that the interpretation, as expressed in the implementing regulation in question, is consistent with the statute and does not "exceed[] the bounds of the permissible."

> *Barnhart v. Walton,* 535 U.S. 212, 218 (2002), *citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984). For present purposes, the court shall assume without deciding that defendant's regulation, 8 C.F.R. § 204.2(d)(2)(vii), is valid.

Defendant's decision is arbitrary, capricious, and contrary to law for several reasons. First, the decision fails to address plaintiffs' contention that they adopted Maria in Italy and it entirely ignores the record evidence supportive of this contention. As the court of appeals noted in Tourus Records, Inc. v. Drug Enforcement Admin., 259 F.3d 731, 736 (D.C. Cir. 2001), "[a]t a minimum, [the arbitrary, capricious, abuse of discretion] standard requires the agency to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." (Citations omitted.) Further, the court reviews the agency decision, not "post hoc rationalization by counsel." Hooker Chems. & Plastics Corp. v. Train, 537 F.2d 620, 636 (2nd Cir. 1976). In addition, an administrative agency may not "ignore evidence placed before it by interested parties." Consumers Union of United States, Inc. v. Consumer Prod. Safety Comm'n, 491 F.2d 810, 812 (2nd Cir. 1974).

Defendant's initial decision (Tr. 9-10) fails to even mention plaintiffs' contention that Stefano and Caterina adopted Maria in Italy. The decision on plaintiffs' first motion for reconsideration does note

that "petitioner . . . seeks consideration of the fact that the petitioner believed the adoption of the beneficiary was finalized in Italy when the beneficiary was a baby" (Tr. 36), but neither discusses the record evidence supporting this claim nor makes a finding as to whether an adoption occurred in Italy. The decision on plaintiffs' second motion for reconsideration focuses solely on the effect of the Michigan court's nunc pro tunc order of adoption and, once again, says nothing regarding whether an adoption occurred in Italy (Tr. 135-37). Defendant's failure to address plaintiffs' contention that Maria was adopted in Italy, or to acknowledge the evidence in support of this contention, or to make a finding one way or another on this important issue, by itself makes defendant's decision in this matter arbitrary and capricious. n3

> n3 As noted above, the court's attention in the instant proceeding focuses on defendant's decision as articulated in the record (Tr. 9--10, 36--37, 135--37). New arguments and analysis by defendant's counsel, presented for the first time in litigation in an effort to prop up the agency's decision, are not part of what the court reviews under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2), authorizing review of "agency action, findings, and conclusions," *not post hoc* arguments or analysis. Therefore, the court shall not address defense counsel's arguments, none of which were mentioned in defendant's written

decisions, as to why the record evidence fails to establish that an adoption occurred in Italy.

The infirmity of defendant's decision is the more egregious because the record contains significant evidence showing that Stefano and Caterina in fact did adopt Maria in Italy in July 1983, days after Maria was born. This evidence includes an Italian court document dated July 22, 1983, the translation of which states:

> Hon. Judge in the Pretura in Partinico
>
> The undersigned DiDia Laura . . . married to Mineo Leonardo . . . living apart from him about ten months, giving her own approval, as per affidavit given on the same date with signature authenticated by Notary . . . that her own natural daughter Di Dia Rosanna, born in Palermo on July 5, 1983, with a person other than her own husband, be given in permanent custody to Messina Stefano . . . and Bultaggio Caterina . . . (husband and wife), residing in the United States of America, which have accepted the custody of the forementioned girl, which will be migrating with them in the United States of America, and having also authorized the same to migrate to the U.S.A. of the forementioned girl, with the present ask your Honor to permit the issuance of the necessary permit so the aforementioned girl could be admitted in the United States of America together with

her custodians Messina Stefano and Vultaggio Caterina so that the appropriate authority issue the passport.

Best wishes.

Partinico, July 14, 1983 Di Dia Laura

The Pretor G.T.

After reading the preceding petition and additional information, believe that the expatriation of the minor in the custody of Messrs. Messina is for her best interest, P.G.T.

The issue of the passport is hereby authorized as requested on the above petition.

Partinico 7-22-1983

(Tr. 15.) Although not entitled an "adoption decree," as defendant's regulation requires, this document has the same effect as such a decree. Clearly, by signing this petition Maria's natural mother intended not only to give "permanent custody" to Stefano and Caterina, but to permit the child to "migrate" with them to the United States. Moreover, the judge not only issued the requested passport but also specifically found that the child's "expatriation" to the United States was in her best interest. This document bears all the indicia of an adoption decree.

Another document in the record, which defendant also disregarded, is a certificate of baptism stating that Maria was "born on 7-5-1983 to Stefano Messina and Vultaggio Caterina" and baptized on July 30, 1983 (Tr. 46). This indicates that local church officials recognized Stefano and Caterina as Maria's parents.

Further evidence of the relationship between Stefano, Caterina and Maria, which defendant also disregarded, is the transcript of the June 26, 2002, confirmation hearing before the Macomb County Circuit Court (Tr. 75-82), in which Stefano and Caterina both testified that they had raised Maria since the day she was born (Tr. 79).

This evidence clearly establishes that Stefano and Caterina adopted Maria in Italy. The word "adopt" is not defined in the Immigration and Nationality Act or in defendant's regulations, and it is therefore to be given its common and ordinary meaning. The American Heritage Dictionary defines the term as meaning "[t]o take into one's family through legal means and raise as one's own child." Webster's New World Dictionary defines the term as meaning "to choose and bring into a certain relationship; specif., to take into one's own family by legal process and raise as one's own child." The Oxford English Dictionary defines the term as meaning "to take (any one) voluntarily into any relationship (as heir, son, father, friend, citizen, etc.) which he did not previously occupy." Certainly under any of these definitions, Maria was adopted in Italy.

The "legal means" or "legal process" occurred when the Italian judge granted the passport petition inasmuch as he acknowledged that the natural mother was voluntarily giving "permanent custody" to Stefano and Caterina and permitting Maria to "migrate" with them to the United States and found that this arrangement was in Maria's best interest.

As noted above, defendant's decision did not discuss the Italian adoption, or make any findings regarding that adoption, and for this reason alone is arbitrary and capricious under Tourus Records, Hooker Chemicals, and Consumers Union, supra. Defendant's decision did acknowledge that Maria was adopted in Michigan, but concluded that the adoption took place after her sixteenth birthday and that the adoption would not be given "nunc pro tunc" effect, despite the clear wording of the amended order of adoption. The court finds this aspect of defendant's decision to be arbitrary, capricious and contrary to law, as well.

The Amended Order of Adoption Nunc Pro Tunc, dated November 10, 2004, states:

THE COURT being fully advised in the premises, and upon a reading of Petitioners Ex-Parte Petition to Amend Order of Adoption Nunc Pro Tunc orders as follows:

IT IS HEREBY ORDERED that the Order of Adoption dated June 26, 2002 is amended to indicate

that the adoption was entered Nunc Pro Tunc, retroactive to the minor's date of birth July 5, 1983.

In its decision, defendant stated that "retroactive or nunc pro tunc adoptions are not acceptable for immigration purposes" (Tr. 136). Defendant cited two decisions of the Board of Immigration Appeals for the propositions that "an adoption for immigration purposes occurs on the date the final adoption decree is issued" and that "retroactive adoptions are not recognized for immigration purposes despite any retroactive effect given the adoption by the issuing court" (Tr. 136). n4

> n4 In his summary judgment motion, defense counsel makes additional arguments as to why the amended order of adoption should not be given "nunc pro tunc" effect. These additional arguments were not articulated by defendant *in its decision* and are precisely the sort of *post hoc* justifications which the court does not consider in an action brought under the Administrative Procedures Act.

Defendant's refusal to give effect to the state court order raises significant federalism and comity concerns. Defendant does not claim that the order is invalid, but rather that the order is not "acceptable" or "recognized" because it makes the adoption retroactive. Defendant cites no authority, and this court is aware of none, supporting the proposition that a federal agency may disregard a valid state court order -- particularly where, as in the present

case, the agency's decision is not supported by statutory authority. As noted above, the statute defines "child" as including "a child adopted while under the age of sixteen years" 8 U.S.C. § 1101(b)(1)(E)(I), and does not rule out nunc pro tunc or retroactive adoptions. Even defendant's regulation, which requires that "the adoption took place before the beneficiary's sixteenth birthday" and that "[a] copy of the adoption decree, issued by the civil authorities, must accompany the petition," 8 C.F.R. § 204.2(d)(2)(vii), is silent on the issue of nunc pro tunc or retroactive adoptions. In short, defendant's decision that "retroactive or nunc pro tunc adoptions are not acceptable for immigration purposes" is not authorized either by the statute or defendant's own regulation interpreting the statute.

The only authority cited in defendant's decision, which speaks directly to the nunc pro tunc issue, is neither statute, regulation, nor court opinion, but a single decision of the Board of Immigration Appeals (BIA).*fn5 While decisions of the BIA are binding on officers and employees of the Department of Homeland Security, that body is nothing more than an administrative court created by the Department of Justice principally to review decisions of immigration judges. See 8 C.F.R. § 1003.1(b), (g). And while the BIA may interpret the Immigration and Nationality Act and implementing regulations, it has no law- or rule-making authority.*fn6 At most, the BIA may comment on the meaning of immigration regulations, but it may not create or amend the regulations.

n5 Defendant also cited *Matter of Mendoza,* Interim Decision No. 2869, 18 I&N Dec. 66 (BIA, June 11, 1981), for the proposition that "an adoption for immigration purposes occurs on the date the final adoption decree is issued" (Tr. 136). However, *Mendoza* did not involve a nunc pro tunc order of adoption and is therefore irrelevant for present purposes.

n6 In fact, it is only so-called "precedent decisions" of the BIA which are intended to "provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations." 8 C.F.R. § 1003.1(d). *See also* 8 C.F.R. § 1003.1(I) (regarding publication of precedent decisions). Both of the BIA decisions cited by defendant in the present case are so-called "interim decisions," not precedent decisions, and the amount of weight to which they are entitled, if any, is questionable.

Defendant's sole authority for its position that "retroactive or nunc pro tunc adoptions are not acceptable for immigration purposes" is Matter of Cariaga, Interim Decision No. 2507, 15 I&N Dec. 716 (BIA, July 22, 1976), a copy of which is attached to defendant's summary judgment motion as Exhibit 1. In Cariaga, the petitioner was an American citizen who had raised the beneficiary, a Mexican boy, since

the boy's Mexican father brought him to the United States at the age of two. Shortly before the father died, when the boy was seven, he signed an affidavit consenting to the boy's adoption by the petitioner. When the boy was 19, petitioner obtained an order from an Iowa state court declaring the boy to be adopted by petitioner, retroactive to the date of the father's affidavit. The BIA chose not to recognize the retroactive effect of the adoption and denied the petition, reasoning that "[t]hrough the imposition of an age restriction on the creation of the adoptive relationship, Congress has attempted to distinguish between bona fide adoptions, in which a child has been made a part of a family unit, and spurious adoptions, effected in order to circumvent statutory restrictions. . . . The act of adoption must occur before the child attains the age of fourteen" Id. at 717. n7

> n7 At the time *Cariaga* was decided, the statutory definition of "child" included a child "adopted while under the age of fourteen." *See id.* at 717.

As indicated above, it is doubtful whether Cariaga, as an interim decision, is entitled to any weight. Clearly, however, the BIA erred in Cariaga by impermissibly substituting its own definition of child ("the act of adoption must occur before the child attains the age of fourteen") for that passed by Congress (child must be "adopted while under the age of fourteen"). Moreover Cariaga does not explain the legal authority by which the BIA, a creation of

the Department of Justice, may disregard a court order. The BIA framed the issue in Cariaga as "whether the retroactive effect which the Iowa Court has given the adoption should be considered by this Board." The BIA neglected to ask the more important question, namely, whether the BIA or any agency may disregard an order, issued by a court of competent jurisdiction, that is lawful on its face.

Defendant's decision in the instant matter likewise offers no legal authority, other than Cariaga, for disregarding the "amended order of adoption nunc pro tunc" issued by the Macomb County Circuit Court. If defendant doubted the validity or correctness of the "nunc pro tunc" designation, defendant should have sought relief from the court that issued the order. Court orders are presumed valid, and it is beyond the province of an administrative agency to declare an order "unacceptable" and act as though the order did not exist. Defendant may challenge the validity of a court order in the proper forum, but it may not on its own motion declare the order invalid. Defendant, like any government entity or individual, is duty bound to follow the orders of validly constituted courts and may not reserve the right to follow only those orders with which it agrees. Defendant's disregard for the rule of law cannot be tolerated in a civilized society, which requires all citizens, including the government itself, to respect and abide by the law.

Another significant factor defendant's decision fails to mention, although it is apparent from the record, is that Stefano and Caterina could not obtain an order of adoption in Michigan until after Maria turned 18 because they were unable to locate Maria's natural parents, whose consent to the termination of their parental rights was required so long as Maria was under 18 (Tr. 96) by which time, under defendant's regulation as interpreted by Cariaga, she had missed the adoption deadline by two years. Allowing the adoption order retroactive effect is the only means of correcting the Catch 22. It is arbitrary and capricious to require compliance with a regulation when compliance is impossible.

Conclusion

For all of these reasons, the court concludes that defendant's decision in this matter is arbitrary, capricious, and contrary to law. It is also lacks common sense, or sense of fairness, or an appreciation for the fact that Stefano and Caterina have raised Maria since the day she was born and that they have lived together in the United States as a family since she was less than one month old. Defendant's proposal to deny Maria immigrant status and to deport her to the country of her birth is absurd in the extreme. Defendant has entirely disregarded the evidence that an adoption took place in Italy days after Maria was born, and defendant has no legal basis for disregarding the Michigan court's order of adoption that is retroactive to the date of her birth. Accordingly,

IT IS ORDERED that plaintiffs' motion for summary judgment is granted.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is denied.

IT IS FURTHER ORDERED pursuant to 5 U.S.C. § 706(1), which authorizes the court to "compel agency action unlawfully withheld," that defendant grant plaintiffs' I-130 "Petition for Alien Relative" forthwith.

s/ BERNARD A. FRIEDMAN

CHIEF UNITED STATES DISTRICT JUDGE

Dated: February 16, 2006

Detroit, Michigan

GONZALEZ-MARTINEZ v. DEPARTMENT OF HOMELAND SEC.

677 F.Supp.2d 1233 (2009)

Rocio Delores GONZALEZ-MARTINEZ and Lyle Geral Dahlberg, Plaintiffs,
v.
DEPARTMENT OF HOMELAND SECURITY, et al., Defendants.

No. 2:08-cv-0800 BSJ.

United States District Court, D. Utah, Central Division.

September 1, 2009.

A. Jason Velez, Robert J. DeBry & Associates, St. George, UT, for Plaintiff.

Brett L. Tolman, Stephen J. Sorenson, Assistant United States Attorney, United States Attorney, Salt Lake City, UT, for Defendants.

ORDER

BRUCE S. JENKINS, Senior District Judge.

Plaintiffs, pursuant to § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 *et seq.,* seeks to review and reverse a decision of the U.S. Citizenship and Immigration Service refusing to classify Rocio Gonzalez-Martinez as an immediate relative (child) under § 201(b)(2)(A)(I) of the Immigration and Naturalization Act, 8 U.S.C. §§ 1101 *et seq.* Such was affirmed on review by the Board of Immigration Appeals on March 28, 2008.

The matter was argued to the court on April 16, 2009, and reserved by the court.

Appearances were as follows: A. Jason Velez appeared on behalf of Plaintiffs and Stephen J. Sorenson appeared on behalf of the United States.

The following facts are found in the record and are undisputed:

1. Plaintiff Rocio Delores Gonzalez-Martinez was born in Naco, Sonora, Mexico, on September 18, 1986. (R. 23-24, 123-24; Compl. exh. A.)

2. Rocio's 17-year-old mother's economic situation was not good, and she decided to give Rocio to her aunt, Maria (now Maria Delores Dahlberg) to raise. (R. 32-33; Compl. exh. B.) Maria and her then-husband, Alfredo Gonzalez Gallego, filed a birth

certificate with the Sonora Civil Registry, listing Rocio as their daughter. (R. 23-25, 121, 123-24; Compl. exh. A.) Maria and Alfredo were subsequently divorced, and Rocio remained with Maria.

3. Maria married Plaintiff Lyle Dahlberg on April 12, 1998, in Santa Clara, Utah. (R. 160, 162; Compl. exh. C.)

4. Dahlberg petitioned for appointment as Rocio's guardian, and was granted guardianship by action of the Fifth District Court of Washington County, Utah, on March 9, 2000. (R. 29-31, 74; Compl. exh. D.)

5. Rocio turned 16 on September 18, 2002.

6. On April 19, 2004, Dahlberg submitted a Petition for Alien Relative (Form 130), seeking to have Rocio designated as the immediate relative child of a U.S. citizen. In response, a CIS officer interviewed Maria and Dahlberg on July 18, 2005. (R. 153-54; Compl. exh. E at 2.)

7. During the interview, Maria "admitted Rocio was not her biological daughter. Maria stated Rocio is her niece, the daughter of Maria's sister.... Maria stated that she took the child (Rocio) and registered her as her biological daughter with the local authorities. Maria stated she never filed any paperwork with the courts and had never attempted to legally adopt Rocio." (R. 121; Compl. exh. E at 2.)

8. The petition was denied by CIS because Dahlberg failed to submit an adoption decree, and without such decree, Rocio did not qualify as his child under § 101(b)(1)(E) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(E)(i). (R. 113-14; Compl. exh. E at 2.)

9. Rocio subsequently filed an application for status as a permanent resident (Form 1-291), but this was denied by the CIS District Director on October 28, 2005, because one claiming immediate relative status is not eligible for permanent residency unless she was the beneficiary of a valid visa petition; and Rocio's visa petition (Form 1-130) had recently been denied. (R. 112; Compl. exh. E at 1.)

10. Removal proceedings were initiated as to Rocio on November 4, 2005. (R. 8-9, 18; Compl. exh. G at 2.)

11. On December 20, 2006, responding to Dahlberg's Petition for Adoption, State

District Judge G. Rand Beacham entered a Decree of Adoption, awarding Dahlberg rights as Rocio's adoptive father. (R. 21-22; Compl. exh. F.) The decree stated, "The adoption of the child is hereby retroactively dated to indicate that the Petitioner has legally adopted the child since ***April 13, 1998."***

(R. 22 ¶ F; Compl. exh. F at 2 ¶ F.) Above his signature block, Judge Beacham entered:

DATED IN OPEN DAY IN [sic] COURT THIS:

20 DAY of Dec., 2006, *nunc pro tunc* to ***April 13, 1998***

(R. 22; Compl. exh. F at 2.)

12. Dahlberg submitted a second Petition for Alien Relative (Form 1-130) on January 3, 2007, with the adoption decree. (R. 14-15; Compl. exh. G at 2.) The written decision by the CIS Field Office Director was filed on March 29, 2007. The decision noted that Rocio reached age 16 on September 18, 2002 (more than four years before the granting of her legal adoption); and cited *Matter of Cariaga,* 15 I. & N. Dec. 716 (BIA 1976): "Where the adoption did not take place until the beneficiary reached [age 19 in that case], the adoption was not valid for immigration purposes notwithstanding the retroactive effect given the adoption decree by the issuing court, and the visa petition to accord the beneficiary immediate relative classification was denied." The Field Director's decision continued:

> Rocio Delores Gonzalez-Martinez was over the age of sixteen when the adoption took place, therefore an adopted child relationship does not exist to qualify her as your adopted child for immigration purposes. Further, the sequence of events suggest that the nunc pro tunc may have been sought solely for the

> purpose of qualifying Rocio for immigration benefits. Accordingly your petition for Rocio Delores Gonzalez-Martinez to qualify her as your adopted child is denied.
>
> (R. 4-5; Compl. Exh. G at 2.)

13. On April 17, 2007, Dahlberg filed a Notice of Appeal to the Board of Immigration Appeals (Form EOIR-29) (R. 1; copy attached to Memorandum in Support of Defendants' Motion to Dismiss in Case No. 2:07cv0246), (dkt.No.6). He also filed an APA action, asking this Court to reverse the decision (*Gonzalez-Martinez v. Dep't of Homeland Security,* Case No. 2:07cv0246 PGC.) The Court dismissed the action for failure to present reviewable "final agency action" under the APA. (*Id.*, dkt. No. 9.)

14. On March 28, 2008, the Board of Immigration Appeals issued its decision:

> PER CURIAM. The petitioner has appealed from the decision of the Field Office Director dated March 29, 2007, denying the visa petition that was submitted on behalf of the beneficiary, the petitioner's adopted child. Under the laws of the United States, the definition of the term "child" in section 101(b)(1)(E) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(E), includes an adopted child only if, among other requirements, the child was "adopted while under the age of sixteen years."

> The petitioner has submitted an adoption decree that indicates that the adoption will be given retroactive effect to a date prior to the beneficiary's sixteenth birthday. However, the immigration laws relating to adoption do not generally recognize retroactive adoption dates. *See Matter of Cariaga,* 15 I. & N. Dec. 716 (BIA 1976). We do not find the present case to be factually distinguishable from *Matter of Cariaga, supra.* See also *Matter of Drigo,* 18 I. & N. Dec. 223 (BIA 1982).
>
> We are sympathetic to the circumstances raised in this case. However, as the record reflects that the beneficiary had already reached the age of sixteen at the time of the adoption, the appeal from the denial of the visa petition must be dismissed.

As noted above, Maria Delores and Lyle Dahlberg were married April 12, 1998. Rocio has lived with Maria since birth. Maria is not Rocio's biological mother. The natural mother was Maria's niece. Rocio was listed on her Mexican birth certificate as Maria's child. Maria, Lyle and Rocio have lived as a family since at least the date of Maria and Lyle's marriage. At that time, Rocio was 11 years old.

The simple question is whether the United States is *required* to give credence, sometimes called

full faith and credit, to a *nunc pro tunc* state adoption decree.

The simple answer of course is not always, but sometimes, to effect the purposes of the relevant federal statutes.

The United States relies on *Cariaga,* a Board of Immigration appeals case decided in 1976, which states in part:

> The issue raised is whether the retroactive effect which the Iowa Court has given the adoption should be considered by this Board in applying the provisions of the Immigration and Nationality Act. The legislative history of the Immigration and Nationality Act of 1952 clearly indicates that the Congress was concerned with the problem of keeping the families of immigrants united. As part of that policy, Congress provided liberal treatment of children. Despite this concern, Congress did not extend immigration benefits to adopted children for fear that fraudulent adoptions would provide a means of evading the quota restrictions. See S. Rept. 1515, 81st Cong., 2d Sess. 468. In 1957, however, Congress included within the definition of "child", "one adopted while under the age of fourteen if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years ..." See Immigration and Nationality Act of

> September 11, 1957 (71 Stat. 639). Through the imposition of an age restriction on the creation of the adoptive relationship, Congress has attempted to distinguish between bona fide adoptions, in which a child has been made a part of a family unit, and spurious adoptions, effected in order to circumvent statutory restrictions. [FN 1]
>
> In light of the history behind the age restriction in section 101(b)(1)(E), it appears clear that the provision should be given a literal interpretation. The act of adoption must occur before the child attains the age of fourteen. Therefore, despite the retroactive effect given the beneficiary's adoption by the Iowa Court, an adoptive relationship was not created within the meaning of the Immigration and Nationality Act, when the beneficiary was adopted under Iowa law at age nineteen.
>
> We are aware of the sympathetic aspects of this case. However, the provisions of the Act do not permit recognition of this adoption for immigration purposes. The petition must be denied. **ORDER:** The appeal is dismissed.

The *Cariaga* case, if applied as a "literal" black-and-white rule, is entirely too restrictive. It gives no deference to the last paragraph of 28 U.S.C. § 1738, which states:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (Emphasis added.)

The C.I.S., as an agency of the United States and through it the Board of Immigration Appeals, engaging in quasi-judicial proceedings, are not free to ignore the provisions of 28 U.S.C. § 1738. It seems to the court that the quasi-judicial effort needs to reconcile the two provisions of federal law, namely the Immigration and Naturalization Act and the statutory full faith and credit provision.

The decision of the Board in this case fails to give recognition to the overriding purpose of

Congress in the immigration statutes to keep families "united," and places undue emphasis on the "fear that fraudulent adoptions would provide a means of evading the quota restrictions"— thus sweeping aside meritorious, nonfraudulent, *nunc pro tunc* orders which formalize as of a given date a socially recognized bona fide family relationship. The decision also pays no deference to the policy of § 1738, favoring the recognition of state court proceedings in the federal system.

There is not a hint of fraud in the petition in this case for an entry of a *nunc pro tunc* order of adoption. It is a non-fraudulent, legitimate state court order that simply formalizes and recognizes the existence in fact of a bona fide family unit, long observed, in the family and in the community.

Ordering a child, even though now mature, legally adopted and acculturated in the United States, to be deported from the' United States is far too Draconian an outcome, and in the opinion of the court, contrary to what Congress intended with respect to both children and proceedings in state court.

Each "adopted" Petitioner should be considered not as subject to a blanket rule, but on an individual basis, with emphasis, it seems to me on the professed policy of Congress of keeping families together when families actually exist.

The answer must be that when there is a valid decree, a non-fraudulent, non-spurious decree entered by a state tribunal, as to what in fact existed at a prior date, then its finding, its determination, should be given the credence demanded by the full faith and credit statute. In that instance, full faith and credit should be applied and the valid non-fraudulent state determinations should be accepted. Not every decree deserves acceptance, but each should be examined on its merits, and not be mechanically discarded. Not all cases are identical. Similar is not identical. A black-and-white rule is unfair to those who have a meritorious argument.

Such a practice may have ease of application, but ease of application is no substitute for thought. A machine can do as well, but due process requires more.

The test for acceptance of a *nunc pro tunc* adoption decree in a federal proceeding is the state test for acceptance.

That becomes the federal test for acceptance. That is what § 1738 says.

The test here is whether Utah would give effect to the decree of adoption. The answer, of course, is yes; and would the state accept the "as of" date, the so called *nunc pro tunc* date, and the answer of course is yes. In this instance, the order "simply adjudicated a prior judicial fact or status," establishing that a bona fide parent-child

relationship existed prior to the entry of the order. Cf. *Whyte v. Blair,* 885 P.2d 791, 793 (Utah 1994). That relationship existed in fact, as of the so called "*nunc pro tunc*" date. Indeed, as an adjudication of a relationship already existing in fact, it may not be a true "*nunc pro tunc*" order. No one disputes that the petitioners lived as parent and child at all times relevant to this proceeding. Rocio is adopted formally from that date. At that time she was eleven years old and well within the category of the federal immigration statute. Thus, the agency should do no less; it should accept that date, and in doing so, it would then meet the twin purposes of the statute, namely to preclude fraud and more importantly to keep families together. To do otherwise elevates one purpose over the other, and thus does not follow the mandate of Congress to consider both, and it ignores the full faith and credit statute. The action is thus "arbitrary and capricious" and contrary to law, 5 U.S.C. § 706(2)(A).

The Board's decision is REVERSED. The matter is REMANDED to the Board of Immigration Appeals so that it in turn may remand the same to the C.I.S. field office with direction to give deference to the state determination as to the effective date of adoption and classify Rocio as an immediate alien relative and issue an appropriate visa.

SO ORDERED.

Let Judgment by entered accordingly.

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR OSCEOLA COUNTY, FLORIDA

CASE NO.: 09-DR-2596-AD

IN RE: THE ADOPTION OF

BOY #1

AND

BOY #2,

REPORT AND RECOMMENDATION OF GENERAL MAGISTRATE

Pursuant to Section 63.192, Florida Statutes, and Rule 12.490 Florida Family Law Rules of Procedure, this case came before the undersigned Magistrate on June 11, 2009 for final hearing on the Petition for Recognition of Foreign Adoption. Based upon the testimony, the pleadings contained in the court file, and the evidence submitted, the Magistrate **FINDS:**

1. The Court has subject matter jurisdiction over the Petition for Recognition of Foreign Adoption.

2. The Court has jurisdiction over the minor children subject to the Petition for Recognition of Foreign Adoption.

3. The Petitioners are residents of Osceola County, Florida. Further, the children and the petitioners have significant connections with the State of Florida.

4. The Petitioners adopted the minor children, Boy #1 and Boy #2, in the country of India in accordance with the Adoption Law of India on January 5, 2007.

5. The requirements for recognizing said foreign certificate of adoption as specified in section 63.192, Florida Statutes, have been met by the Petitioners.

6. The Petitioners testified that they wish to waive the ten (10) days prior to entry of the final Judgment hereupon.

It is, therefore, recommended that the Court enter a Final Decree of Recognition of Foreign Adoption declaring that:

1. The foreign adoption decree granted in the country of India granting the adoption of Boy #1 and Boy #2, should be recognized and given full faith and credit in the state of Florida.

2. The minor children subject to the Petition, Boy #1 and Boy #2, are declared to be the legal children of the Petitioners, Marko Milakovich and Ghukhuli Z. Milakovich.

3. The minor children shall be the legal heirs at law of the Petitioners and shall be entitled to all rights and privileges, and subject to all obligations of a child being born to Petitioners.

4. The Decree of Recognition of Foreign Adoption creates a relationship between the adoptees and the Petitioners and all relatives of Petitioners that would have existed if the adoptees were blood descendants of the Petitioners, born within wedlock, entitled to all rights and privileges thereof, and subject to all obligations of a child being born to the Petitioners.

REPORTED, RECOMMENDED, AND FILED in Osceola County, Florida, on this 11th day of June, 2009.

_____s_____
LINH T. ISON
General Magistrate

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Report and Recommendation of the General Magistrate has been furnished by via U.S. Mail, postage prepaid, on the 15th day of June, 2009 to: Marko Milakovich and

Ghukhuli Milakovich, 5060 Harkley Runyan Rd., Saint Cloud, FL 34771.

s/ Yazel Ortiz
Magistrate Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR OSCEOLA COUNTY, FLORIDA

CASE No. 2009-DR-2596-AD

IN THE MATTER OF THE ADOPTION OF:

BOY #1

AND

BOY #2,

FINAL JUDGMENT OF RECOGNITION OF FOREIGN ADOPTION

This action was heard on the Petition for Recognition of foreign Adoption as specified in Florida Statue 63.192, "Recognition of Foreign Judgment of Decree Affecting Adoption," which directs that a decree granting adoption, issued pursuant to due process of law by a court or authorized body of any other jurisdiction within or without the United States shall be recognized in this state, and the rights and obligations of the parties shall be determined as though the judgment or decree were issued by a court of this state; and therefore this courts finds that the due process of

law of the foreign adoption resulted in the deed of Adoption by India and that the best interest of the minors will be accomplished by Recognition of foreign Adoption in the State of Florida.

NOW, THEREFORE IT IS ADJUDGED that:

1. The minor children subject to the petition are declared to be the legal children of petitioners Marko Milakovich and Ghukhuli Zhimomi Milakovich.

2. The Deed of Adoption entered on January 5, 2007 in the country of India is hereby domesticated and all of the rights and obligations of the parties in this adoption shall be determined as though the judgment were issued by a Court of this state.

3. This Decree of Recognition of Foreign Adoption creates a relationship between the adoptees and the Petitioners and all relatives of Petitioners that would have existed if the adoptees were blood descendants of the Petitioners, born within wedlock, entitled to all rights and privileges thereof, and subject to all obligations of a child being born to the Petitioners.

4. The minor children shall continue to be known as Boy #1 and Boy #2. The Department of Health, Bureau of vital statistics, is hereby directed to prepare and register a Certificate of foreign Birth.

5. The Court has reviewed the Report and Recommendation filed by the General Magistrate in this cause and the Court hereby accepts and incorporates the Magistrate's Report and Recommendation into this final judgment. The Clerk of the Court shall record a copy of the Report of the General Magistrate attached hereto as part of this Final Judgment of Recognition of Foreign Adoption.

DONE AND ORDERED in the Chambers at Kissimmee, Osceola county, Florida this 16 day of June, 2009.

s/ Jeffrey M. Fleming
CIRCUIT COURT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by via U.S. Mail, postage prepaid, on the 16 day of June, 2009, to: Marko Milakovich and Ghukhuli Milakovich, 5060 Harkley Runyan Rd., Saint Cloud, FL 34771

s/ Terry Marino
Judicial Assistant

STATE OF FLORIDA

OFFICE of VITAL STATISTICS

CERTIFICATE OF FOREIGN BIRTH

STATE FILE NUMBER: **109-1996-306145**

CHILD'S NAME: **BOY #1**

DATE OF BIRTH: **NOVEMBER 15, 1996**

SEX: **MALE**

COUNTRY OF BIRTH: **INDIA**

DATE FILED: **JULY 20, 2009**

MOTHER'S MAIDEN NAME: **GHUKHULI MILAKOVICH**

FATHER'S NAME: **MARKO MILAKOVICH**

DATE ISSUED: **JULY 20, 2009**

THIS CERTIFICATE IS NOT EVIDENCE OF UNITED STATES CITIZENSHIP FOR THE CHILD OR PARENTS NAMED ABOVE.

COURT NAME: **CIRCUIT**

DOCKET NUMBER: **REDACTED**

COUNTY/STATE: **OSCEOLA, FLORIDA**

COURT DATE: **06/16/2009**

I hereby certify that this certificate is filed pursuant to 382,017, Florida Statutes.

_____s/_____ REQ: 2009620635
State Registrar

THE ABOVE SIGNATURE CERTIFIES THAT THIS IS A TRUE AND CORRECT COPY OF THE OFFICIAL RECORD ON FILE IN THIS OFFICE. THIS DOCUMENT IS PRINTED OR PHOTOCOPIED ON SECURITY PAPER WITH A WATERMARK OF THE GREAT SEAL OF THE STATE OF FLORIDA ON THE FRONT, AND THE BACK CONTAINS SPECIAL LINES WITH TEXT AND SEALS IN THERMOCHROMIC INK.

FLORIDA DEPARTMENT OF
HEALTH

DH FORM 1946 (08-04)

25774063 CERTIFICATION OF VITAL RECORD

STATE OF FLORIDA

OFFICE of VITAL STATISTICS

CERTIFICATE OF FOREIGN BIRTH

STATE FILE NUMBER: **109-1998-306180**

CHILD'S NAME: **BOY #2**

DATE OF BIRTH: **DECEMBER 31, 1998**

SEX: **MALE**

COUNTRY OF BIRTH: **INDIA**

DATE FILED: **JULY 20, 2009**

MOTHER'S MAIDEN NAME: **GHUKHULI MILAKOVICH**

FATHER'S NAME: **MARKO MILAKOVICH**

DATE ISSUED: **JULY 20, 2009**

THIS CERTIFICATE IS NOT EVIDENCE OF UNITED STATES CITIZENSHIP FOR THE CHILD OR PARENTS NAMED ABOVE.

COURT NAME: **CIRCUIT**

DOCKET NUMBER: **REDACTED**

COUNTY/STATE: **OSCEOLA, FLORIDA**

COURT DATE: **06/16/2009**

I hereby certify that this certificate is filed pursuant to 382,017, Florida Statutes.

_____s/_____ REQ: 2009620691
State Registrar

THE ABOVE SIGNATURE CERTIFIES THAT THIS IS A TRUE AND CORRECT COPY OF THE OFFICIAL RECORD ON FILE IN THIS OFFICE. THIS DOCUMENT IS PRINTED OR PHOTOCOPIED ON SECURITY PAPER WITH A WATERMARK OF THE GREAT SEAL OF THE STATE OF FLORIDA ON THE FRONT, AND THE BACK CONTAINS SPECIAL LINES WITH TEXT AND SEALS IN THERMOCHROMIC INK.

FLORIDA DEPARTMENT OF
HEALTH

DH FORM 1946 (08-04)

25774068 CERTIFICATION OF VITAL RECORD