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Mr. Francis J. Lorson, Esq.
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United States Supreme Court
One First St., N.E.
Washington, D.C. 20543

BY FAX
April 22, 1992

RE: Gene McNary, et al. v. Haitian Centers Council, Inc., et al.
(Civ. No. 92-1258 E.D.N.Y. 1992), appeal pending, No. 92-6090
(2d Cir. 1992) (Second Circuit argument scheduled May 7 or 8, 1992)

Dear Mr. Lorson:

We understand that the Solicitor General's application to Justice Thomas, as Second Circuit Justice, for a stay pending appeal to the Second Circuit of Judge Sterling Johnson's preliminary injunction order in this case has been referred to the Conference. We respectfully request that you transmit this letter to the full Court for its consideration.

Attached to the Government's application at page 190 is the uncross-examined Declaration of Donna Hrinak, Deputy Assistant Secretary of State for Mexico and Caribbean Affairs, Bureau of Inter-American Affairs, dated April 20, 1992, which was not part of the record before the District Court in this case. Ms. Hrinak's declaration cites recent Coast Guard figures regarding the interdiction of fleeing Haitians, claims "that the injunctive relief ordered by the District Court in this case has contributed in significant part to the increased outflow of Haitians from Haiti," id. at 190, and concludes that "the mere existence of pending litigation, and particularly the existence of any kind of injunctive relief against the United States Government, acts as a magnet for Haitians to leave Haiti." Id. at 193.

As we noted on page 12 of our Memorandum requesting Summary Denial of the Government's Extraordinary Application for a Stay Pending Appeal, after a five and one-half hour hearing that included live testimony, Judge Johnson's preliminary injunction opinion found the Government's evidence regarding such a "magnet effect" to be "inconclusive." PI Op. at 12. At the preliminary injunction hearing, the Government

presented absolutely no evidence to link the increased number of Haitian interdictees with the District Court's order. On the other hand, respondents presented numerous reasons why Haitians have been interdicted in larger numbers in the last few weeks, including evidence that substantial numbers of Haitians who had landed in Cuba had recently been expelled onto the high seas by Castro. See Pl. Exh. # 69 at 62; PI Transcript at 108-11.

Given this background, the Hrinak Declaration filed yesterday appears to be yet another Government attempt to use uncross-examined, extra-record affidavits manufactured for the purpose of appellate litigation to mislead the Supreme Court to stay this Court's lawful order. The Government has now failed to stay that order on four successive occasions, twice before Judge Johnson and twice before the Second Circuit (Pratt, Timbers & Mukasey, JJ.). In Haitian Refugee Center v. Baker, 112 S.Ct. 1245 (1992), an earlier case before this Court, the Solicitor General's successful January 31, 1992 application to this Court for a stay of the District Court's injunctive relief similarly relied upon untested allegations in extra-record affidavits that did not survive subsequent cross-examination.

To forestall another round of such Government misconduct, following the filing of the stay application yesterday, respondents sought a status conference with Judge Johnson, on the record, and requested that he permit us to take the deposition of Ms. Hrinak immediately, so as cross-examine her with regard to the "magnet effect" allegations made in her declaration. Judge Johnson expressed concern on the record that the Government appeared to be "stacking the deck," by including for the first time in a stay application before this Court a declaration that had not been subject to cross-examination. Accordingly, Judge Johnson directed the Government to inform this Court that the Hrinak Declaration had been generated for the first time on appeal and had not been part of the record before the District Court. Judge Johnson further advised respondents to move before this Court either to strike the Hrinak Declaration from the record or, in the alternative, to supplement the record before this Court with a

*For example, the Solicitor General filed the affidavit of Admiral William P. Leahy, Jr. before the Supreme Court, affirming that having counsel from the Haitian Refugee Center present on Coast Guard cutters would interfere drastically with operations. Upon later deposition, Admiral Leahy testified that his own 14 year-old son had spent two weeks on a Coast Guard cutter during an operational law enforcement mission. Similarly, Assistant Secretary of State Bernard Aronson declared that he had "credible reports" that as many as 20,000 Haitians were "massing on one of Haiti's coasts preparing to depart by sea for the United States." In subsequent deposition, however, Aronson conceded that "massing" was "an ambiguous term," that they were not "gathered in some huge group," and that he could not be sure of how many there actually were. See generally HRC v. Baker, Plaintiffs' Application to Stay the Mandates of the United States Court of Appeals for the Eleventh Circuit Pending Certiorari at 31-41.

deposition of Ms. Hrinak or counter-declarations regarding the "so-called" magnet effect.

Accordingly, respondents hereby request that this Court take judicial notice of the attached "Chronology of Events in Haiti Since March 18, 1992," drawn from the wire services and newspaper accounts. See Appendix A. These events, which include the collapse of an international plan for returning President Aristide to Haiti and a new wave of violence and beatings by the Haitian military, are also recounted in the attached Declaration of Jocelyn McCalla of the National Center for Haitian Refugees, who has just returned from seven days in Haiti. See Appendix B. The events recounted in these appendices wholly rebut the Government's unfounded claim of irreparable injury from the District Court's order by providing ample reason, wholly unrelated to that order, why Haitians might have begun to flee Haiti in enlarged numbers in late March.

Now that the Court as a whole is considering the Government's stay application, respondents reiterate their request that that application be summarily denied, or that respondents be given an opportunity to file a responsive memorandum of law within twenty-four hours of the Court's call for a response. Respondents reiterate that the only issue raised by this stay is whether our clients -- three legal service organizations and their Haitian clients, who are being held in custody, incommunicado, and against their will on territory subject to complete U.S. jurisdiction and control -- will have an opportunity to talk to one another before the Second Circuit resolves the appeal.

Given that thirty-four credible asylum applicants will be sent back just as soon Judge Johnson's order is stayed; that conditions in Haiti appear to be rapidly deteriorating; that respondent Haitian Service Organizations are suffering daily and irreparable injury to their First Amendment rights because the Government denies them access to their clients; that no probative evidence has been offered regarding any magnet effect caused by Judge Johnson's order; that that order does not affect the Government's power to repatriate Haitians who have been "screened-out," i.e., found not to have a credible fear of political persecution, or even "screened-in" (so long as they have been adequately counseled); that no certiorari petition is or will soon be pending before this Court; that the Second Circuit is already scheduled to hear an expedited appeal in this case in about two weeks; and that the Government's arguments against the order have already been rejected six successive times, without dissent, by two federal courts, respondents again respectfully urge this Court to deny the stay requested in this case.

Very truly yours,

Harold Hongju Koh

Harold Hongju Koh
Counsel for Plaintiffs

Haitian Centers Council,
Inc., et al.

Appendix A: Chronology of Recent Events in Haiti Since March 18, 1992
Appendix B: Declaration of Jocelyn McCalla

cc: The Honorable Sterling Johnson, Jr., EDNY
Scott Dunn, Esq., AUSA-EDNY
Ronald Mann, Esq., Solicitor General's Office, DOJ
John F. Daly, Esq., Civil Appellate, DOJ
Robert Bombaugh, Esq., OIL-DOJ