IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-13009-D

ERNEST MOISE, HEDWICHE JEANTY, BRUNOT COLAS, JUNIOR PROSPERE, PETERSON BELIZAIRE and LAURENCE ST. PIERRE, on behalf of themselves and all others similarly situated,

Appellants,

v.

JOHN M. BULGER, Acting Director for District 6, Immigration and Naturalization Service, JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service, JOHN ASHCROFT, Attorney General of the United States, IMMIGRATION AND NATURALIZATION SERVICE, and UNITED STATES DEPARTMENT OF JUSTICE,

Appellees.

On Appeal From the United States District Court
For the Southern District of Florida

APPELLANTS' REPLY BRIEF

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I. THE GOVERNMENT CONTINUES NOT TO DISPUTE THAT THE PAROLE STATUTE AND REGULATION FORBID THE CONSIDERATION OF NATIONALITY AND RACE.

There continues to be no dispute that the parole statute and regulation require that parole determinations be made "without regard to race or national origin." Nowhere in its brief does the government contend that the language of the statute and regulation permits the consideration of race or nationality or that the government has changed the interpretation it articulated before the Supreme Court in Jean v. Nelson, 472 U.S. 846 (1985).[1] Instead, the government argues that the Becraft Haitian detention policy in fact does not make distinctions based on nationality or race. Gov. Br. at 33-37. And, even if it did, it would be permissible because the Acting Deputy INS Commissioner Becraft possessed sufficient authority to promulgate the policy notwithstanding the neutral parole statute and regulation. Gov. Br. at 37-41. Both of these arguments fail.

Without ever addressing the meaning of the parole statute and regulation, the government attempts to minimize the importance of Jean v. Nelson, stating that the decision "dealt with allegations of disobedience of official policy by subordinate decision makers" and was therefore limited to its facts. Gov. Br. at 39. This assertion, however, misses the point of petitioners' argument about the relevancy

[1] In Jean v. Nelson, the Court stated "Respondents concede that the INS's parole discretion under the statute and the regulations, while exceedingly broad, does not extend to considerations of race or national origin." Jean, 472 U.S. at 855.

of Jean v. Nelson. Jean v. Nelson is relevant to the present case because it interpreted the parole statute and regulation, thereby fixing their meaning. Jean v. Nelson cannot be simply distinguished on its facts. While the *application* of the statute and regulation in any given case may turn on particular facts, the *meaning* of the statute does not change unless and until the Supreme Court's interpretation of the statute is successfully challenged. In the words of the Supreme Court, "[i]t is [the Court's] responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute means . . . ." Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13 (1994). Because the Supreme Court adopted the government-advanced interpretation of the statute and regulation in Jean v. Nelson, the government is bound by the interpretation arrived at in that case.[2]

[2] The government has not changed its position and cannot do so now. The government has presented no evidence, such as a field guidance or policy memorandum, to indicate that it had retracted its nondiscriminatory interpretation of the parole statute or regulation which it articulated before the Supreme Court in Jean v. Nelson. The government cannot simply state during the course of this litigation that it has changed its interpretation of the parole statute and regulation. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988) (declining to defer to agency interpretations which were mere litigating positions). Moreover, because the argument has not been raised in its brief, it should be considered waived. United States v. Nealy, 232 F.3d 825, 830-31 (11th Cir. 2000).

II. CONTRARY TO THE GOVERNMENT'S CLAIM, THE BECRAFT HAITAIN DETENTION POLICY VIOLATES THE NEUTRAL PAROLE STATUTE AND REGULATION BECAUSE IT REQUIRES THE CONSIDERATION OF NATIONALITY AND/OR RACE AND DENIES CASE-BY-CASE REVIEW OF RELEASE REQUESTS.

The Becraft Haitian detention policy violates on its face the neutral statute and regulation because it *requires* that Immigration and Naturalization Service (INS) officers consider whether a detainee is Haitian when making parole decisions and *requires* that Haitians (and Haitians alone) be subjected to an "unusual hardship" standard that reduced the Haitian release rate from 96 percent to 6 percent.[3] Moreover, INS further violated the parole statute and regulation by failing to conduct individualized review of parole requests filed by Haitians. None of the government's assertions even addresses these arguments.

A. The Becraft Haitian Detention Policy On Its Face Requires Consideration of Nationality and/or Race.

The government cites no relevant authority for its claim that the Becraft Haitian detention policy does not violate the neutral parole statute and regulation. The government cites to the following three cases as authority for its claim that "the parole policy at issue is one that the INS has historically invoked in response

[3] The government does not dispute petitioners' claim that, in the month prior to the Becraft Haitian detention policy, Haitians were released at a rate of 96 percent. Pet. Br. at 5. The government also does not dispute petitioners' claim that other similarly situated asylum seekers were released at a rate of 95 percent for the period December 2001 through January 2002. Id. at 6.

to immigration crises such as mass migration:" Louis v. Nelson, 544 F. Supp. 973 (S.D. Fla. 1982), You Yi Yang v. Maugans, 68 F.3d 1540 (3d Cir. 1995), and Mathews v. Diaz, 426 U.S. 67 (1976). Gov. Br. at 35. None of these cases supports the government's position. The district court in Louis never sanctioned discriminatory parole determinations, but merely found the policy at question did not in fact discriminate. Louis, 544 F. Supp. at 1004.[4] Moreover, the Supreme Court expressly found that the parole statute and regulation forbid considerations of race and nationality in parole decisions, regardless of the possibility of a mass migration. Jean v. Nelson, 472 U.S. 846 (1985). You Yi Yang v. Maugans addressed the legal issue of whether certain Chinese immigrants had made an "entry" into the United States as that term is defined in immigration law. You Yi Yang, 68 F.3d at 1546. The case had nothing to do with parole decisions and therefore had nothing to do with whether the INS could consider race and/or nationality in parole determinations. Finally, Mathews v. Diaz involved an equal protection challenge to Congress's authority to eliminate certain medicare benefits for noncitizens and, thus, had nothing to do with parole or any INS determined issues. Diaz, 426 U.S. at 80.

[4] This finding was reversed by a panel of this Court, Jean v. Nelson, 711 F.2d 1455 (1983).

The government grossly mischaracterizes petitioner's statutory claim as a claim to having a "right or entitlement to be paroled" or asking for "court-ordered parole." Gov. Br. at 17, 36. This is simply incorrect. Petitioners have never asserted a right or entitlement to parole or to a particular outcome in their requests for parole. To the contrary, petitioners have consistently argued that they have a statutory right to be *considered* for parole "without regard to race or national origin" because the Supreme Court has interpreted the parole statute and regulation to require such a nondiscriminatory determination.

The government's citation to Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981), does not support its position that petitioners are asserting an entitlement to parole. Gov. Br. at 36. Dumschat involved a constitutional challenge to the denial without explanation of an application for a commutation of a criminal sentence. Dumschat, 452 U.S. at 465-67. The Supreme Court held that the Board of Pardons was not required to state reasons for its denial because the respondent had no constitutional right to commutation of his sentence. Id. This case is wholly inapposite to petitioners' statutory claim because Dumschat was a constitutional case, not a statutory interpretation case, and petitioners claim no constitutional right to parole, but only the right to nondiscriminatory consideration for parole as prescribed by statute. Moreover, unlike Dumschat, where the Court found that there were no standards governing commutation, this case involves the

question of whether a statutory limitation on the exercise of discretionary parole authority has been violated.

Here, the Becraft policy violates the statute and regulation on its face because it *requires* adjudicators to consider whether the applicant for parole is Haitian. Because the policy is facially invalid, the degree of impact that the policy had on parole determinations is not relevant to petitioners' statutory claim. Nevertheless, the government seeks to downplay the radical impact that the Becraft Haitian detention policy had on Haitian parole determinations. Gov. Br. at 35-36, 50. But the undisputed facts demonstrate that the Becraft policy had a radical impact on Haitian requests for parole. The policy expressly imposed a new "unusual hardship" standard that resulted in a release rate of 6 percent while other asylum seekers were released at a rate of 95 percent. Pet. Br. at 5-6. This 6 percent release rate for Haitians contrasts markedly with the 96 percent release rate immediately prior to the policy. Id. at 5. Moreover, non-Haitians were released without even having to file a release request with INS.

The government would also have the Court believe that the Becraft policy only applied to Haitians arriving by boat in South Florida. Gov. Br. at 35, 49. This is incorrect. As is demonstrated by Acting Deputy Commissioner's declaration, the policy was directed at all "inadmissible Haitians arriving in South Florida," regardless of whether they arrived by boat or by plane. R2-38-Ex. 1 at 4.

While the government conveniently later modified the Becraft policy to permit the parole of Haitians arriving by air, this modification occurred on April 5, 2002, after this lawsuit was filed. R2-38-Ex. 1 at 6; R2-39-24-26.[5]

Finally, the government is incorrect in suggesting that the district court found that the Becraft Haitian detention policy did not make distinctions based on nationality. Gov. Br. at 34. To the contrary, the district court's analysis was based on the opposite premise, namely that the policy made precisely such distinctions. The court stated: "the Supreme Court's holding in Jean v. Nelson does not preclude the Government from adopting a parole policy that differentiates between nationalities." R2-65-12. While it is true that the district court did accept without question the government's stated rationales for promulgating the Becraft policy, the court accepted these explanations as "facially legitimate and bona fide" reasons *for creating a policy that differentiates between nationalities.*

B. INS Officers Did Not Review Haitians' Release Requests On a Case-by-Case Basis.

The government distorts the truth in its statement to this Court that INS officers continued to adjudicate parole requests filed by Haitians on a case-by-case basis. Gov. Br. at 50. This claim is particularly bold as the government admits

[5] The fact that the government initially included Haitians arriving *by air* in the detention policy demonstrates that the government's post-litigation rationale of deterring Haitians arriving *by boat* is pretextual. See Pet. Br. at 35-40.

that the Haitians were kept in detention not because of their individual circumstances, but because the government wanted to prevent a mass migration and save lives as a general policy matter. Gov. Br. at 10-11. Moreover, the district office did not forward for consideration to INS Headquarters requests filed by Haitians who were not pregnant or unaccompanied minors, but instead either quickly denied the requests with false reasons for denial or refused to issue a decision. R2-38-Ex. 1 at 5; R1-4-Ex. 1 at 1, Ex. 2 at 2, Ex. 3 at 1, Ex. 6. At the same time, asylum seekers of other nationalities were routinely released without even having filed release requests.[6] For all of these reasons, the government's claim to this Court that INS officers continued to consider the individual merits of Haitians' release requests is simply false.

III. CONTRARY TO THE GOVERNMENT'S CLAIM, ACTING DEPUTY COMMISSIONER BECRAFT DID NOT POSSESS AUTHORITY TO ACT CONTRARY TO THE NEUTRAL PAROLE STATUTE AND REGULATION.

The government puts forth two arguments to support its position that the Acting Deputy Commissioner was acting within the limits of his authority in

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[6] The government notes that petitioners each filed similar requests for parole. Gov. Br. at 43 n. 21. While it is true that they each filed *pro se* requests on a standardized letter, the letters did contain information specific to each (for example, sponsor information). In any event, the fact that petitioners used a standardized letter is irrelevant to this case, as the cases were not denied based on their individual merits but because of the Becraft Haitian detention policy. Moreover, as stated above, asylum seekers of other nationalities *were not required to file a request for parole.*

promulgating the Haitian detention policy. First, the government argues that "nationality-based classifications are precisely the kind of classifications respecting aliens that are entirely legitimate." Gov. Br. at 37. The government also argues that the Acting Deputy Commissioner had sufficient authority to make nationality a factor in parole decisions regarding Haitians. Gov. Br. at 38.

Both of these arguments, however, miss the point of petitioners' statutory claim. Petitioners do not dispute the general authority of Congress or executive officials to make "nationality-based classifications" in the area of immigration. Rather, petitioners claim only that, in this particular case, Congress has spoken and has mandated by statute that parole decisions must be made "without regard to race or nationality." While the Attorney General has broad discretion to make parole determinations, this discretion must be exercised within the bounds set by Congress and thus does not extend to considerations of race and nationality. As an inferior executive officer, the Acting Deputy INS Commissioner must also exercise his parole authority within the limits set by Congress. Only the President pursuant to authority delegated by Congress has the authority under the Immigration and Nationality Act (INA) to act in a way that contravenes the neutral parole statute. 8 U.S.C. § 1182(f); Pet. Br. at 15-20.

None of the authority cited by the government contradicts petitioners' argument. While the government cites to the Eleventh Circuit *en banc* decision in

Jean v. Nelson, 727 F.2d 957 (11th Cir. 1985), the government completely ignores the subsequent Supreme Court decision, Jean v. Nelson, 472 U.S. 846 (1985), which fixed the meaning of the parole statute and regulation and required the exercise of parole be within nondiscriminatory parameters. Gov. Br. at 37.

Other authority cited by the government involves *Congress* passing an immigration law that differentiates between nationals. See Gov. Br. at 37 n. 18 (citing Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2193, amended by, Pub. L. No. 105-139, 111 Stat. 2644 (1997); Cuban American Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966); Alvarez v. District Director, INS, 539 F.2d 1220 (9th Cir. 1976), cert. denied, 430 U.S. 918 (1977)). In contrast, Congress in this case has enacted a parole statute that forbids considerations of race and nationality.

The other cases cited by the government involve the INS making nationality distinctions either by regulation or directive. See Gov. Br. at 37 n. 18 (citing Malek-Marzban v. INS, 653 F.2d 113 (4th Cir. 1981); Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975); Yassini v. Crosland, 618 F.2d 1356 (9th Cir. 1980); Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979)). Petitioners, however, do not dispute the authority of the Attorney General to promulgate regulations or to otherwise act within the bounds of his authority under the INA. None of the cases cited by the

government stands for the proposition that the Attorney General or his subordinates can act in a way that contravenes a Congressional statute.

Regarding the government's point that the parole regulation specifically authorizes the Deputy INS Commissioner to exercise the Attorney General's parole power, petitioners also do not dispute this fact. Again, however, this parole authority must be exercised within the limits set by Congress. The Deputy INS Commissioner, like the Attorney General, is bound by the dictates of the neutral parole statute and regulation.

IV. CONTRARY TO THE GOVERNMENT'S CLAIM, 8 U.S.C. § 1252(a)(2)(B)(ii) DOES NOT APPLY BECAUSE PETITIONERS DO NOT CHALLENGE DISCRETIONARY DETERMINATIONS IN INDIVIDUAL CASES AND THE JURISDICTIONAL BAR DOES NOT APPLY IN HABEAS PROCEEDINGS.

Contrary to the government's contention, 8 U.S.C. § 1252(a)(2)(B)(ii) does not apply to petitioners' claims because they do not challenge discretionary determinations. Moreover, the jurisdictional bar does not apply in habeas proceedings under 28 U.S.C. § 2241. To the extent that this Court finds that the district court was correct to limit itself to habeas jurisdiction, the bar does not apply for this additional reason.

A. 8 U.S.C. § 1252(a)(2)(B)(ii) Only Applies to Discretionary Determinations.

The government erroneously contends that 8 U.S.C. § 1252(a)(2)(B)(ii), which bars review of discretionary decisions by the Attorney General, precludes judicial review of petitioners' claims in this case. Gov. Br. at 19. The government misses entirely the crux of petitioners' arguments by continuing to improperly characterize petitioners' claims as challenges to discretionary parole determinations. As stressed in their principal brief, petitioners do not challenge the exercise of discretion in their individual cases. Pet. Br. at 24-29. Petitioners claim that the INS has acted beyond the scope of its delegated authority in disregarding the plain language of the parole statute and regulation that *limits* the agency's discretion.

The government fails to appreciate that not all claims concerning the parole provision at 8 U.S.C. § 1182(d)(5)(A) are barred by Section 1252(a)(2)(B)(ii) simply because the granting of parole involves the exercise of discretion. This Court has dismissed such a broad reading of this type of procedural bar. Pet. Br. at 25 (citing Al Najjar v. Ashcroft, 257 F.3d 1262, 1298 (11th Cir. 2001) (concluding that substantively similar procedural bar did not prohibit legal challenges to provision governing discretionary determinations); McNary v. Haitian Refugee Center, 498 U.S. 479, 492-94 (1991) (differentiating between discretionary determinations and challenges to the "practices and policies" of the agency in

making the determinations)). As noted by the Supreme Court in INS v. St. Cyr, 533 U.S. 289 (2001), there is a marked difference between challenges to "substantively unwise exercise[s] of discretion" and "questions of law that [arise] in the context of discretionary relief." St. Cyr, 533 U.S. at 307-08 (also noting that deportable aliens traditionally have "a right to challenge the Executive's failure to exercise the discretion *authorized by the law*").[7]

B. 8 U.S.C. § 1252(a)(2)(B)(ii) Does Not Apply in Habeas Proceedings.

Contrary to the government's claim (Gov. Br. at 19 n.9), the jurisdictional provision 8 U.S.C. § 1252(a)(2)(B)(ii) does not apply to habeas proceedings under 28 U.S.C. § 2241. The provision states, in relevant part:

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

8 U.S.C. § 1252(a)(2)(B). On its face, this language does not repeal the preexisting jurisdiction available to litigants under 28 U.S.C. § 2241. Nowhere is 28 U.S.C. § 2241 or habeas jurisdiction referenced.

[7] Because petitioners do not bring challenges to discretionary determinations, but present questions of statutory and constitutional interpretation, this Court should review the district court's decision *de novo*.

Even if there is some ambiguity about whether 8 U.S.C. § 1252(a)(2)(B)(ii) repeals habeas jurisdiction, the Supreme Court's decision in St. Cyr rearticulated the well-settled proposition that Congress cannot repeal jurisdiction by implication, but it must do so expressly. St. Cyr, 533 U.S. at 299. Accordingly, courts apply a stringent standard to ascertain whether it was expressly repealed, requiring there be no possible doubt about Congress's intention to repeal a source of jurisdiction. In coming to its conclusion in St. Cyr that habeas jurisdiction was not repealed by any of the three jurisdictional provisions at issue, the Supreme Court noted that none of the provisions specifically mentioned 28 U.S.C. § 2241. Id. at 312. Given the historic use of § 2241 jurisdiction as a means of reviewing immigration orders, the Court found Congress' failure to refer specifically to § 2241 particularly significant. Id. at 313 (citing Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991)). This case presents the same scenario, as 8 U.S.C. § 1252(a)(2)(B)(ii) does not mention 28 U.S.C. § 2241.

The Supreme Court in St. Cyr also based its conclusion that 28 U.S.C. § 2241 had not been repealed in part on the fact that, "the term 'judicial review' or 'jurisdiction to review' is the focus of each of these three provisions" at issue. St. Cyr, 533 U.S. at 311. The Court found that, in the immigration context, "judicial review" and "habeas corpus" have historically distinct meanings. Id. (citing

Heikkila v. Barber, 345 U.S. 229 (1953); Morissette v. United States, 342 U.S. 246, 263 (1952)).

The Court concluded that the three provisions at issue in St. Cyr, 8 U.S.C. §§ 1252(a)(1), 1252(a)(2)(C) and 1252(b)(9), did not repeal habeas jurisdiction because they only referred to "jurisdiction to review" or "judicial review." St. Cyr, 533 U.S. at 311-14. Similarly, 8 U.S.C. § 1252(a)(2)(B)(ii) does not refer to "habeas corpus" but instead uses the phrase "jurisdiction to consider or review." Thus, under the Supreme Court's reasoning in St. Cyr, the provision cannot be interpreted to repeal habeas jurisdiction.

V. CONTRARY TO THE GOVERNMENT'S CONTENTIONS, THERE IS JURISDICTION TO CERTIFY THE CLASS IN THIS CASE.

Contrary to the government's assertions, petitioners have in no way "abandoned their challenge to the denial of a class writ of habeas." Gov. Br. at 57. Petitioners' principal brief focuses on and fully discusses the district court's errors in dismissing the class writ of habeas corpus. Without fail, petitioners have addressed every argument raised by the district court in dismissing their claims, and petitioners have explicitly asked this Court to grant the "class action petition for writ of habeas corpus."[8] Pet. Br. at 61.

[8] Moreover, the district court below denied the motion for class certification as *moot* based on its blanket dismissal of the underlying claims—the claims at issue in this appeal. At no point did the district court reach the merits of the class

The government also incorrectly asserts that 8 U.S.C. § 1252(f)(1) denies the courts the jurisdiction or authority to certify the proposed class and grant relief in this case. Gov. Br. at 58. By its own terms, Section 1252(f)(1) does not apply to this case. Section 1252(f)(1) denies all federal courts, other than the Supreme Court, the jurisdiction or authority to "enjoin or restrain the operation of the provisions of *part IV* of [subchapter II]." 8 U.S.C. § 1252(f)(1) (emphasis added). The parole provision at 8 U.S.C. § 1182(d)(5), however, is located in *part II* of subchapter II, and not within part IV, and thus does not fall within the limits of Section 1252(f)(1). See 8 U.S.C. § 1182(d)(5); 8 C.F.R. § 212.5. See also Catholic Social Servs. v. INS, 232 F.3d 1139, 1149-50 (9th Cir. 2000) (concluding that Section 1252(f)(1) does not apply to a preliminary injunction under 8 U.S.C. § 1255(a) because it is located in part V instead of part IV of subsection II).

Contrary to the government's attempts to mischaracterize petitioners' claims, petitioners do not seek to "enjoin or restrain the operation" of 8 U.S.C. § 1225(b)(1)(B)(ii).[9] Petitioners do not challenge INS' authority to detain them

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certification motion. The government's assertion that petitioners have somehow failed to deal with class certification is surprising. In addressing the erroneous dismissal of the underlying claims, petitioners have addressed the exact basis of the district court's denial of the motion for class certification.

[9] As the government notes, Part IV of subchapter II encompasses 8 U.S.C. §§ 1221-1231, which, in turn, includes the detention provision at Section 1225(b)(1)(B)(ii). As noted above, however, the parole provision at Section 1182(d)(5) is located in Part II.

under 8 U.S.C. § 1225, nor do they seek to enjoin the INS from detaining other arriving Haitian asylum seekers under this section. Petitioners simply seek to ensure proper implementation of the parole provision at 8 U.S.C. § 1182(d)(5) as written—specifically, that parole determinations be made on a neutral, case-by-case basis, and without discrimination as to race or nationality, as provided by statute and regulation. Therefore, since petitioners do not seek to enjoin or restrain any part IV provision, the limitation on injunctive relief, by its own terms, does not apply to the relief sought in this case.[10]

VI. IN ANY EVENT, NOTHING RAISED BY THE GOVERNMENT REBUTS PETITIONERS' CLAIM THAT THE ACTING DEPUTY INS COMMISSIONER HAD NO FACIALLY LEGITIMATE AND BONA FIDE REASON FOR PROMULGATING THE HAITIAN DETENTION POLICY.

Petitioners argue in the alternative that the government had no facially legitimate and bona fide reason for the Becraft Haitian detention policy and that the government's stated reasons were pretextual, post hoc rationalizations. Pet. Br. at 34-40. In addressing petitioners' arguments, the government contends that: 1)

[10] The legislative history concerning Section 1252(f)(1) supports this plain language reading of the provision. The legislative history clearly indicates that Congress meant Section 1252(f)(1) to protect against the injunction of the "operation of the new removal procedures established in [IIRIRA]." Immigration in the National Interest Act of 1995, H.R. Rep. No. 104-469, pt. 1, at 161 (1996). Congress was simply concerned with ensuring that the removal procedures "remain in force" while any lawsuits regarding the procedures are pending. Id.

petitioners "lack the authority to determine whether particular aliens should be admitted to this country as well as the expertise and information sources necessary to appraise the basis for decisions entrusted to the political branches of government," and 2) the government should not "be required to articulate specific reasons for the denial of parole." Gov. Br. at 42-43. Neither of these assertions successfully rebuts petitioners' arguments.

First, as stated above, petitioners do not claim a right or entitlement to be paroled or "admitted" to the country. Moreover, contrary to the government's contention, the issue is not whether petitioners have "the authority" to determine which aliens should be admitted or whether petitioners have the "expertise and information sources" necessary to evaluate the government's decisions. Rather, the issue is whether the Becraft policy is based on "facially legitimate and bona fide" reasons. This analysis requires that this Court, not petitioners, determine whether the government's stated reasons are reasonably based on the record.

In insisting that the government should not "be required to articulate specific reasons for the denial of parole," the government misunderstands the relevancy of the more than 90 written denials of parole issued to Haitians. The issue is not that the written denials lacked specific reasons, but that the written denials nowhere contain the reasons for detaining Haitians articulated by Deputy INS Commissioner Becraft *during the course of this litigation*. Instead, the virtually

identical denials state that the Haitians were denied parole because *they were considered flight risks for a failure to prove identity*. R1-4-Ex. 2 at 1, Ex. 6. Nowhere in the written denials appear the reasons articulated by Becraft during this case. None of the denials reference the government's purported concern about saving lives or deterring a mass migration. This is critical to this Court's assessment of whether the government had a facially legitimate and bona fide reason for adopting the Becraft policy, as post hoc rationalizations for the policy are not reasonably based on the record and cannot constitute facially legitimate and bona fide reasons.[11]

VII. CONTRARY TO THE GOVERNMENT'S CLAIM, THE DISTRICT COURT VIOLATED THE FEDERAL RULES OF CIVIL PROCEDURE AS WELL AS THE RULES GOVERNING HABEAS CORPUS PROCEEDINGS.

The district court erroneously dismissed the entire case before trial even though there were genuine issues of material fact. The government unsuccessfully argues that such action was proper because the "[t]he court made clear (R2-65-8) its finding that 'the issues were fully briefed.'" Gov. Br. at 55. This, however, is the incorrect standard for summary judgment under rule 56(c) of the Federal Rules of Civil Procedure.

[11] The government's citation to newspaper articles as support for its position that the Becraft policy was motivated by a desire to save lives is egregiously inappropriate because the newspaper articles are not in evidence and, moreover, they are self-serving statements from the INS's own press releases.

The government also fails to rebut petitioners' alternative argument that, even if the district court was limited to habeas jurisdiction, the court erroneously failed to hold an evidentiary hearing and grant petitioners leave to commence discovery. The government argues that the question of whether a "facially legitimate and bona fide" reason existed for the Becraft Haitian detention policy is a "question[] of law which required neither an evidentiary hearing nor discovery to resolve." Gov. Br. at 55. This is incorrect, as the issue is a question of fact not law. Pet. Br. at 34-35 (discussing cases holding that "facially legitimate and bona fide" reasons must be reasonably related to the record). As such, the district court is obligated to allow the parties to develop the record and to make findings of fact after a hearing in order to determine whether a reason is facially legitimate and bona fide. A hearing was especially called for in this case given the post hoc rationalizations put forth by the government which are contradicted by their own written reasons for denial. See Section VI above.

VIII. CONTRARY TO THE GOVERNMENT'S CLAIMS, THIS COURT HAS JURISDICTION TO REVIEW PETITIONERS' APA RULEMAKING CLAIM AND THE BECRAFT POLICY SHOULD HAVE BEEN SUBJECT TO RULEMAKING.

A. The APA Permits Review of Compliance with its Own Notice and Comment Rulemaking Procedures.

In arguing that review under the Administrative Procedures Act (APA) is foreclosed because the granting or denying of parole is an "agency action

committed to agency discretion by law," 5 U.S.C. § 701(a)(2), the government misconstrues petitioners' APA claim. Petitioners challenge the failure of government to subject the Becraft Haitian detention policy to the notice and comment procedures of the APA, 5 U.S.C. § 553(b). Petitioners do not challenge individual parole decisions. The exception to APA review for "agency action committed to agency discretion by law" is a very narrow one, existing only where "in a given case there is no law to apply" when reviewing the agency action. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). Since there is unquestionably substantial law to apply in order to determine government compliance with notice and comment procedures, courts have consistently rejected arguments that agency discretion over *substantive* individual decisions precludes review of the *procedural* propriety of its rule making. See, e.g., Inova Alexandria Hospital v. Shalala, 244 F.3d 342, 346 (4th Cir. 2001); American Medical Association v. Reno, 57 F.3d 1129, 1134 (D.C. Cir. 1995); New York City Employees' Retirement Sys. v. SEC, 45 F.3d 7 (2d Cir. 1995); Five Flags Pipe Line Co. v. U.S. Dept. of Transportation, 1992 WL 78773 (D.D.C. 1992). Indeed, the district court in this case came to the same conclusion, finding that petitioners' rulemaking claim was not insulated from review.[12] R2-65-31.

[12] Lincoln v. Vigil, 508 U.S. 182, 195 (1993), upon which government relies, actually supports petitioners' argument. In Lincoln, the Supreme Court found that the substantive decision to terminate clinical services was "committed to agency

B. The Becraft Haitian Detention Policy is a "Rule" Subject to the Notice and Comment Procedures of the APA.

The government fails to address the district court's opinion and the numerous cases relied upon by petitioners which support petitioners' argument that the Becraft Haitian detention policy is a "rule" within the meaning of the APA. The district court found that the Becraft policy was a new rule because of the broad definition of the term "rule" under the APA. R2-65-31-32. The government nowhere addresses this argument and instead appears to rely chiefly on the fact that the Becraft policy did not reverse *on a nationwide basis* the longstanding INS rule of making parole decisions without regard to race or nationality. Although they cite to no supporting authority, they repeatedly refer to the policy's geographic limitation to one district.[13] Gov. Br. at 45. A virtually identical geographically limited restriction, however, was held to be a "rule" in United States v. Picciotto, 875 F.2d 345 (D.C. Cir. 1989) (concluding that "additional conditions" applicable only to one national capital region park constitute a substantive rule subject to the APA's notice and comment requirements).

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discretion by law." Lincoln, 508 U.S. at 184. However, the Court then stated that it was nevertheless compelled to separately examine whether the action was a "rule" subject to the "notice and comment" procedures of the APA. Id. at 195-96.

[13] The government's accompanying factual representation implying that the policy was limited to one "boatload of 165 inadmissible aliens," Gov. Br. at 45, is disingenuous. See Pet. Br. at 5-6.

Moreover, the government's argument that the Becraft policy is not a new rule because it did not change INS's interpretation of the parole statute and regulations simply fails. The Becraft policy, on its face, reversed the agency's prior nondiscriminatory parole rule by *requiring* consideration of the nationality of the immigrant. Indeed, the district court recognized that the Becraft Policy was a policy "that differentiates between nationalities." Any amendment to a prior rule or change in a longstanding interpretation of an existing rule requires APA rulemaking. Shalala v. Guernsey, 514 U.S. 87, 100 (1995).

Finally, the single case mentioned by government, American Trucking Ass'n, Inc. v. I.C.C., 688 F.2d 1337 (11th Cir. 1982), rev'd on other grounds, 467 U.S. 354 (1984), actually supports petitioners' position. In American Trucking, this Court held that a policy changing a longstanding agency interpretation must be subjected to the notice and comment procedures of the APA:

> While a decision in a particular case or cases to revoke a special permission authority would not be rulemaking, the decision to reverse a longstanding and uniform practice by revoking all outstanding authorities of a particular type and implicitly indicating that no such authorities will be issued in the future is clearly a rule.

American Trucking, 688 F.2d at 1348.

C. The Becraft Haitian Detention Policy "Rule" Does Not Fall Within the "General Statement of Policy" or "Interpretive Rule" Exceptions to APA Rulemaking.

In arguing that the Becraft Haitian detention policy is exempt from the APA's notice and comment procedures as a "general statement of policy" or "interpretive rule," the government relies solely upon their own unsupported representation that the policy in no way affected the discretion to grant parole. This claim is starkly contradicted by the record as well as numerous cases rejecting similar attempts by agencies to avoid APA rulemaking. The policy changed from one requiring that immigrants' parole determinations be made without regard to race or nationality to a policy in which all Haitian immigrants in South Florida were treated differently from all other arriving immigrants.

Predictably, the result was that the parole decisions with respect to Haitians—and only Haitians—was dramatically altered.[14] Given this record, it is disingenuous to argue, as the government does, that the policy "simply reiterated the INS's general policy of considering parole requests on a case by case basis." Gov. Br. at 51. Moreover, even if the INS officials retained *some* discretion under the new policy, courts have consistently held a policy which simply "narrows" the

[14] The release rate for Haitians who passed their credible fear interviews dropped from 96 percent in November 2001 to 6 percent for the period from December 14, 2001 to March 18, 2002, while the release rate for other nationalities remained at 95 percent.

discretion in the determinative process cannot be exempted from notice and comment as a "statement of policy." See Pet. Br. at 50-53 and cases cited therein.

The government has made no attempt to distinguish or respond to the cases cited by petitioners. Indeed, the case cited by the government, Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975), actually supports petitioners' position. In Noel, the INS issued a policy directive of general application which had the effect of changing the practice of the New York District Director. 508 F.2d at 1025-26. The Court of Appeals for the Second Circuit held that it was a "statement of policy" because the directive simply educated all District Directors about the agency's existing policy. Id. at 1031. Because only the New York District Director had departed from that policy, the educational impact of the directive created a change in his decisionmaking. The court found that "policy statements" assist in "the education of agency members in the agency's work." Id. at 1030. In contrast, the Becraft Haitian detention policy serves no educational or policy clarification goal. Its sole purpose, as expressed in the policy itself, was to alter the way in which INS treated Haitians—and Haitians alone.

The Becraft policy is also not exempt from the APA as an "interpretive rule." In Shalala v. Guernsey, the Supreme Court held that an "interpretive rule" that is inconsistent with an existing agency regulation must be published. 514 U.S. at 99. Moreover, numerous other cases hold that changes in longstanding

interpretive policies, even though "interpretive" themselves, must be subjected to the notice and comment procedures. See, e.g., Shell Offshore Inc. v. Babbitt, 238 F.3d 622 (5th Cir. 2001); Alaska Professional Hunters Association v. FAA, 177 F.3d. 1030 (D.C. Cir. 1999). The Becraft policy, by requiring nationality to be a decisionmaking criteria, reversed decades of administrative and judicial construction of the parole statute and regulations and represented a dramatic departure from prior practice. As such, it is subject to the notice and comment procedures of the APA.

D. The Becraft Haitian Detention Policy "Rule" Does Not Fall Within the "Foreign Affairs Function" Exception to APA Rulemaking.

The "foreign affairs function" exception to APA rulemaking is narrow and requires the satisfaction of two requirements. First, it must be a policy driven by relations between the United States and other sovereign nations. Zhang v. Slattery, 55 F.3d 732, 744-45 (2d Cir. 1995); Yassini v. Crossland, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980). Second, it must support clearly enunciated Presidential policy as part of the President's constitutional role in foreign affairs. Yassini, 618 F.2d at 1360-61.

The government does not even attempt to establish that the Becraft policy meets these standards, nor could they if they had tried. The record in this case, even when construed most favorably to the government, shows that the Becraft

policy is a decision by a midlevel agency bureaucrat to change a longstanding agency rule allegedly in order to deter additional illegal immigration from a particular country. There is no evidence whatsoever of any Presidential involvement, much less Presidential involvement implicating foreign affairs. As such, there is no authority or justification for the INS to claim the "foreign affairs exception" to the APA in this case.

VIII. AS ASYLUM SEEKERS WHOM INS HAS DETERMINED HAVE A CREDIBLE FEAR OF PERSECUTION AND WHO DO NOT MAKE A CLAIM TO ADMISSION, PETITIONERS HAVE A RIGHT NOT TO BE INVIDIOUSLY DISCRIMINATED AGAINST IN THEIR APPLICATIONS FOR PAROLE.

Contrary to the government's assertions, petitioners are entitled to raise an equal protection challenge to invidious discrimination in incarceration on the basis of race and/or nationality. That inadmissible aliens have no due process right to or constitutionally protected interest in admission to the United States is entirely irrelevant to petitioners' claims. Gov. Br. at 23-27. Petitioners have not claimed any right to admission or release,[15] and petitioners do not contend that the Constitution requires the adoption of any particular substantive policy in regard to

[15] It is important to note that the word "parole" has two entirely separate meanings in immigration law. Only temporary parole is involved here. The parole involved is not parole *into* the country in the sense of admission, but rather temporary release from physical custody pending a determination of asylum or admissibility.

detention or parole. Petitioners claim only that the neutral parole policy adopted must be applied in an evenhanded manner.

To hold that a person cannot challenge invidious discrimination on *equal protection* grounds simply because that person has no due process or protected interest in the governmental action would be unprecedented. The logical extension of such an argument is that the government could employ without justification a policy under which all white asylum seekers are released pending their asylum claims while all black asylum seekers are kept incarcerated. None of the "due process" cases cited by the government holds that inadmissible aliens lack the right to raise equal protection challenges. And none even hints that government officials can deprive a person of physical liberty solely on the basis of his race or nationality wholly free from constitutional scrutiny, particularly where high-level executive officials and Congress have decreed otherwise.

CONCLUSION

Based on the foregoing, Appellants request that the Court vacate the decision of the District Court for the Southern District of Florida and grant them the relief sought in their class action petition for writ of habeas corpus and complaint for injunctive and declaratory relief. In the alternative, Appellants request that the Court remand this case to the district court with instructions to

proceed in accordance with the Federal Rules of Civil Procedure or, in the alternative, to hold an evidentiary hearing and grant leave for discovery.

Dated: September 10, 2002

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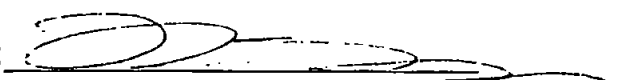
BY: 
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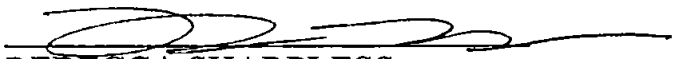
CERTIFICATE OF RULE 32(a)(7)(B) COMPLIANCE

Undersigned counsel for Appellants certifies that this Reply Brief contains no more than 7,000 words. The word processing program with which this brief was prepared calculated the number of words in this brief to be 6,900.



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CERTIFICATE OF SERVICE

I certify that two true and correct copies copy of the foregoing Principal Brief as well as one copy of the Reply Brief have been mailed to the following by U.S. Postal Service on this 10th day of September, 2002:

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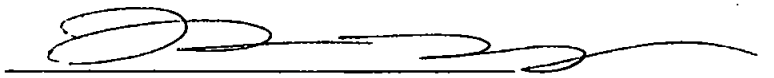

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