No. 02-13009-D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ERNEST MOISE, HEDWICHE JEANTY, BRUNOT COLAS
JUNIOR PROSPERE, PETERSON BELIZAIRE, AND LAURENCE ST. PIERRE,

Petitioners/Appellants,

v.

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

Respondents/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR RESPONDENTS/APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

I hereby certify that the following persons may have an interest in the outcome of this case:

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3. Peter Michael Becraft, Acting Deputy Commissioner, Immigration and Naturalization Service ("INS")
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24. Joan A. Lenard, United States District Judge, Southern District of Florida

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37. Laurence St. Pierre, Appellant
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39. James W. Ziglar, Commissioner, INS

M. JOCELYN LOPEZ WRIGHT

STATEMENT REGARDING ORAL ARGUMENT

Respondents request oral argument. This case involves the analysis and application of the Constitution, statutes, regulations, and precedent to issues such as immigration parole for inadmissible aliens, the Attorney General's authority to formulate policies regarding control of the Nation's borders, separation of powers, and national sovereignty. Oral argument will assist the Court in understanding the interplay of law and policy to these issues.

August 14, 2002

M. JOCELYN LOPEZ WRIGHT

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JOHN M. BULGER, Acting Director for District 6, Immigration and Naturalization Service, et al.,

Respondents/Appellees.

BRIEF FOR RESPONDENTS/APPELLEES

STATEMENT OF JURISDICTION

Before the district court, Petitioners/Appellants Hedwiche Jeanty, Brunot Colas, Junior Prospere, and Laurence St. Pierre relied upon 28 U.S.C. §§ 1331, 1361, and 2241, 5 U.S.C. § 701 et seq. (Administrative Procedures Act ("APA")), and article 1, section 9, clause 2 of the Constitution as jurisdictional bases. Respondents/Appellees John M. Bulger, et al. (collectively, "respondents" or "the Government"), contested the existence of jurisdiction on all grounds. Exercising only section 2241 habeas jurisdiction, on May 17, 2002, the District Court for the Southern District of Florida issued a final order denying petitioners' emergency motion for a temporary restraining order, preliminary injunction and/or class writ of habeas corpus, denying their motion to certify a class, and dismissing their

class action petition for writ of habeas corpus and complaint for injunctive and declaratory relief. R2-65.[1/]

Petitioners filed their notice of appeal on May 24, within the sixty days permitted by 28 U.S.C. § 2107(b) and Federal Rule of Appellate Procedure 4(a)(1). This Court's jurisdiction arises under 28 U.S.C. §§ 1291 and 2253(a).[2/] Venue properly lies in this Court. 28 U.S.C. §§ 1294(1), 2253(a).

STATEMENT OF THE ISSUES

1. Whether the district court properly concluded that it had only habeas jurisdiction over inadmissible petitioners' claims given the review preclusion of 8 U.S.C. § 1252(a)(2)(B)(ii).

2. Whether inadmissible aliens may invoke the Fifth Amendment to challenge the Attorney General's discretionary authority over parole determinations where this Court has previously held that such aliens have no constitutional rights

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[1/] The district court's order is published in the official reporter as Jeanty, et al. v. Bulger, et al., 204 F. Supp. 2d 1366 (S.D. Fla. 2002). Ernest Moise and Peterson Belizaire were dismissed below and are not petitioners in this appeal. R2-57; R2-65-5 n.4.

[2/] The lack of a separate judgment under Federal Civil Procedure Rule 58 does not affect this Court's jurisdiction. Reynolds v. Golden Corral Corp., 213 F.3d 1344, 1345 (11th Cir. 2000). The May 24 Notice of Appeal was filed on behalf of Hedwiche Jeanty, Brunot Colas, and Laurence St. Pierre. R2-66. On June 13, petitioners filed an Amended Notice of Appeal adding Junior Prospere as an appellant.

with regard to their applications for admission, asylum or parole.

3. Whether the adjustment to the INS Detention Use Policy was a valid exercise of the Attorney General's delegated authority over parole determinations and is based upon facially legitimate and bona fide reasons.

4. Whether the adjustment is exempt from the APA's rulemaking requirements.

5. Whether the district court properly denied habeas relief and dismissed inadmissible aliens' petition for a class writ of habeas and complaint for declaratory and injunctive relief without discovery or an evidentiary hearing, where the issues of its jurisdiction and the applicable standard of review are questions of law, and where it lacked authority to grant class-wide relief.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

Petitioners, inadmissible Haitians who were rescued by the Coast Guard off the Florida coast and are in immigration custody, filed a petition for a class writ of habeas corpus combined with a complaint for declaratory, injunctive and mandatory class action relief in the district court on March 15, 2002. R-1-1. They allege that the Immigration and Naturalization Service's ("INS") application of the detention and parole provisions of the Immigration and Nationality Act ("INA") to Haitians arriving in

South Florida violates the statute, the regulations, the APA, and the Fifth Amendment. R1-1. Petitioners sought class certification (R1-5, 6) and, by emergency motion, requested a temporary restraining order ("TRO") and/or preliminary injunction or a class writ of habeas corpus requiring the INS either to release them on parole pending adjudication of their applications for admission, or, in the alternative, to readjudicate their parole requests. R1-2, 3.

Briefing on petitioners' emergency motion and motion for class certification was completed on March 21. R1-13, 14; R2-20, 21. On April 5, the district court requested further information from the parties, directing the Government, in part, to submit documents "describing the manner in which instructions regarding the adjustment of parole criteria were communicated to Miami District INS officials." R2-30. The Government submitted responsive documents (R2-39), including, inter alia, a copy of the INS Detention Use Policy issued in October 1998 (R2-39-1), as well as two supplemental declarations by INS officials (R2-38), and parole-related documents for each of the petitioners (R2-37).

After considering the parties' briefs and the additional documents submitted in response to the April 5 order, on May 17, 2002, the district court issued a decision (1) denying petitioners' motion for class certification, (2) denying the request for a TRO, (3) denying the request for a preliminary injunction and/or class writ of habeas corpus, (4) dismissing the

class action writ of habeas corpus and complaint for injunctive and declaratory relief, and (5) closing the case. R2-65. This appeal followed.

B. Statutory and Regulatory Background

Under the immigration laws, if an INS officer determines that an arriving alien "is inadmissible [for lack of the proper entry documents], the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A). Further, "[i]f the officer determines at the time of the interview that an alien has a credible fear of persecution within the meaning of [8 U.S.C. § 1225b(b)(1)(B)(v)[3/]], the alien shall be detained for further consideration of the application for asylum." 8 U.S.C. § 1225(b)(1)(B)(ii) (emphasis added).

[3/] "Credible fear of persecution" is defined as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of [8 U.S.C.]." 8 U.S.C. § 1225b(b)(1)(B)(v). The INS has explained that:

> [t]he credible fear standard sets a low threshold of proof of potential entitlement to asylum; many aliens who have passed the credible fear standard will not ultimately be granted asylum.

62 Fed. Reg. 10,320 (Mar. 6, 1997) (prefatory comments).

Section 1182(d)(5)(A) of Title 8 United States Code, provides a narrow exception to this detention mandate by authorizing the Attorney General, "in his discretion," to parole temporarily into the United States any alien applying for admission "under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." See 8 C.F.R. § 212.5(a) (2002). Even if either of these requirements is satisfied, parole may only be granted if "the aliens present neither a security risk nor a risk of absconding." 8 C.F.R. § 212.5(b).

The Attorney General's discretionary parole authority consistently has been construed as the only vehicle to release an inadmissible alien from immigration custody. See Perez-Perez v. Hanberry, 781 F.2d 1477, 1481-82 (11th Cir. 1986); Palma v. Verdeyen, 676 F.2d 100, 105 (4th Cir. 1982). In enacting the parole statute in 1954, Congress intended that the release of inadmissible aliens on parole be the exception, "granted only occasionally, in the case of rare and exigent circumstances." Amanullah v. Nelson, 811 F.2d 1, 6 (1st Cir. 1987);[4/]

[4/] Amanullah discusses in detail the legislative history of the parole statute as it existed in 1987. 811 F.2d at 5-8. At that time, the statute authorized the Attorney General to grant discretionary parole to aliens applying for admission only "for emergent reasons or for reasons deemed strictly in the public interest." 8 U.S.C. § 1182(d)(5)(A) (1982). In 1996, Congress amended section 1182(d)(5)(A) by striking "for emergent reasons or reasons deemed strictly in the public interest" and inserting "only on a case-by-case basis for urgent humanitarian reasons or

(continued...)

see Barrera-Echavarria v. Rison, 44 F.3d 1441, 1446 (9th Cir. 1995) (en banc) ("Congress intended that detention be the 'default' choice, and parole a discretionary exception"). Thus, the statute makes clear that such parole "shall not be regarded as an admission of the alien" and that the alien shall be returned forthwith to custody when, "in the opinion of the Attorney General," the purposes of the parole have been served. 8 U.S.C. § 1182(d)(5)(A). In other words, while the parole device authorizes the Attorney General to release an inadmissible alien temporarily into the community, the alien's legal status remains at the border. Leng May Ma v. Barber, 357 U.S. 185, 186-89 (1958); Garcia-Mir v. Smith, 766 F.2d 1478, 1483-84 (11th Cir. 1985) (discussing the "entry fiction"), cert. denied sub nom. Marquez-Medina v. Meese, 475 U.S. 1022 (1986).

[4/](...continued)
significant public benefit." See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 § 602(a) (Sept. 30, 1996) ("IIRIRA"). IIRIRA's legislative history makes clear that when Congress required "case-by-case" determination and substituted a higher standard for the grant of parole, it intended to "tighten" the Attorney General's discretion so that the parole device could not be used to circumvent the INA's admission requirements. S. Rep. No. 104-249, at 2-3, 21 (1996) (stating at page 3 that IIRIRA's amendments are necessary to, inter alia, address "the abuse of humanitarian provisions such as asylum and parole"); H. Rep. 104-469, pt.1 at 140-41 (1996) (citing with disfavor the parole of large groups of foreign nationals and emphasizing that the parole authority "should not be used to circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories.").

The Attorney General has delegated his parole authority to the INS Commissioner, as he is empowered to do by 8 U.S.C. § 1103(a). See 8 C.F.R. § 2.1 (2002). In turn, the regulations state:

> The authority of the Commissioner to continue an alien in custody or grant parole under section 212(d)(5)(A) of the [INA, 8 U.S.C. § 1182(d)(5)(A)] shall be exercised by the district director or chief patrol agent, subject to the parole and detention authority of the Commissioner or [his] designees, which include the Deputy Commissioner, the Executive Associate Commissioner for Field Operations, and the regional director, any of whom in the exercise of discretion may invoke this authority under section 212(d)(5)(A). . . .

8 C.F.R. § 212.5 (2001).

C. Statement of Facts

1. Petitioners are four of 187 Haitian migrants rescued by the Coast Guard on December 3, 2001, when their overloaded sailboat, the Simapvivetzi, ran aground off South Florida. Sue Ann Pressley, Haitians Rescued from Boat Stuck Off Fla. Coast, Wash. Post, Dec. 4, 2001, at A2 (available at 2001 WL 30330157); Luisa Yanez, Haitian Migrants Taken Ashore, Miami Herald, Dec. 4, 2001, at 1B (available at 2001 WL 31463296). Eighteen migrants jumped off the boat and swam to shore; two more were reported drowned. R2-26-2;[5/] Jody A. Benjamin, Haitians at Krome Await

[5/] Documents 25-28 in the record are the originals of the declarations we submitted as part of the Government's opposition to petitioners' emergency motion. See R1-14.

Ruling; Coast Guard Sends Back Two More Ships, S. Fla. Sun-Sentinel, Dec. 11, 2001, at 3B (available at 2001 WL 29960770).

Because none of the remaining 167 migrants had proper entry documents and were therefore inadmissible, they were processed in expedited removal proceedings. 8 U.S.C. § 1225(b)(1). Under the statute, the regulations, and the INS Detention Use Policy in effect, the INS was required to detain aliens in expedited removal proceedings, with limited exceptions. R2-26-3; R2-39-2-3; 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 235.3(b)(2)(iii). If an alien expresses a desire to apply for asylum and is found to have a credible fear of persecution, the alien is referred for a full removal proceeding under 8 U.S.C. § 1229a. Because of limited detention space, the INS's general policy is to favor the release of such aliens if they can demonstrate their true identity, that they are likely to appear as ordered in future immigration proceedings, and that they do not pose a danger to the community. R2-26-3; R2-39-6; R2-38-Becraft Supp. Decl. ¶ 6.

Over a two-week period, the INS conducted credible fear interviews of the 167 migrants. R2-26-3. All but two were found to have a credible fear and were placed into non-expedited removal proceedings with the opportunity to apply for asylum at a hearing before an immigration judge.[6/] R2-26-3-4. On an

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[6/] The two migrants who did not establish a credible fear were ultimately removed to Haiti and are not a part of this lawsuit. R2-26-4.

individualized, case-by-case basis, the INS also began considering each migrant's eligibility for release on parole. R2-26-4-5.

2. The Simapvivetzi was only one of several boats that were reported by the Coast Guard and the media to have departed from Haiti destined for Miami since early November 2001. See R2-28-3; R2-25-2-3. See also Jacqueline Charles, Haitian Refugees Returned By Cuba; Perilous Sea Voyage in Hurricane Season Ends Where It Started, Charlotte Observer, Dec. 20, 2001, at 10A (two boats bound for the United States, one with 63 Haitians and another with 238 Haitians). Concerned that even more Haitians would risk their lives crossing the ocean to reach the United States, one day after the Simapvivetzi's rescue, the INS issued a statement to the media advising Haitians of the dangers they faced by boarding overloaded, unseaworthy boats heading out to sea only to be interdicted by the Coast Guard and returned to Haiti. R2-25-3; Charles Rabin & Alfonso Chardy, INS Warns Desperate Haitians of Sea Trips, Miami Herald, Dec. 5, 2001, at 1B.

Additionally, in the wake of a sharp increase in dangerous maritime departures from Haiti (see R2-62-51-52, 55), consultations occurred among officials from several executive agencies and the INS in Washington, D.C. R2-25-3-4; R2-38-Becraft Supp. Decl. ¶ 7. Pursuant to these consultations, in an effort to discourage potential immigrants from further taking

risky sea voyages to reach the United States[7/] and to avoid an immigration crisis of the magnitude which existed during the early 1980s and 1990s with the Haitian and Cuban mass migrations, the Acting Deputy Commissioner for the INS instructed the Miami District INS office that no Haitians should be paroled without the approval of INS Headquarters. R2-25-3-4; R2-38-Becraft Supp. Decl. ¶ 7; see R2-39-11-23. This was an adjustment to the general INS Detention Use Policy in response to the special circumstances that arose with arrival of the Simapvivetzi in south Florida. R2-25-3-4.

3. On or about December 14, 2001, the INS officers at Krome Service Processing Center ("Krome") were advised by the District Director for Miami that INS Headquarters had directed the district not to parole Haitians from custody or to transfer them without prior approval from INS Headquarters. R2-26-5; R2-39-11-16. The District Director explained that Headquarters was initiating the parole adjustment in an effort to deter a mass

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[7/] Petitioners' declarations demonstrate that the INS's concern was not unfounded. See R1-4-Ex. 7: Moise Decl. ¶ 6 ("The boat trip was dangerous. . . . The boat was overcrowded. The trip was especially difficult for my children who got sick due to the windy weather."); Jeanty Decl. ¶ 6 ("I risked my life by taking a boat from Haiti to the United States. The trip was very dangerous."); Colas Decl. ¶ 3 ("The voyage on the boat was extremely difficult. . . . I know that I could have died on the trip . . ."); Prospere Decl. ¶ 4 ("There was not enough water or food on the boat. It was also overcrowded."); St. Pierre Decl. ¶ 3 ("I left Haiti on a boat. It was a difficult journey. There were too many people on the boat . . . not enough food or water. A couple of people died trying to make it to shore.").

exodus from Haiti to the United States. R2-26-5; R2-38-Lee Supp. Decl. ¶ 5. The Krome Deportation Officers continued to review the migrants' parole requests on an individual, case-by-case basis. R2-26-5; R2-38-Lee Supp. Decl. ¶¶ 6-12.

Based upon the results of the parole request reviews, the Officer-in-Charge at Krome recommended to the Regional Detention and Removal Operation ("RDRO") that the INS grant parole to 15 of the migrants (five women who were pregnant and ten unaccompanied minors who had family members in the community) who arrived on December 3. R2-26-5. These parole recommendations were reviewed and approved by INS Headquarters. R2-26-5.

The Miami district continued to forward to the RDRO other recommendations regarding parole. R2-26-5. In February 2002, Miami officials received permission to release pregnant women and unaccompanied minors without Headquarters approval. R2-38-Becraft Supp. Decl. ¶ 11; R2-39-17. In March, Miami received further permission to release, without Headquarters approval, Haitians granted asylum where the INS had waived appeal. R2-39-21-22; R2-38-Becraft Supp. Decl. ¶ 11;. Additionally, on April 5, 2002, INS Headquarters issued procedures to be used for the consideration of release of certain Haitians who arrive by air or other regular means at designated ports of entry in south Florida. R2-38-Becraft Supp. Decl. ¶ 9; R2-39-24-26.

4. In January 2002, petitioners Jeanty, Colas and Prospere submitted almost identical one-page form letters requesting

parole. R2-34. The INS denied these requests because "[b]ased on the particular facts of [their] case[s], including manner of entry, INS cannot be assured that [they] will appear for immigration hearings or other matters as required." R2-37-Jeanty at 24, Colas at 23, Prospere at 27. Petitioner St. Pierre requested parole in February 2002 and identified a sponsor in April.[8/] R2-37-St. Pierre at 27, 28. Petitioners alleged below that the INS's parole policy in South Florida violates the INA, its regulations, and the APA, is unconstitutional, and is contrary to the Supreme Court's decision in Jean v. Nelson, 472 U.S. 846 (1985) ("Jean II"), aff'g on other grounds 727 F.2d 957 (11th Cir. 1985) (en banc) ("Jean I"). R1-1.

D. The District Court's Decision

The district court held that 8 U.S.C. § 1252(a)(2)(B)(ii) precluded its jurisdiction over petitioners' challenge to the Attorney General's exercise of discretion in denying their parole requests, but did not strip it of habeas jurisdiction over petitioners' challenge to "the Attorney General's statutory and constitutional authority to refuse them parole allegedly without making case-by-case determinations." R2-65-14-15, 30. Exercising only section 2241 habeas jurisdiction and limiting its review accordingly, the court denied the emergency motion for a TRO and/or preliminary injunction or class writ of habeas corpus

[8/] The request was denied after the district court had issued its final order.

and the request for class certification, and dismissed the Class Action Petition for Writ of Habeas Corpus and Complaint. R2-65-15 n.10, 33-34.

Reviewing petitioners' constitutional claims first, the district court concluded that because of their status as inadmissible aliens, they "have no constitutional rights with regard to their [parole] applications." R2-65-16 (quoting Garcia-Mir). Thus, the court made clear, it would be guided by the "statutes and regulations promulgated by the political branches" in "determin[ing] whether Government officials have acted within the scope of their statutory and delegated authority." R2-65-17.

Turning to the statutory claims, the court rejected petitioners' reading of Jean II and concluded that the Supreme Court had decided the case on narrow grounds which did not implicate the authority of Congress, the President, or the Attorney General, and therefore, Jean II did not stand for the broad proposition "that the Executive must maintain nationality-neutral parole criteria as a policy matter." R2-65-24. Recognizing that the INA allowed the Attorney General to delegate his parole authority to INS officials, the court held that "the Acting Deputy Commissioner possesses sufficient authority to speak for the Executive branch" and was authorized to adjust the parole criteria in South Florida as necessary. R2-65-25-26. The court upheld the INS's policy adjustment because "preventing loss

of life and avoiding a mass migration from Haiti are facially legitimate and bona fide reasons for detaining Haitian nationals who arrive by boat in South Florida." R2-65-28-29. The court also concluded that petitioners were properly denied parole. R2-65-30.

As to petitioners' APA claims, the court held that the parole policy adjustment was not subject to the APA's rulemaking requirements under the "general policy statement" exception. R2-65-32-33. The court reasoned that "[t]he adjusted policy does not negate the discretionary nature of the parole determination, and it does not prevent INS officials from granting parole," and concluded that the adjustment did not establish a "binding norm" and, therefore, did not need to be promulgated as a rule. R2-65-33.

Because the court determined that no writ should issue, it further concluded that "no basis exists for the issuance of a preliminary injunction or temporary restraining order, or any further action," and ordered the case dismissed. R2-65-33.

E. Standard of Review

A district court's factual findings in a habeas corpus proceeding are reviewed for clear error. Chateloin v. Singletary, 89 F.3d 749, 752 (11th Cir. 1996). Moreover, and contrary to petitioners' contention (Pet'r Br. at 11), the proper standard of review applied to the Attorney General's decision not to parole an alien into the United States is whether the denial

is based upon a "facially legitimate and bona fide reason." Fiallo v. Bell, 430 U.S. 787, 794 (1977) (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)); Jean I, 727 F.2d at 976-77; Perez-Perez, 781 F.2d at 1482. This standard of review is an extremely deferential one. Sidney v. Howerton, 777 F.2d 1490, 1491 (11th Cir. 1985) (characterizing the INS's parole authority as "particularly sweeping"). The Government has no obligation to produce evidence to sustain the rationality of a classification. Heller v. Doe, 509 U.S. 312, 319 (1993). Rather, a decision by the Executive bears a "strong presumption of validity," and those attacking the rationality of the decision have "the burden to negate every conceivable basis which might support it, whether or not the basis has a foundation in the record." Id. at 320 (internal citation omitted).

Once a "facially legitimate and bona fide" reason is adduced, it is improper for a court to look behind that decision. Jean I, 727 F.2d at 977. The Court's only task is to determine whether the officials acted "within the scope of their delegated powers." Jean I, 727 F.2d at 977. This narrow standard of review applies even where other constitutional rights may be implicated. Kleindienst, 408 U.S. at 770 ("when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against [constitutional] interests . . .").

SUMMARY OF ARGUMENT

The question of whether petitioners may compel the Attorney General to exercise his discretionary parole authority to admit inadmissible aliens to the United States temporarily pending a determination of their admissibility, goes to the very heart of the Nation's sovereignty. Because considerations of sound policy and separation of powers dictate that under these circumstances court-ordered parole be foreclosed when inconsistent with the determination of the political branches, the district court's denial of habeas relief and dismissal of petitioners' complaint and petition for class writ of habeas, was correct.

It is a well-settled rule that unadmitted aliens have no constitutional rights regarding their applications for admission, asylum and parole; thus, there is no warrant for reading the Constitution as authorizing the courts to override the Attorney General's (acting through his delegates) policy determination that inadmissible petitioners' parole is not appropriate. The unavailability of extrastatutory judicial review of denial of parole necessarily flows from the plenary authority of the Legislative and Executive Branches over matters pertaining to the admission and exclusion of aliens, as well as the broad authority of the political branches over foreign affairs, which allows for the application of nationality distinctions in framing and implementing the immigration laws. Thus, the district court properly held that petitioners have no constitutional right to

parole and that the Supreme Court's decision in Jean II does not stand for the proposition that the Executive must maintain nationality-neutral parole criteria as a policy matter.

Moreover, and consistent with the delegation of authority specified in the statute and regulations, the district court correctly concluded that the adjustment to the INS Detention Use Policy at issue in this case was well within scope of the INS Acting Deputy Commissioner's delegated powers. Because that adjustment was adopted based on the facially legitimate and bona fide reasons of preventing the loss of life, deterring a mass migration, and ensuring asylum seekers' presence at their removal hearings, the court properly upheld the policy adjustment and refused petitioners' requests for discovery or for an evidentiary hearing for the purpose of looking behind the Acting Deputy Commissioner's exercise of discretion.

Further, the district court's conclusion that the adjustment is exempt from the APA's rulemaking requirements as a general statement of policy is correct given the high standard for a grant of parole, and the fact that the Miami District's discretion to recommend parole in any particular case meeting that standard, was unaffected by the adjustment. Finally, denial of the writ and dismissal of the complaint should be affirmed on the ground that under 8 U.S.C. § 1252(f)(1), the courts lack jurisdiction to provide petitioners with the requested relief of a class-wide injunction. In sum, the district court properly

rejected petitioners' statutory and constitutional challenges to the Attorney General's decision to adjust the parole practice in South Florida and that decision should be affirmed.

ARGUMENT

I. 8 U.S.C. § 1252(a)(2)(B)(ii) PRECLUDES JUDICIAL REVIEW OF THE ATTORNEY GENERAL'S DISCRETIONARY DECISIONS OVER PAROLE OF INADMISSIBLE ARRIVING ALIENS

Section 1252(a)(2)(B)(ii) of Title 8 United States Code provides that:

> 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 . . . .[9/]

The "subchapter" referred to in the statutory text is subchapter II of Chapter 12 of Title 8 U.S.C., which covers sections 1151-1378. Because decisions respecting release from custody, including parole under 8 U.S.C. § 1182(d)(5)(A), are discretionary determinations falling within subchapter II, see

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[9/] The title to section 1252 ("Judicial review of orders of removal") does not limit the reach of the statutory text only to appellate review of a final order of removal. Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) (title of statute cannot limit the plain meaning of the text); see Richardson v. Reno, 180 F.3d 1311, 1317-18 & n.11 (11th Cir. 1999) (applying section 1252(a)(2)(B)(ii) in non-final order suit seeking review of parole decision); CDI Info. Servs., Inc. v. Reno, 278 F.3d 616, 619-20 (6th Cir. 2002) (applying section outside the context of a final order of removal and citing cases); Mapoy v. Carroll, 185 F.3d 224, 227-31 (4th Cir. 1999) (collateral suit seeking a stay of deportation and release from INS custody); Curri v. Reno, 86 F. Supp. 2d 413, 418 (D.N.J. 2000) (habeas petition by inadmissible alien denied parole).

Van Dinh v. Reno, 197 F.3d 427, 433 (10th Cir. 1999), the district court properly concluded that they fall squarely within the ambit of section 1252(b)(2)(B)(ii). R2-65-13-15.

Whether a statute precludes judicial review "is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984); see also Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 301 (1943) ("type of problem involved" and "history of statute" are "highly relevant"). Any "presumption" of reviewability is just that -- a presumption. Block, 467 U.S. at 341. And although the Supreme Court has observed that the presumption may be overcome only upon a showing of "clear and convincing evidence," it has never applied that standard "in the strict evidentiary sense"; it is sufficient that "the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" Id. at 350-51 (citation omitted).

IIRIRA's amendments to the immigration statute manifest Congress's clear intent to preclude judicial review over discretionary determinations such as parole. See Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 486 (1999) ("AADC") ("Of course many provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts -- indeed, that can fairly be said to be the theme of the legislation.")

(emphasis in original). As the Supreme Court observed in AADC, 8 U.S.C. § 1252(g) and similar discretion-protecting jurisdictional provisions were specifically designed to preclude interlocutory judicial intervention that undermined the "streamlined process [to remove aliens] that Congress had designed." AADC, 525 U.S. at 485, 487. These amendments demonstrate that the courts have no authority to act inconsistently with the Attorney General's discretionary determinations -- a principle that applies with particular force to parole cases such as this one because, as we discuss below, inadmissible arriving aliens are not extended the same constitutional protections as United States citizens or admitted aliens. Cf. Marczak v. Greene, 971 F.2d 510, 516 (10th Cir. 1992) (noting that inadmissible aliens seeking release on parole are not entitled to the full scope of habeas review because "[e]xcluded aliens have no constitutional right to be paroled into this country."); Amanullah, 811 F.2d at 16 (that case involved exclusion rather than deportation proceedings "militates strongly in favor of further circumscription of the claim to an evidentiary hearing" in habeas proceedings).

As we have explained, the INS had discretion to grant or deny parole to petitioners but chose to exercise that discretion negatively -- not to petitioners' liking but certainly within the perimeters of its authority.[10/] Perez-

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[10/] The "nature of the administrative action" challenged (continued...)

Perez, 781 F.2d at 1481-82 ("It has been firmly established in this circuit that the obverse of this grant of authority to the Attorney General to parole an excludable alien is the power to deny such parole."). Thus, the district court properly concluded that it lacked jurisdiction over petitioners' challenges to the Attorney General's exercise of his discretion to deny their parole requests.[11] R2-65-14-15.

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[10] (...continued)
here and the "type of problem involved" also weigh heavily against recognizing a right of judicial review in this case. Block, 467 U.S. at 345; Switchmen's Union, 320 U.S. at 301. The fact that the immigration statute prescribes the Attorney General's grant of parole in discretionary terms and specifies no instance where parole must be granted, 8 U.S.C. § 1182(d)(5)(A), is sufficient in itself to demonstrate that Congress did not contemplate any role for the courts and sufficiently disposes of petitioners' arguments (Pet'r Br. at 25-27) that section 1252(a)(2)(B)(ii) does not foreclose review of their claims. See Webster v. Doe, 486 U.S. 592, 600 (1988) (statute authorizing employee termination whenever the agency director "deem[s]" it necessary or advisable "appears to foreclose the application of any meaningful judicial standard of review.").

[11] We argued below that section 1252(a)(2)(B)(ii) also deprived the district court of habeas jurisdiction. R1-14; R2-60-20-26. The court nonetheless concluded that it had jurisdiction under 28 U.S.C. § 2241 to review petitioners' claims 1-3 and 5. R2-65-15 n.10. Although respondents have not appealed this aspect of the decision below, to the extent that this Court must determine its own jurisdiction, Lettman v. Reno, 168 F.3d 463, 464-65, vacated in part on other grounds by Lettman v. Reno, 185 F.3d 1216 (11th Cir. 1999), we incorporate by reference our arguments below that habeas jurisdiction is also precluded. See R1-14; R2-60-20-26.

II. THE FIFTH AMENDMENT PROVIDES NO BASIS FOR OVERRULING THE ATTORNEY GENERAL'S DECISION TO DENY PAROLE PENDING DETERMINATION OF AN ALIEN'S ADMISSIBILITY INTO THE UNITED STATES

A. As Applicants for Admission, Petitioners Have No Extrastatutory Rights Regarding Determinations Related to their Admission, Including Parole

Petitioners' bold assertion (Pet'r Br. at 54) that they are "entitled to bring an equal protection challenge" to the Attorney General's exercise of his parole authority and, therefore, the district court erred in concluding that they "have no constitutional rights with regard to their [parole] applications," disregards more than a century's worth of Supreme Court jurisprudence and long-standing Circuit precedent establishing that inadmissible aliens are not within the protection of the Fifth Amendment. E.g., Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (aliens who have not yet entered our borders are accorded only that degree of process provided by "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress"); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212, 215 (1953) (inadmissible aliens are merely "on the threshold of initial entry" and are "treated as if stopped at the border"); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (excludable aliens "are not within the protection of the Fifth Amendment."); Jean I, 727 F.2d at 972 ("excludable aliens cannot challenge either admission or parole decisions under a claim of constitutional

right."). Stated differently, it is well-recognized that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." United States ex rel Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

The critical distinction between aliens who have gained admission to the United States and those who have not is ingrained in our immigration law:

> [O]ur immigration laws have long made the distinction between those aliens who have come to our shores seeking admission * * * and those who are within the United States after an entry, irrespective of its legality. In the latter instance, the Court has recognized additional rights and privileges not extended to those in the former category who are merely "on the threshold of initial entry."[12/]

Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) (footnote added); see, e.g., 8 U.S.C. § 1101(a)(13); Sale v. HCC, 509 U.S. 155, 174-76 & n.31 (1993); Landon v. Plasencia, 459 U.S. 21, 25-27, 32 (1982); Garcia-Mir, 766 F.2d at, 1483-84. The notion that "an unadmitted and nonresident alien [has] no constitutional right of entry to this country as a nonimmigrant or otherwise," Kleindienst, 408 U.S. at 762, is firmly rooted in the recognition that the plenary authority to govern the admission and exclusion of aliens is a fundamental and inherent attribute of national

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[12/] As the district court recognized, this doctrine is known as the "entry fiction." R2-65-16 (citing Garcia-Mir, 766 F.2d at 1478).

sovereignty that enables both the Legislative and Executive Branches to fulfill their respective functions:

> The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.

Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895).

Notwithstanding their physical presence within the boundaries of the United States, it is undisputed that petitioners in this case have not gained admission and, because they possess no valid documents authorizing their entry, fall within the category of "inadmissible" arriving aliens. R1-1-10 (class defined as aliens "applying for admission"). Although arriving aliens clearly cannot be punished or subjected to cruel treatment as a matter of constitutional law,[13/] under the settled principles discussed above, it is equally clear that the district court properly concluded (R2-65-17) that the Fifth Amendment's due process requirements do not enlarge arriving aliens' procedural and substantive rights in the admission process beyond those provided by statute and administrative regulations. Mezei, 345 U.S. at 212; Knauff, 338 U.S. at 544; Perez-Perez, 781 F.2d

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[13/] See Amanullah, 811 F.2d at 9 ("To be sure, outside the context of admission and exclusion procedures, excludable aliens do have due process rights."); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981); see also Wong Wing v. United States, 163 U.S. 228, 244-45 (1896).

at 1479 ("Parole decisions are deemed an integral part of the admissions process, and excludable aliens consequently cannot challenge parole decisions as a matter of constitutional right.").

Moreover, petitioners cannot invoke the protections of the Fifth Amendment to challenge their parole denials because "a constitutionally protected interest cannot arise from relief that the executive exercises unfettered discretion to award." Tefel v. Reno, 180 F.3d 1286, 1300 (11th Cir. 1999), cert. denied, 530 U.S. 1228 (2000). The statute is clear that a grant of parole is dispensed at the discretion of the Attorney General and his delegates. 8 U.S.C. § 1182(d)(5)(A). Accordingly, the parole statute does not create a substantive entitlement or liberty interest protected by the Constitution -- a principle long recognized in this Circuit and in other courts, Jean I, 727 F.2d at 972 (no liberty interest in parole);[14] Amanullah, 811 F.2d at 8; Gisbert v. Attorney General, 988 F.2d 1437, 1443 (5th Cir.

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[14] Upon affirming this Court's en banc decision in Jean, the Supreme Court stated that the constitutional question should not have been reached because the issues on appeal could have been resolved on statutory and regulatory grounds. Jean II, 472 U.S. at 854-55. Nevertheless, this Court later noted that "our en banc holding in [Jean I] regarding the constitutional issue remains viable as the Supreme Court did not vacate the opinion but affirmed and remanded on alternative grounds." Cuban American Bar Ass'n v. Christopher, 43 F.3d 1412, 1428 n.20 (11th Cir.) ("CABA"), cert. denied 516 U.S. 913 (1995). Petitioners' assertion (Pet'r Br. at 60 n.20) that "there is no binding precedent on this Court" governing their equal protection claim fails to acknowledge this Court's holding in CABA.

1993) (same) -- and petitioners can raise no Fifth Amendment claim. Jean I, 727 F.2d at 982 ("In the absence of a constitutional right, the only procedure to which plaintiffs are entitled are those granted by the statute or the agency."). Further, to the extent that petitioners are relying upon the INS's previous practice under the Detention Use Policy (R2-39-6) of favoring parole for aliens who have demonstrated a credible fear to establish an entitlement to parole, their attempt to craft such an entitlement must fail. As the Supreme Court has observed in a case involving commutation of criminal sentences, "[a] constitutional entitlement cannot 'be created -- as if by estoppel -- merely because a wholly and expressly discretionary . . . privilege has been granted generously in the past.'" Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981) (emphasis in original; citation omitted).

B. Petitioners' Status as Applicants for Admission Forecloses their Challenge to the Denial of Parole Pending a Determination of their Admissibility

Petitioners contend (Pet'r Br. at 54-61) that the principles of the entry doctrine do not, in any event, govern this case because as aliens who have established a "credible fear," they are allegedly "facially admissible" to the United States (Pet'r Br. at 56), and because they invoke the Fifth Amendment not with respect to their applications for admission but, instead, with respect to their applications for parole from detention pending a

determination of admissibility. These arguments are meritless and contravene Circuit precedent. Jean I, 727 F.2d at 976 ("We have rejected the argument that the entry doctrine fiction is inapplicable in the context of parole decisions . . .").

First, petitioners place undue weight on the INS's determination that they have established a credible fear of persecution. If "[t]he grant of asylum does not . . . create an interest protected by the due process clause," Jean I, 727 F.2d at 981, then meeting the lower credible fear threshold (see supra, n.3) is clearly insufficient to trigger constitutional protections. See id. at 982 n.34 ("we disavow any language used by the HRC[v. Smith, 676 F.2d 1023 (5th Cir. Unit B 1982)] court that might be read to suggest that excludable aliens have constitutional rights under the fifth amendment with regard to their applications for admission, asylum, or parole within this country."). In any event, meeting the credible fear standard does not make an alien "facially admissible"; it simply affords the alien an opportunity to apply for asylum. 8 C.F.R. § 235.3(b)(4). It is actual admission to the United States -- which petitioners have not obtained -- not simply "facial admissibility," that triggers the Fifth Amendment's protection. The Japanese Immigrant Case, 189 U.S. 86, 101 (1903) ("[A]n alien who has entered the country and has become subject in all respects to its jurisdiction, and a part of its population" is entitled to due process under the Fifth Amendment).

As to petitioners' assertion (Pet'r Br. at 59) that even where an individual has no right to a benefit the Government "must act in accordance with equal protection if it chooses to provide that benefit,"[15/] the authorities they cite for support simply are not pertinent here because those cases involved either aliens who had entered the United States and were subject to the Constitution, (Plyler v. Doe, 457 U.S. 202 (1982)), or are wholly unrelated to admission and immigration (Shaw v. Murphy, 532 U.S. 223 (2001) (prisoners)).

Petitioners' argument that their claim of unlawful discrimination is analytically distinct from any assertion of a substantive right to parole and, therefore, the exercise of the Attorney General's parole authority may be subjected to extrastatutory constraints that are inapplicable to the admission process itself, must be rejected. Pet'r Br. at 57 ("temporary parole . . . would not impinge upon the admission process"). Although parole does not effect an entry into the United States in contemplation of the law, as this Court recognized in Jean I, "it does permit the physical entry of the alien into the midst of

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[15/] But see The Chinese Exclusion Case, 130 U.S. 581 (1889) (indicating that the "sovereign power[]" to "admit subjects of other nations to citizenship" is subject to any restraint imposed by "the Constitution itself," (at 604), but nonetheless concluding that the Constitution imposes no restraint upon the authority of Congress to exclude a class of aliens based on their national origin, and that the determination of the Legislative Branch as to the "necessity" of any such classification is "conclusive upon the judiciary" (at 606)).

our society and implicates many of the same considerations -- such as employment and national security concerns -- that justify restrictions on admission," 727 F.2d at 971-72 & n.20, and "if aliens can claim that they have a constitutional right to due process regarding temporary release pending a final determination in their cases, the government's ability to control "entry" into this country is severely eroded," id. at 971 n.18. The discretionary authority to grant or withhold parole is inextricably bound up with the inherent sovereign authority to exclude and detain aliens. Indeed, the Attorney General's discretionary parole authority may be exercised only with respect to an "alien applying for admission to the United States" (8 U.S.C. § 1182(d)(5)(A)) and cannot realistically be viewed in isolation from the authority to exclude and detain. As the Supreme Court has expressly recognized, "detention, or temporary confinement" is "part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens." Wong Wing, 163 U.S. at 235; see also Perez-Perez, 781 F.2d at 1479. Petitioners' contention (Pet'r Br. at 57) that applying the Fifth Amendment to their parole requests allegedly "would in no way interfere with the ability of the Attorney General and his subordinates to determine their admissibility," is unrealistic and ignores the reality that such a constraint would severely undermine the Government's plenary authority to control entry of aliens.

Mezei is on point. There, the Supreme Court held that the Fifth Amendment afforded an excludable alien no right to be allowed temporary physical entry into this country. The issue presented was "whether the Attorney General's continued exclusion of [Mezei] without a hearing amounts to an unlawful detention, so that courts may admit him temporarily to the United States on bond until arrangements were made for his departure." 345 U.S. at 207. Because Mezei did not challenge the Government's power to exclude him but sought only release pending implementation of the exclusion order, this Court has recognized that the decision "did not concern admission or exclusion per se, but the rights of an alien when challenging his continued detention pending the enforcement of an exclusion order that had been entered against him." Jean I, 727 F.2d at 970. It follows, then, that the holding of Mezei denying extrastatutory rights to excludable aliens is not restricted to frontal challenges to denial of the right to enter. Rather, Mezei also forecloses excludable (now "inadmissible") aliens' efforts to litigate collateral claims such as the propriety of denial of interim parole.

Similar to Mezei, petitioners here do not challenge the Attorney General's authority under 8 U.S.C. § 1225(b)(1)(B)(ii) to exclude or detain them as aliens inadmissible for lack of proper entry documents. R1-1-12-13; see Pet'r Br. at 57. They seek to sidestep this authority, however, by arguing that they should be "temporar[ily] released" as a remedy for a kind of

collateral wrong they have allegedly suffered: discrimination in the administration of detention and parole. Pet'r Br. at 57-61. But Mezei, too, arguably had a discrete constitutional claim (sounding in procedural due process) that could have been distinguished analytically from any assertion of a substantive right to parole. 345 U.S. at 207. Nevertheless, in extending the entry doctrine to bar even Mezei's claim for parole, the Supreme Court did not deem it necessary to determine that the reasons for denying parole without a hearing were sufficiently compelling and sufficiently related to sovereign prerogatives to preclude judicial review. Compare 345 U.S. at 217-18 (Black, J., dissenting); id. at 224-28 & n.9 (Jackson, J., dissenting). Instead, the Court simply remarked that because Mezei was an "entrant alien," the "Attorney General [could] lawfully exclude [him] without a hearing as authorized by emergency regulations promulgated pursuant to the Passport Act." Id. at 214-15. Thus, Mezei forecloses petitioners' contention that the Government must justify the withholding of extrastatutory judicial review of the particular claim that an alien seeks to raise in challenging the denial of parole.[16/]

[16/] Petitioners' attempt to distinguish Mezei because, unlike Mezei, they are not yet subject to a final order of removal (Pet'r Br. at 58), is unpersuasive. If anything, Mezei's claim was more compelling than that of petitioners because no country was willing to admit him so his detention was potentially indefinite in duration. By contrast, petitioners' detention is ancillary to their admission: if their asylum claims are denied

(continued...)

III. THE DISTRICT COURT CORRECTLY UPHELD THE PAROLE POLICY ADJUSTMENT

A. Application of the INS's Neutral Detention Policy to Petitioners Does Not Violate the Statute or the Regulations

The district court properly rejected petitioners' contention that the parole adjustment contravenes Jean II, which, they claim, should be read to "forbid consideration" (Pet'r Br. at 14) of national origin and/or race in parole determinations. R2-65-24.

First, the INS has never considered petitioners' race in its custody determinations. R2-25-4. The mere fact that the Miami District's parole practice was adjusted with respect to inadmissible Haitians who have established a credible fear of persecution is not sufficient to establish impermissible discrimination based upon race. Indeed, if the INS had a policy of denying parole on the basis of race, then no Haitian or other Black refugees would have been released on parole. That is clearly not the case here, as petitioners acknowledge (R1-1-14) and as demonstrated by the parole of former petitioner Belizaire

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[16/](...continued)
and a final order of removal is entered, there is no impediment to their return to Haiti; if they are able to demonstrate admissibility, they will in due course be admitted. The Supreme Court's holding in Mezei is unaffected by its recent decision in Zadvydas v. Davis, 533 U.S. 678, 694 (2001), and it remains good law. See 533 U.S. at 693 (explaining that Mezei's excludable status "made all the difference").

and other Haitians. R2-62-119-31. Thus, petitioners' claim of race discrimination has no factual merit.

Second, petitioners err in asserting that the district court "found that the Haitian detention policy in fact 'differentiates between nationalities.'" Pet'r Br. at 15 (citing R2-65-12, 24). A review of the decision below reveals no such "finding"; the court simply stated on page 12 of its decision that it "finds that the Supreme Court's holding in Jean [II] does not preclude the Government from adopting a parole policy that differentiates between nationalities." R2-65-12. This is a far cry from finding that the Government actually adopted such a policy. It is consistent, rather, with the court's accurate analysis of the rationale in Jean II (R2-65-22-24), and its conclusion that the case was decided on a narrow basis and did not establish, as petitioners claim, a broad rule requiring individualized parole determinations without regard to race or nationality. R2-65-22, 24 ("The Supreme Court held neither . . . nor that the Executive must maintain nationality-neutral parole criteria as a policy matter.").

Moreover, on page 24 of its decision, the district court actually determined that the parole policy was adopted not on the basis of nationality, but "based on specific policy concerns, including the goals of preventing a mass migration from Haiti and ensuring the presence of Haitian asylum seekers at their removal hearings." R2-65-24 (emphasis added). Thus, it accepted

respondents' explanation that the parole policy being applied to petitioners here is in response to factors other than the nationality of the affected individuals, such as country conditions in the country of origin and geographical proximity to the United States which increases the likelihood of mass migration and also of migrant deaths due to dangerous sea voyages undertaken to reach this country. Indeed, the parole policy at issue is one that the INS has historically invoked in response to immigration crises such as mass migration. See, e.g., Louis v. Nelson, 544 F. Supp. 973, 979-82 (S.D. Fla. 1982) (describing the return to the pre-1954 restrictive parole policy in 1981 in response to the mass migration and flow of illegal immigration from the Carribean countries of Cuba and Haiti); You Yi Yang v. Maugans, 68 F.3d 1540, 1543-44 (3d Cir. 1995) (300 Chinese immigrants on the Golden Venture were detained by the INS pending a determination upon their applications for asylum). The fact that the INS has applied the parole policy to specific nationalities in response to immigration crises such as mass migrations does not render the policy or the INS's actions discriminatory. It merely demonstrates that, on occasion, nationality classifications have been adopted "in order to make a humane response to a natural catastrophe or an international political situation." Mathews v. Diaz, 426 U.S. 67, 81 (1976).

Although the majority of the Haitian migrants who arrived on December 3 were not released on parole, as we have pointed out

above, petitioners have no right or entitlement to be paroled while they are awaiting determination of their applications for admission. To the contrary, the statute is couched in terms requiring petitioners' detention. 8 U.S.C. § 1225(b)(1)(B)(ii). Moreover, the fact that the INS may have generously granted parole prior to December 3, 2001, does not lead to the conclusion that petitioners are entitled to parole.[17/] Cf. Dumschat, 452 U.S. at 465 ("No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution."). The district court properly rejected petitioners' reading of Jean II and

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[17/] Petitioners' purported statistical data (Pet'r Br. at 5-6) deserve little weight. Indeed, in Jean, the district court rejected similar statistical evidence submitted by plaintiffs in that case to prove their discrimination claim. In doing so, the court observed that

> [p]arole is not a random process and the probability of parole is not the same for every person. The decision to grant a deferred inspection takes into account many factors not contained in the data analyzed by Plaintiffs' statistician. Factors that may be considered include the age and health of the alien as well as the reason he does not appear entitled to enter this country. . . . . The only conclusion that can be drawn from this evidence is that Haitians are being impacted by the detention policy to a greater degree than aliens of any other nationality at the present time.

Louis v. Nelson, 544 F. Supp. 973, 982-83 (S.D. Fla. 1982), aff'd in part, rev'd in part by, Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), rev'd in part and dismissed in part, Jean I, 727 F.2d at 984.

correctly concluded that the parole adjustment at issue was prompted by policy concerns, not petitioners' race or nationality.

B. Even If the INS's Policy is not Nationality-Neutral, the Policy Should Be Affirmed Because Nationality Distinctions are Inherently Permissible in the Formulation and Application of the Immigration Laws

In any event, because the subject matter of immigration law necessarily implicates the relationship of the United States with aliens and foreign countries, nationality-based classifications are precisely the kind of classifications respecting aliens that are entirely legitimate. See, e.g., Jean I, 727 F.2d at 978 n.30 (citing examples of distinctions on the basis of national origin in the INA and observing that the authority to draw nationality-based classifications generally is shared by Congress and the Executive); R1-14-25-26.[18/] Congress has explicitly delegated to

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[18/] See, e.g., Nicaraguan Adjustment and Central American Relief Act ("NACARA"), Pub. L. No. 105-100, 111 Stat. 2193, amended by, Pub. L. No. 105-139, 111 Stat. 2644 (1997); Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (historical note to 8 U.S.C. § 1255); Yassini v. Crosland, 618 F.2d 1356 (9th Cir. 1980) (INS directive revoking deferred departure dates for Iranian nationals); Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979) (regulation requiring Iranian students to report on their current status); Malek-Marzban v. INS, 653 F.2d 113 (4th Cir. 1981) (amendment to rule on voluntary departure to reduce the time allowed for Iranian nationals); Noel v. Chapman, 508 F.2d 1023, 1028 (2d Cir.), cert. denied, 423 U.S. 824 (1975) (alien relatives of resident aliens from Eastern Hemisphere given preference not applicable to alien relatives of Western Hemisphere resident aliens); Alvarez v. District Director, INS, 539 F.2d 1220 (9th Cir. 1976), cert. denied, 430 U.S. 918 (1977) (special status for commuter aliens only from Mexico and Canada).

the Attorney General the full breadth of its discretion to make determinations as to the availability of parole. See 8 U.S.C. § 1182(d)(5)(A). This grant of discretion necessarily includes the authority to draw nationality distinctions in the exercise of parole authority "for reasons deemed strictly in the public interest." Id.; see Mathews v. Diaz, 426 U.S. 67, 81 (1976). Because the courts lack the expertise and information sources that would be necessary to appraise the basis for nationality classifications established with regard to the entry of aliens, the parole policy adjustment should be upheld as valid even if it is nationality-based and the district court's denial of petitioners' request for judically-mandated parole adjudications and release should be affirmed. See Nixon v. Fitzgerald, 457 U.S. 731, 751-53 (1982) (recognizing that "before exercising jurisdiction [courts] must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch.").

C. The Acting Deputy Commissioner's Exercise of His Delegated Authority Was Proper and Valid

Petitioners also err in contending (Pet'r Br. at 15-20) that only the President may adopt nationality-based policies and, therefore, the Acting Deputy Commissioner lacked sufficient authority to adjust the INS's parole practice at issue in this case. Indeed, this argument ignores the Legislative and Executive Branches' concurrent authority over immigration.

Nishimura Ekiu, 142 U.S. at 659; Jean I, 727 F.2d at 965 ("The political branches of the federal government therefore possess concurrent authority over immigration matters."). It further ignores the reality that the principal responsibility for immigration matters in the Executive branch resides with the Attorney General. 8 U.S.C. § 1103(a).

Petitioners next argue (Pet'r Br. at 19) that the district court's determination that the Acting Deputy Commissioner had sufficient authority to adjust the parole practice is error because if that were the case, then "local district directors and chief patrol agents" could just as validly promulgate the policy, a conclusion that allegedly "directly conflicts" with Jean II. Plaintiffs in Jean II challenged "the power of low-level politically unresponsive government officials to act in a manner which is contrary to federal statutes . . . and the directions of the President and the Attorney General, both of whom provided for a policy of non-discriminatory enforcement," 472 U.S. at 853; they specifically did not challenge the authority of "Congress, the President, or the Attorney General" to adopt nationality-based criteria in the administration of the parole statute. Id. at 852-53. Thus, Jean II dealt with allegations of disobedience of official policy by subordinate decision makers.

The 1982 regulation at issue in Jean II has since been amended to clarify "which officials are authorized by the

Attorney General, acting through the Commissioner, to grant parole from Service custody." 65 Fed. Reg. 82,254 (Dec. 28, 2000) ("the power to delegate this authority clearly flows from the Attorney General through the Commissioner to [his] designees"). As the district court found, Congress has delegated to the Attorney General the authority to make parole determinations. 8 U.S.C. § 1182(d)(5)(A). In turn, the Attorney General has delegated his authority to other employees of the Department of Justice, as he is empowered to do by statute. 8 U.S.C. § 1103(a)(3). Through this delegation, the Commissioner, the Deputy Commissioner, the Executive Associate Commissioner for Field Operations, and the regional director are empowered to exercise the Attorney General's parole authority. 8 C.F.R. § 212.5(a) (2002). Petitioners' argument (Pet'r Br. at 19) regarding local district directors' and chief patrol agents' authority to formulate nationality-based parole policies badly misreads the regulation which states that as to those officials, the exercise of parole authority is "subject to the parole and detention authority of the Commissioner or [his] designees," including the Deputy Commissioner. Id. (emphasis added).

Indeed, in this case, the INS officers who adjudicated petitioners' parole requests did so in accordance with the parole instruction issued on December 14 by the Acting Deputy Commissioner - one of the top level INS officials to whom the Attorney General has delegated his parole authority by

regulation. Thus, contrary to petitioners' claim the Deputy Commissioner is invested with the authority to adjust the parole practice as he did in this instance and the exercise of that authority is completely valid.

D. Preventing the Loss of Life and Deterring a Mass Migration are Facially Legitimate and Bona Fide Reasons for the Parole Policy Adjustment

The INS denied petitioners' requests for parole because "[b]ased on the particular facts of [the particular] case, including manner of entry," it was not assured that the individual would appear for an immigration hearing or other matters as required. R2-37-Jeanty at 24, Colas at 23, Prospere at 27. In view of petitioners' demonstrated desperation to leave Haiti despite the dangers involved in the boat trip (see supra, n.7) and INS Headquarters' expressed concern that the practice of favoring release for aliens who arrive by the boatload and who demonstrate a credible fear would encourage other similarly situated aliens to risk their lives in dangerous sea voyages en masse and would have led, in practice, to the unregulated presence of illegal aliens within the United States, the district court properly concluded (R2-65-29) that the INS had provided a facially legitimate and bona fide reason for the parole adjustment.[19/] Kleindienst, 408 U.S. at 69-70; Sidney v.

[19/] Proposed amicus Lawyers Committee for Human Rights ("LCHR") argues that the INS's detention of asylum seekers for (continued...)

Howerton, 777 F.2d at 1492. Petitioners' arguments (Pet'r Br. at 35-40) that these reasons are allegedly not credible overlooks the fact that they 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.[20] See Mathews v. Diaz, 426 U.S. at 81 ("For reasons

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[19] (...continued)
deterrence purposes is inconsistent with international law. These arguments are misplaced, however, as petitioners have not asserted any claim that the Government has violated international law. See R2-65-7 n.6. Moreover, petitioners conceded below that they do not challenge the Attorney General's authority to detain them under 8 U.S.C. § 1225(b)(1)(B)(ii), which authorizes detention of asylum seekers pending adjudication of their asylum claim. R2-20-1 ("Nor do Petitioners challenge the authority of the Attorney General to detain them or to make discretionary parole decisions."). Thus, LCHR's arguments regarding the impact of detention on asylum seekers and their ability to present their asylum claims are beside the point. In any event, no petitioner has alleged -- much less established -- that he or she has had difficulty obtaining evidence of an asylum claim while in detention, and the fact remains that an alien may demonstrate refugee status through his or her own credible testimony. See Al Najjar v. Ashcroft, 257 F.3d 1262, 1270 (11th Cir. 2001). Considering that truthfulness is not dependent upon whether an alien is detained, an asylum seeker's parole status is not dispositive of his ability to present an asylum claim.

[20] For example, petitioners' use of the statistics for Ecuadorian interdictions (Pet'r Br. at 39) is simply misguided. According to the Coast Guard's Website:

> In 1999 and 2000, Coast Guard cutters on Counterdrug patrol in the Eastern Pacific have encountered increasing numbers of migrants being smuggled from Ecuador to points in Central America and Mexico. While this may not have a direct connection to the U.S., the Coast Guard acts for humanitarian

(continued...)

long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."); Fiallo, 430 U.S. at 792 ("[O]ver no conceivable subject is the legislative power of Congress more complete") (citation omitted).

Moreover, petitioners' insistence that the agency should be required to articulate specific reasons for the denial of parole[21] must be rejected as it overlooks the fact that neither the parole statute nor the regulations impose limits on what procedures are to be followed; nor do they require the Attorney

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[20] (...continued)
reasons. Most of these vessels do not have the proper conditions to transport these migrants and lack the safety equipment in the event of an emergency. The Coast Guard works with the flag state of the vessels and other countries to escort the vessels to the closest safe port.

"Overview" at http://www.uscg.mil/d7/d7dpa/ (Migrant Statistics; Overview (emphasis added)). Thus, unlike petitioners here, the Ecuadorians interdicted by the Coast Guard are apparently not heading for the United States and so those statistics currently have no bearing on immigration parole policies.

[21] This claim is especially ironic given that petitioners submitted almost identical requests for parole in the form of boilerplate letters obtained from immigrant assistance groups. R2-34 Petitioners made no attempt in their written requests for parole to establish facts in their individual cases that would justify a grant of parole under the statute -- that is, for "urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A); see R2-65-30 (district court notes that "none of Petitioners' parole applications indicates any unusual hardship that would qualify for consideration by Headquarters.").

General or his delegates to act on prescribed grounds in making custody determinations. Accordingly, the Attorney General and his delegates cannot be required to write an exegesis for each denial of parole when neither the statute nor the regulations require an articulation of the reasons for the grant or denial of parole. See Dumschat, 452 S. Ct. at 466-67.

IV. RESPONDENTS ARE NOT IN VIOLATION OF THE APA

A. 8 U.S.C. § 1252(a)(2)(B)(ii) Foreclosed APA Review of Petitioners' Claims 4 and 6

Petitioners asserted below that the INS was in violation of the APA because it allegedly: (1) abused its discretion by not "providing an accurate statement of the grounds for denial" (R1-1-21 (claim 4)); (2) did not comply with the rulemaking requirements (R1-1-21-22 (claim 5)); and (3) abused its discretion by "unlawfully withh[olding] agency action to which the Petitioner class is entitled" (R1-1-22 (claim 6)). Thus, contrary to their present contentions (Pet'r Br. at 25), not only did they assert a challenge to the INS's promulgation of the parole policy, they also challenged their individual denials of parole as an abuse of discretion when they alleged that the INS impermissibly denied their requests and provided inaccurate reasons for the denials. However, the APA is not an independent source of jurisdiction, Califano v. Sanders, 430 U.S. 99, 105 (1977), and, by its own terms, does not apply where "statutes preclude judicial review," 5 U.S.C. § 701(a)(1). In view of 8

U.S.C. § 1252(a)(2)(B)(ii)'s preclusion of judicial review over the Attorney General's exercise of discretion, the district court properly concluded that APA review of petitioners' claims 4 and 6 was foreclosed. R2-65-30-31.

B. APA Review Is Also Precluded Because a Custody Determination Is an Agency Action Committed to Agency Discretion By Law

APA review is also foreclosed by 5 U.S.C. § 701(a)(2), which provides that the APA does not apply where "agency action is committed to agency discretion by law." Heckler v. Chaney, 470 U.S. 821, 830 (1985); ICC v. Locomotive Engineers, 482 U.S. 270, 282 (1987); Lincoln v. Vigil, 508 U.S. 182, 190-91 (1993). This narrow exception applies "only when the statute granting agency discretion is so broad that it provides no law for courts to apply when reviewing the agency action." Haitian Refugee Center, Inc. v. Baker, 953 F.2d 1498, 1507 (11th Cir. 1992). Under this standard, the Attorney General's decision to exercise his discretionary authority to deny parole to petitioners is not suitable for judicial review. As the Supreme Court explained in Heckler, 470 U.S. at 830, where a law "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," it can be taken to have "'committed' the decision making to the agency's judgment absolutely."

Certain categories of administrative decisions have traditionally been regarded as "committed to agency discretion." Lincoln, 508 U.S. at 191. For example, in Heckler, the Supreme Court held that a decision by an agency (the Food and Drug Administration ("FDA")) not to institute enforcement proceedings was presumptively unreviewable because, among other things, such a decision "often involves a complicated balancing of . . . factors which are peculiarly within its expertise." 470 U.S. at 831-32; see also Lincoln, 508 U.S. at 191-93 (equating an agency's allocation of funds from a lump-sum appropriation to the FDA's judicially unreviewable enforcement action in Heckler). Similarly, in ICC v. Locomotive Engineers, the Court concluded that the Interstate Commerce Commission's ("ICC") refusal to grant reconsideration because of alleged material error in that action, constituted another type of administrative decision that has traditionally been left to agency discretion. 482 U.S. at 282; Lincoln, 508 U.S. at 191. In reaching this conclusion, the Court emphasized "the impossibility of devising an adequate standard of review for such agency action" given the general absence of a statement of reasons for the reconsideration denial. ICC, 482 U.S. at 282.

In this case, the language of the statute and the regulations place no limitations upon the Attorney General's discretion to deny parole; rather, he is required to undertake a case-by-case determination only in those instances where he is

considering a grant of parole. 8 U.S.C. § 1182(d)(5)(A). This requirement of a case-by-case analysis specific to grants of parole and the detention mandate of 8 U.S.C. § 1225(b)(1)(B)(ii), demonstrate that, petitioners' assertions (see R1-1-15) notwithstanding, there is a presumption that aliens applying for admission to this country, even aliens with a credible fear, will be detained pending a determination upon their admissibility. See Wong Wing, 163 U.S. at 235 ("detention, or temporary confinement" is "part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens * * *."). Indeed, the prefatory comments to the current parole regulation reveal that the INS expressly rejected commenters' suggestion that aliens who have established a credible fear of persecution be presumptively eligible for release. 62 Fed. Reg. 10,320 (Mar. 6, 1997) ("Again, the clear language of the statute states that such aliens shall be detained.").

In view of the statute's broad grant of discretion to the Attorney General to deny parole, a decision to continue an alien in custody is precisely the kind of action that should be regarded as committed to the agency's discretion. Moreover, immigration law necessarily implicates sensitive political matters which are appropriately within the purview of the Executive Branch rather than the courts. Mathews v. Diaz, 426 U.S. at 81. Indeed, judicial review of the exercise of the Attorney General's parole discretion, even under a deferential

standard, would undesirably "inhibit the flexibility of the political branches of government to respond to changing world conditions." Id. The courts simply do not possess the requisite expertise or familiarity with international relations problems properly to evaluate the policy determinations of the political branches respecting the exercise of discretion in the administration of parole authority:

> [I]t is not the business of the courts to pass judgment on the decisions of the President in the field of foreign policy. Judges are not expert in that field and they lack the information necessary for the formation of an opinion. The President on the other hand has the opportunity of knowing the conditions which prevail in foreign countries, he has his confidential sources of information and his agents in the form of diplomatic, consular and other officials.

Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir. 1979) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)). In the final analysis, there simply are no "judicially discoverable and manageable standards" for assessing the justifications for policy reasons behind the Attorney General's discretionary exercise of his parole authority and the district court properly concluded that section 1252(b)(2)(B)(ii) precluded judicial review of the INS's discretionary parole determinations. Cf. Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1011 n.4 (9th Cir. 1987) (holding that the reasoning in Heckler would also support its conclusion that judicial review over the INS's decision not to grant deferred action status to a particular alien is not

available even though it is "not precisely a 'decision not to take enforcement action'").

C. The INS's Decision to Continue Petitioners in Detention Absent Approval for Release from Headquarters is Not Subject to Rulemaking

1. The Parole Instruction is Not a Rule

The INS Headquarters' instruction to the Miami District regarding the detention and parole of Haitians who arrive in south Florida after December 3, 2001, does not violate the APA because it is not a rule and, therefore, is not subject to notice and comment. See American Trucking Ass'n, Inc. v. United States, 688 F.2d 1337, 1348 (11th Cir. 1982) (the decision to revoke a special permission authority in a particular case or cases would not be rulemaking). The instruction did not have the effect of reversing on a nationwide basis the INS's acknowledged detention use policy of favoring parole for aliens who had established a credible fear of persecution -- which, in any event, was never a policy of automatic grants of parole. To the contrary, the instruction was merely an adjustment to the INS's Detention Use Policy (which itself is not a rule), limited to one district (R2-62-3-4, 9-11, 18 (Lee Decl. ¶ 11)), to address the agency's legitimate concern that grants of parole to a boatload of 165 inadmissible aliens would only encourage other potential immigrants to undertake risky and unsafe sea voyages to reach the United States en masse. R2-62-3-4. Consistent with the statute

and the regulation, the INS's policy regarding grants of parole has always been, and remains, to adjudicate an alien's eligibility on a case-by-case basis. R2-62-17-18. Petitioners' own complaint acknowledges that not all Haitians were denied parole, and the many documents we submitted relating to the INS's consideration of petitioners' parole requests, demonstrates the INS's continued adherence to the case-by-case policy. See R2-37; R2-62-23-32.

2. The Parole Instruction is Exempt from Rulemaking under the "General Statement of Policy" and "Interpretative Rule" Exceptions

The INS's actions taken with respect to Haitians in South Florida is also exempt from notice-and-comment rulemaking under the "general statement of policy" (R2-65-30-33) and "interpretative rule" exceptions. 5 U.S.C. § 553(b)(A). To determine whether a directive constitutes a rule or a general statement of policy, the "key inquiry" in this Circuit is

> the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.

Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1377 (11th Cir. 1983), cert. denied, 466 U.S. 927 (1984); see also

Guardian Federal Sav. and Loan Ass'n v. Federal Sav. and Loan Ins. Corp., 589 F.2d 658, 666 (D.C. Cir. 1978) (general statement of policy must leave administrator free "to exercise his informed discretion in situations that arise"). Thus, so long as the policy is sufficiently general to guide the agency's decision but leaves room for discretion in applying the rule to individual cases, informal rulemaking is not required. See Guardian Federal, 589 F.2d at 667; Regular Common Carrier Conf. of the Am. Trucking Ass'n, Inc. v. United States, 628 F.2d 248, 251 (D.C. Cir. 1980) (if agency explicitly says new policy leaves open free exercise of informed discretion, then rights and duties have not actually been diminished, and binding norm has not been established).

The adjustment to the INS Detention Use Policy at issue here simply reiterated the INS's general policy of considering parole requests on a case-by-case basis. The instruction from INS Headquarters to the Miami District was not to release or transfer Haitians arriving in the district after December 3, "without clear approval" from Headquarters. R2-62-115. This instruction did not prohibit the parole of Haitians; rather, it reiterated the statutory design of presumptive detention but left the INS officers in Miami who conducted the parole eligibility reviews free to make recommendations for a favorable exercise of discretion regarding parole of certain Haitians based upon individual circumstances. R2-62-11-12; see Noel v. Chapman, 508

F.2d 1023, 1029-31 (2d Cir. 1975) (INS statement limiting New York District Director's discretion to grant the privilege of voluntary departure was a "general statement of policy").[22/] And, in fact, recommendations for release on parole were made and adopted, leading to a grant of parole to at least 118 Haitians to date. See R2-62-18, 129-31. As a statement of general policy, the parole instruction is not subject to rulemaking.

Even if the instruction is considered to be a rule, it is an interpretative rule which is exempt from rulemaking. Although the term "interpretative rule" is not expressly defined in the APA, courts have recognized that it "is merely a clarification or explanation of an existing statute or rule." Guardian Federal, 589 F.2d at, 664; id. at 664-65 n.21 (citing additional authority which defines the term merely as "interpretations of statutory provisions" and "adaptations of interpretations of statutes"). In this case, the December 14, 2001 instruction to the Miami District was not an adjustment to the regulation or to the statute. Rather, it was an adjustment to a statement in the INS

[22/] In reaching its conclusion in Noel, the Second Circuit reasoned that the instructions at issue did not change the "existing right of the appellants to have their applications for extensions of time to depart authorized in the sole discretion of the District Director." 508 F.2d at 1030. The court also distinguished between statements directed at agency personnel to explain how to conduct discretionary functions and statements directed at the public to impose obligations upon them and concluded that the INS statement at issue was aimed at "educati[ng the] agency members in the agency's work." Id. (citations omitted).

Detention Use Policy (R2-67-105) that generally favors parole for aliens who have established a credible fear and who do not pose either a risk of flight or a danger to the community. Thus, the parole instruction is not a discriminatory policy subject to rulemaking but goes to the INS's determination of its priorities (i.e., discouraging risky sea voyages and deterrence of mass migration) and the use of detention space. See Vermont Yankee v. Natural Resources Defense Counsel, 435 U.S. 519, 524 (1978) (formulation of internal agency procedures is "basically left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments" and "the administrative agencies should be free to fashion their own rules of procedure . . . permitting them to discharge their multitudinous duties.").

3. The Parole Instruction is Exempt from Rulemaking under the "Foreign Affairs Function" Exception

APA § 553(a)(1) exempts from notice and comment rulemaking those rules involving "a military or foreign affairs function of the United States." For the foreign affairs exception to apply, the Government must show that "the public rulemaking provisions [w]ould provoke definitively undesirable international consequences." Yassini v. Crosland, 618 F.2d 1356, 1360, n.4 (9th Cir. 1980). In this case, the INS modified its parole practices in the Miami District because it was concerned about

protecting the safety of potential immigrants attempting to cross the sea,[23] and also with preventing a mass migration. Based upon its past experience with the Haitian and Cuban mass migrations in the early 1980s and 1990s, the INS reasonably took proactive measures to prevent such a situation from creating both an immigration emergency in the United States and an increasing death toll on the high seas. Thus, no publication for notice and comment was necessary here.[24]

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[23] See Associated Press, 12 Haitians Drown after Boat Capsizes Off Bahamas; 15 More Migrants Lost, Feared Dead, Chi. Trib., May 11, 2002, at 6 (available at 2002 WL 2653823) ("More than 200 people are thought to have died off the Bahamas this year in desperate attempts to reach the coast of Florida.").

[24] In 1983, a panel of this Court found that the foreign affairs exemption was inapplicable to a change in parole policy. Jean v. Nelson, 711 F.2d 1455, 1477-78 (11th Cir. 1983). However, the en banc court dismissed the appeal insofar as it challenged the failure to provide notice and comment, and remanded the matter to the district court to vacate the judgment as moot. Jean I, 727 F.2d at 962. In any event, as the Supreme Court determined, the grant of the rehearing en banc vacated the panel's opinion. Jean II, 472 U.S. at 852. Thus, the panel's opinion has no precedential value. Even if it did, it would be distinguishable here because the Acting Deputy Commissioner's declaration shows that there would have been "undesirable international consequences" to publishing the INS's decision for notice and comment, coupled with the attendant delays that would have entailed the proof that was missing in Jean, 711 F.2d at 1477.

V. DISMISSAL OF PETITIONERS' PETITION FOR CLASS WRIT OF HABEAS AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF SHOULD BE AFFIRMED.

A. Neither an Evidentiary Hearing nor Discovery was Necessary

Petitioners also argue (Pet'r Br. at 29-34) that the district court erred by allegedly resolving this case "in summary judgment fashion" or, alternatively, by deciding this matter solely on the basis of the habeas petition. First, the assertion that the district court turned petitioners' emergency motion into a motion for summary judgment, however, is simply wrong. The court made clear (R2-65-8) its finding that "the issues were fully briefed" in the parties' filings relating to petitioners' emergency motion and the motion for class certification, and the parties' submissions in response to the April 5 order requesting documents. The court further made clear that it was exercising only habeas jurisdiction over petitioners' statutory and constitutional claims (R2-65-13-15) and, because it concluded that a writ would not issue, no separate basis for the issuance of injunctive relief existed and the case should be dismissed in full (R2-65-15 n.10, 33).

Moreover, the district court's determinations that it retained only habeas jurisdiction over petitioners' claim and that respondents had provided facially legitimate and bona fide reasons for the parole adjustment, are questions of law which required neither an evidentiary hearing nor discovery to resolve.

Thus, the assertion that the court erred by not ordering discovery in this case, is meritless.

The district court's decision to decide this case on the parties' previously mentioned filings is perfectly consistent with the Rules of Habeas Corpus. Although petitioners are correct (Pet'r Br. at 32) that 28 U.S.C. § 2243 requires that a hearing date be set when a writ of order is returned, as they also acknowledge, the court never ordered respondents to answer the habeas petition. See Pet'r Br. at 32 n.15. Rather, and in view of petitioners' decision to file simultaneously with their habeas petition an emergency motion for a TRO/preliminary injunction and/or a class writ of habeas, the district court ordered respondents "to file an . . . other pleading [i.e., a response to the emergency motion]" pursuant to Section 2254 Habeas Corpus Rule ("Hab. Cor. R.") 4, ("Preliminary Consideration by Judge") so that she could "take such other action as [she] deems appropriate."[25/] Furthermore, section 2243's requirement that "a day shall be set for hearing" does not mean that a hearing must be held; indeed, Habeas Corpus Rule 8 specifically contemplates dismissal of a habeas petition prior to an evidentiary hearing and the cancellation of a scheduled hearing if it appears to the judge that one is not required.

[25/] The advisory committee notes to Hab. Cor. R. 4 explain that the rule is designed to give a judge flexibility in the determination of a case.

Hab. Cor. 8. Further still, petitioners are not entitled to discovery in habeas proceedings. Hab. Cor. R. 6(a). Because petitioners themselves chose to proceed by habeas (albeit in the alternative), they cannot seriously contend that the district court erred by taking them up on their request.

B. The Courts Lack Jurisdiction to Grant Petitioners' Requested Relief

Petitioners seek a "class writ of habeas corpus and preliminary and permanent injunction" directing the INS to release them and to readjudicate their requests for parole. The district court is correct that the circumstances of this case do not warrant the issuance of a writ.[26/] R2-65-33. Moreover, because petitioners have not raised any arguments challenging the denial of class certification in their opening brief, it appears they have abandoned their challenge to the denial of a class writ of habeas. See United States v. Nealy, 232 F.3d 825, 830-31 (11th Cir.2000) ("Defendant abandoned the . . . issue by not raising the issue in his initial brief."). In any event, habeas relief cannot be granted to petitioners because their detention is specifically authorized under the statute; thus, the habeas statute cannot be used to compel the INS to release them or to grant them parole because the writ "cannot be utilized as a base for the review of a refusal to grant collateral administrative

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[26/] We also argued below that habeas jurisdiction over discretionary decisions is barred by 8 U.S.C. § 1252(a)(2)(B)(ii) and is not available.

relief or as a springboard to adjudicate matters foreign to the question of the legality of custody." Pierre v. United States, 525 F.2d 933, 935-36 (5th Cir. 1976).

Further, under the plain terms of 8 U.S.C. § 1252(f)(1), the authority to provide the extraordinary remedy of a class-wide injunction is vested solely and exclusively in the Supreme Court. That provision, entitled "Limit On Injunctive Relief," provides that:

> Regardless of the nature of the action or claim or the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of Title II, as amended by [IIRIRA], other than with respect to application of such provision to an individual alien against whom proceedings under such chapter have been initiated.

8 U.S.C. § 1252(f)(1) (emphasis added). Chapter 4 of Title II of the INA, as amended by IIRIRA, encompasses the new INA sections 231 through 241 (8 U.S.C. §§ 1221-1231), relating to the "Inspection, Apprehension, Examination, Exclusion and Removal" of aliens. See IIRIRA § 308(a). The detention provision under which petitioners are being detained (8 U.S.C. § 1225(b)(1)(B)(ii)) is within Chapter 4 of Title II. Thus, the statute clearly does not permit federal courts other than the Supreme Court to enjoin the operation of the detention laws on a class-wide basis. See AADC, 525 U.S. at 481-82.

CONCLUSION

For all the foregoing reasons, respondents respectfully request that the district court's decision be affirmed.

Respectfully submitted,

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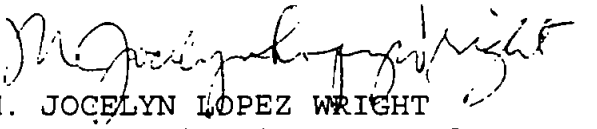

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(C). Beginning with the Statement of Issues through the Conclusion (see 11th Cir. R. 32-4), this brief contains 13,974 words.

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CERTIFICATE OF SERVICE

I certify that on this 14th day of August 2002, I caused paper and electronic copies of the foregoing Brief for Respondent to be served upon petitioner by placing them in an envelope which was subsequently sealed and forwarded to a mail room of the United States Department of Justice for the addition of the correct amount of first class postage and same-day delivery to a United States Post Office in Washington, D.C. The envelope was addressed as follows:

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ADDENDUM

8 U.S.C. § 1182(d)(5) (2002)

§ 1182. Inadmissible aliens

* * *

(d) Temporary admission of nonimmigrants

(5)(A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return, or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorned General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

CODE OF FEDERAL REGULATIONS
TITLE 8--ALIENS AND NATIONALITY
CHAPTER I--IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE
SUBCHAPTER B--IMMIGRATION REGULATIONS
PART 212--DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE
Current through July 19, 2002; 67 FR 47660

§ 212.5 Parole of aliens into the United States.

(a) The authority of the Commissioner to continue an alien in custody or grant parole under section 212(d)(5)(A) of the Act shall be exercised by the Deputy Executive Associate Commissioner for Detention and Removal, the Director of the Office of Juvenile Affairs, the district director, or the chief patrol agent, subject to the parole and detention authority of the Commissioner or his designees. The Commissioner or his designees, which include the Deputy Commissioner, the Executive Associate Commissioner for Field Operations, and the regional director, may invoke, in the exercise of discretion, the authority under section 212(d)(5)(A) of the Act.

(b) The parole of aliens within the following groups who have been or are detained in accordance with § 235.3(b) or (c) of this chapter would generally be justified only on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," provided the aliens present neither a security risk nor a risk of absconding:

(1) Aliens who have serious medical conditions in which continued detention would not be appropriate;

(2) Women who have been medically certified as pregnant;

(3) Aliens who are defined as juveniles in § 236.3(a) of this chapter. The Director of the Office of Juvenile Affairs shall follow the guidelines set forth in § 236.3(a) of this chapter and paragraphs (b)(3)(i) through (b)(3)(iii) of this section, in determining under what conditions a juvenile shall be paroled from detention:

(i) Juveniles may be released to a relative (brother, sister, aunt, uncle, or grandparent) not in Service detention who is willing to sponsor a minor and the minor may be released to that relative notwithstanding that the juvenile has a relative who is in detention.

(ii) If a relative who is not in detention cannot be located to sponsor the minor, the minor may be released with an accompanying relative who is in detention.

(iii) If the Service cannot locate a relative in or out of detention to sponsor the minor, but the minor has identified a non-relative in detention who accompanied him or her on arrival, the question of releasing the minor and the accompanying non-relative adult shall be addressed on a case-by-case basis;

(4) Aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; or

(5) Aliens whose continued detention is not in the public interest as determined by the district director, chief patrol agent, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs.

(c) In the case of all other arriving aliens, except those detained under § 235.3(b) or (c) of this chapter and paragraph (b) of this section, the district director, chief patrol agent, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs may, after review of the individual case, parole into the United States temporarily in accordance with section 212(d)(5)(A) of the Act, any alien applicant for admission, under such terms and conditions, including those set forth in paragraph (d) of this section, as he or she may deem appropriate. An alien who arrives at a port-of-entry and applies for parole into the United States for the sole purpose of seeking adjustment of status under section 245A of the Act, without benefit of advance authorization as described in paragraph (f) of this section shall be denied parole and detained for removal in accordance with the provisions of § 235.3(b) or (c) of this chapter. An alien seeking to enter the United States for sole purpose of applying for adjustment of status under section 210 of the Act shall be denied parole and detained for removal under § 235.3(b) or (c) of this chapter, unless the alien has been recommended for approval of such application for adjustment by a consular officer at an Overseas Processing Office.

(d) Conditions. In any case where an alien is paroled under paragraph (b) or (c) of this section, the district

director, chief patrol agent, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs may require reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so. Not all factors listed need be present for parole to be exercised. The district director, chief patrol agent, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs should apply reasonable discretion. The consideration of all relevant factors includes:

(1) The giving of an undertaking by the applicant, counsel, or a sponsor to ensure appearances or departure, and a bond may be required on Form I-352 in such amount as the district director, chief patrol agent, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs may deem appropriate;

(2) Community ties such as close relatives with known addresses; and

(3) Agreement to reasonable conditions (such as periodic reporting of whereabouts).

(e) Termination of parole--

(1) Automatic. Parole shall be automatically terminated without written notice (i) upon the departure from the United States of the alien, or, (ii) if not departed, at the expiration of the time for which parole was authorized, and in the latter case the alien shall be processed in accordance with paragraph (e)(2) of this section except that no written notice shall be required.

(2)(i) On notice. In cases not covered by paragraph (e)(1) of this section, upon accomplishment of the purpose for which parole was authorized or when in the opinion of the district director or chief patrol agent in charge of the area in which the alien is located, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs, neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he or she shall be restored to the status that he or she had at the time of parole. When a charging document is served on the alien, the charging document will constitute written notice of termination of parole, unless otherwise specified. Any further inspection or hearing shall be conducted under section 235 or 240 of the Act and this chapter, or any order of exclusion, deportation, or removal previously entered shall be executed. If the exclusion, deportation, or removal order cannot be executed within a reasonable time, the alien shall again be released on parole unless in the opinion of the district director, chief patrol agent, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs the public interest requires that the alien be continued in custody.

(ii) An alien who is granted parole into the United States after enactment of the Immigration Reform and Control Act of 1986 for other than the specific purpose of applying for adjustment of status under section 245A of the Act shall not be permitted to avail him or herself of the privilege of adjustment thereunder. Failure to abide by this provision through making such an application will subject the alien to termination of parole status and institution of proceedings under sections 235 and 236 of the Act without the written notice of termination required by § 212.5(e)(2)(i) of this chapter.

(f) Advance authorization. When parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued Form I- 512.

(g) Parole for certain Cuban nationals. Notwithstanding any other provision respecting parole, the determination whether to release on parole, or to revoke the parole of, a native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980, shall be governed by the terms of § 212.12.

(h) Effect of parole of Cuban and Haitian nationals.

(1) Except as provided in paragraph (h)(2) of this section, any national of Cuba or Haiti who was paroled into the United States on or after October 10, 1980, shall be considered to have been paroled in the special status for nationals of Cuba or Haiti, referred to in section 501(e)(1) of the Refugee Education Assistance Act of 1980, Public Law 96-422, as amended (8 U.S.C. 1522 note).

(2) A national of Cuba or Haiti shall not be considered to have been paroled in the special status for nationals of Cuba or Haiti, referred to in section 501(e)(1) of the Refugee Education Assistance Act of 1980, Public Law 96- 422, as amended, if the individual was paroled into the United States:

(i) In the custody of a Federal, State or local law enforcement or prosecutorial authority, for purposes of criminal prosecution in the United States; or

(ii) Solely to testify as a witness in proceedings before a judicial, administrative, or legislative body in the United States.

[40 FR 49767, Oct. 24, 1975; as amended at 46 FR 24929, May 4, 1981; 47 FR 30045, July 9, 1982; 47 FR 46494, Oct. 19, 1982; 52 FR 16194, May 1, 1987; 52 FR 48802, Dec. 28, 1987; 53 FR 17450, May 17, 1988; 61 FR 36611, July 12, 1996; 62 FR 10348, March 6, 1997; 63 FR 31895, June 11, 1998; 65 FR 80294, Dec. 21, 2000; 65 FR 82255, Dec. 28, 2000; 66 FR 7863, March 26, 2001; 67 FR 39257, June 7, 2002]

<General Materials (GM) - References, Annotations, or Tables>

8 C. F. R. § 212.5

8 CFR § 212.5

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8 C.F.R. § 212.5 (1985)

8 CFR S 212.5

TITLE 8--ALIENS AND NATIONALITY
Chapter I-Immigration and Naturalization Service, Department of Justice
Subchapter B--Immigration Regulations
Part 212--Documentary Requirements: Nonimmigrant; Waivers; Admission of Certain Inadmissible Aliens; Parole.

s 212.5 Parole of aliens into the United States.

(a) In determining whether or not aliens who have been or are detained in accordance with s 235.3(b) or (c) will be paroled out of detention, the district director should consider the following:

(a)(1) The parole of aliens who have serious medical conditions in which continued detention would not be appropriate would generally be justified by "emergent reasons";

(a)(2) The parole of aliens within the following groups would generally come within the category of aliens for whom the granting of the parole exception would be "strictly in the public interest", provided that the aliens present neither a security risk nor a risk of absconding:

(a)(2)(i) Women who have been medically certified as pregnant;

(a)(2)(ii) Aliens who are defined as juveniles should only be placed in a juvenile facility or with an appropriate responsible agency or institution, recognized or licensed to accommodate juveniles by the laws of that State. A juvenile is generally defined as a person subject to the jurisdiction of a juvenile court. To determine what constitutes legal age or exceptions to the above definition in a particular State, the laws of the state where the alien is physically present will apply. Children of tender years who are too young to be placed in a juvenile facility or youth hall, and older juveniles who it is anticipated will remain in detention for a period longer than thirty days, should be placed with relatives or friends. In those extreme cases where it is impossible to accommodate a child of tender years accompanied by an adult or juvenile who will or has remained in detention for periods of over 30 days, consideration should be given to paroling the juvenile with the accompanying adult to a responsible agency, relative, or friend. When it is determined that such juvenile should be paroled from detention, the following guidelines should be followed:

(a)(2)(ii)(A) Juveniles may be released to a relative (brother, sister, aunt, uncle) not in Service detention who is willing to sponsor a minor and the minor may be released to that relative notwithstanding that he has a relative who is in detention.

(a)(2)(ii)(B) If a relative who is not in detention cannot be located to sponsor the minor, the minor may be released with an accompanying relative who is in detention.

(a)(2)(ii)(C) If the Service cannot locate a relative in or out of detention to sponsor the minor, but the minor has identified a nonrelative in detention who accompanied him on arrival, the question of releasing the minor and the accompanying nonrelative adult shall be addressed on a case-by-case basis.

(a)(2)(iii) Aliens who have close family relatives in the United States (parent, spouse, children, or siblings who are United States citizens or lawful permanent resident aliens) who are eligible to file, and have filed, a visa petition on behalf of the detainee;

(a)(2)(iv) Aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States:

(a)(2)(v) Aliens whose continued detention is not in the public interest as determined by the district director.

(a)(3) Aliens subject to prosecution in the United States who are needed for the purposes of such prosecution may be paroled to the custody of the appropriate responsible agency or prosecuting authority.

(b) In the cases of all other arriving aliens except those detained under s 235.3(b) or (c), and paragraph (a) of this section, the district director in charge of a port of entry may, prior to examination by an immigration officer, or subsequent to such examination and pending a final determination of inadmissibility in accordance with sections 235 and 236 of the Act and this chapter, or after a finding of inadmissibility has been made, parole into the United States temporarily in accordance with section 212(d) (5) of the Act any such alien applicant for admission at such port of entry under such terms and conditions, including those set forth in paragraph (c) of this section, as he may deem appropriate.

(c) Conditions. In any case where an alien is paroled under paragraph (a) or (b) of this section, the district director may require reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so. Not all factors listed need be present for parole to be exercised. The district director should apply reasonable discretion. The consideration of all relevant factors includes:

(c)(1) The giving of an undertaking by the applicant, counsel, or a sponsor to ensure appearances, and a bond may be exacted on Form I-352 in such amount as the district director may deem appropriate;

(c)(2) Community ties such as close relatives with known addresses; and

(c)(3) Agreement to reasonable conditions (such as periodic reporting of whereabouts).

(d) Termination of parole-- (d)(1) Automatic. Parole shall be automatically terminated without written notice (i) upon the departure from the United States of the alien, or, (ii) if not departed, at the expiration of the time for which parole was authorized, and in the latter case the alien shall be processed in accordance with paragraph (d) (2) of this section except that no written notice shall be required.

(d)(2) On notice. In cases not covered by paragraph (d) (1) of this section, upon accomplishment of the purpose for which parole was authorized or when in the opinion of the district director in charge of the area in which the alien is located neither emergency nor public interest warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he or she shall be restored to the status which he or she had at the time of parole. Any further inspection or hearing shall be conducted under section 235 or 236 of the Act and this chapter, or any order of exclusion and deportation previously entered shall be executed. If the exclusion order cannot be executed by deportation within a reasonable time, the alien shall again be released on parole unless in the opinion of the district director the public interest requires that the alien be continued in custody.

(e) Advance authorization. When parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued Form I- 512.

[40 FR 49767, Oct. 24, 1975; as amended at 46 FR 24929, May 4, 1981; 47 FR 30045, July 9, 1982; 47 FR 46494, Oct. 19, 1982]

Authority: Secs. 101, 103, 212, 214, 235, 236, 238, 242, 66 Stat. 166, 173, 182, as amended, 189, 198, 200, 202, 208, as amended, 8 U.S.C. 1101, 1103, 1182, 1184, 1225, 1226, 1228, 1252, 1182b, 1182c, unless otherwise noted.
8 CFR s 212.5
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