No. 03-230

In The
Supreme Court of the United States

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

Petitioners,

v.

JOHN M. BULGER, Interim District Director, Florida, Bureau of Citizenship and Immigration Services; THOMAS RIDGE, Secretary, Department of Homeland Security; JOHN ASHCROFT, Attorney General of the United States; DEPARTMENT OF HOMELAND SECURITY; BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES DEPARTMENT OF JUSTICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO THE RESPONDENTS' BRIEF IN OPPOSITION

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ARGUMENT

I. THIS CASE IS NOT MOOT.

A. Named Plaintiffs May Litigate the Denial of Class Certification Even After the Loss of An Individual Stake in the Merits.

This case is not moot because named plaintiffs may litigate the denial of class certification even after the loss of an individual stake in the merits. In *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), this Court held that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." *Id.* at 404. This is because "a case or controversy still exists" for the members of the proposed class — the class the named plaintiff sought to represent. *Id.* at 407; *see also id.* at 396.

This case presents a live controversy under *Geraghty* because petitioner Laurence St. Pierre continues to contest the district court's failure to certify the class.[1] The government errs in its assertion that petitioners "neither contest the district court's failure to certify the class as a class action nor identify any putative class member, other than the named petitioners who have been removed to Haiti, who seeks to maintain this action." Opp. Cert. at 9. Petitioners have consistently contested the district court's dismissal of their motion for class certification as "moot" after the court dismissed the case on the merits.[2] It is

[1] The government correctly points out that five of the original six petitioners were dismissed from this action. Opp. Cert. at 6, 8. Laurence St. Pierre, however, has not been dismissed.

[2] The district court failed to rule separately on the motion for class certification and dismissed the motion for class certification as moot after first denying the underlying claims on their merits without even holding an evidentiary hearing. App. at 40. In this way, the district court inextricably intertwined the merits of the case with the class certification issue.

simply untrue that petitioners have not identified any other putative class members who seek to maintain this action. Before the court of appeals, four other similarly situated Haitians moved to intervene in this case.[3] These motions were denied without reasoning by the court of appeals in a separate order on the same day that it denied the appeal in this case. App. 1.

B. The Controversy Over the Becraft Haitian Detention Policy Is Still "Live" for Members of the Proposed Class and Any Factual Dispute As to Its Viability Must Be Resolved in the First Instance by the District Court.

The controversy over the Haitian detention policy instituted by INS Acting Deputy Commissioner Peter Michael Becraft is still "live" for members of the proposed class. *Geraghty*, 445 U.S. at 396. Contrary to the government's suggestion, the November 13, 2002 Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,926 (2002) ("November 2002 Notice"), does not "supersede" the challenged Becraft Haitian detention policy. Opp. Cert. at 9. The Becraft policy mandates the incarceration of virtually all Haitian asylum-seekers pending an adjudication of their asylum claims, including Haitians like the proposed class members who were interdicted at sea and subjected to expedited removal proceedings. The November 2002 Notice does nothing more than expand the class of aliens subject to expedited removal proceedings to include sea arrivals who make it to land without interdiction. 67 Fed. Reg. at 68,925. Moreover, contrary to the government's claim, the November

[3] Guerda Alexis, Marie Guerrier, Darius Satune, and Ysmanie Toussaint filed motions to intervene in this case before the court of appeals.

2002 Notice does not mandate that all non-Cubans will be detained without the possibility of parole. As recognized by the government in the Supplementary Information explaining the new rule, "[p]arole of such aliens based on humanitarian concerns may be considered in accordance with section 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5) and 8 CFR 212.5." 67 Fed. Reg. at 68,925. *This is simply a restatement of the very parole authority at issue in this case.* In any event, the question of whether the November 2002 Notice supersedes the Becraft detention policy is a factual issue that must be determined by the district court in the first instance.[4]

C. The Issues in This Case Are of the Type "Capable of Repetition Yet Evading Review."

Petitioners' claims are "capable of repetition yet evading review" and are therefore not moot. *Murphy v. Hunt*, 455 U.S. 478, 482-83 (1982). There is a reasonable expectation that petitioners could return to the United States seeking protection from persecution in Haiti and there is a reasonable expectation that they will be detained again pursuant to the same policy they now challenge.[5] The challenged policy has not been withdrawn, and, given conditions in Haiti, it is more likely that petitioners will flee future persecution. And, like the gestation

[4] To the extent the government argues that it is no longer using national origin and/or race as a broad factor in discriminating against Haitian asylum-seekers regarding their release from detention pending the adjudication of their asylum claims, this case must be remanded to the district court for initial factual determinations.

[5] Petitioners, after being removed from the United States, could return to the United States seeking the protection of our asylum laws. The immigration regulations recognize that previously removed individuals could return seeking protection from persecution. 8 C.F.R. § 241.8(e) (exempting from reinstatement of removal returning individuals who have a "fear of returning" to their home country).

period in *Roe v. Wade*, 410 U.S. 113, 123-25 (1973), and the pretrial detention period in *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975), the time period during which a detainee is unlawfully denied parole under the Becraft policy is short relative to the time required for judicial review. The detention lasts only as long as it takes for the administrative agency to process the detainees' underlying asylum cases.

II. IF THIS CASE IS MOOT, THE PROPER REMEDY IS VACATUR OF THE LOWER COURT'S DECISION.

If this Court finds that this case is moot, this Court should follow its established practice of remanding this case to the court of appeals with instructions to vacate the judgment of the district court below. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The government incorrectly argues that this established practice is inapt because "the case became moot due to petitioners' own decisions." Opp. Cert. at 9 n.2.

A. Petitioner St. Pierre Took No Voluntary Action To Moot Her Appeal.

Petitioner St. Pierre took no voluntary action to moot her claims in this case. Her administrative appeal of her asylum case was dismissed on December 17, 2002, thus subjecting her to a final order of removal. That she "declin[ed] to seek judicial review of her final administrative removal order," as the government points out, Opp. Cert. 9 n.2, is irrelevant to whether or not she voluntarily gave up her legal claims *regarding detention* while her asylum claim was pending. An order of removal becomes final after dismissal of an appeal by the Board of Immigration Appeals.[6] As someone subject to a final order of removal,

[6] The filing of a petition for review with the court of appeals for review does not stay removal. 8 U.S.C. § 1252(b)(3)(B).

she was no longer eligible for parole under 8 U.S.C. § 1182(d)(5), the parole statute at issue in this case.[7] Therefore, once her asylum appeal was dismissed, she was precluded from litigating an appeal in this case through no fault of her own. Her case is a classic example of the circumstances in which the vacatur principle of *Munsingwear* is intended to apply.

The government incorrectly conflates petitioner St. Pierre's two appeals — the appeal in this case addressing the legality of her detention and the administrative appeal in her asylum case — when it argues that her decision not to seek review of her asylum case renders vacatur inappropriate. Opp. Cert. at 9 n.2. The two cases cited by the government do not support the government's argument because they involve litigants who either settled their direct legal claim or failed to file an appeal.[8] In contrast, petitioner St. Pierre did appeal the decision she now seeks to vacate and she has not entered into a settlement agreement. In any event, as discussed above, the filing for judicial review of her asylum case would not have extended her eligibility for release on parole. *See supra* note 7. Thus, this case falls squarely under *Munsingwear*, and

[7] The parole statute at issue in this case, 8 U.S.C. § 1182(d)(5), does not apply to aliens with final orders of removal. Under the regulations, an order of removal becomes final "[u]pon dismissal of an appeal by the Board of Immigration Appeals." 8 C.F.R. § 241.1(a). Filing for judicial review of a final order of removal does not continue an individual's eligibility for parole under 8 U.S.C. § 1182(d)(5).

[8] In *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship.*, 513 U.S. 18 (1994), this Court held that vacatur is not appropriate when the petitioner enters into a settlement agreement. *Id.* at 25. Here, petitioner St. Pierre did not settle or otherwise voluntarily give up her challenge to the legality of her detention while her asylum case was pending. *Karcher v. May*, 484 U.S. 72 (1987), is equally inapposite. *Karcher* was a case filed by legislative officers. After the legislative officers were no longer in office, their successors decided not to appeal the case. *Id.* at 76. This Court held that vacatur was not appropriate because the successor litigants had declined to pursue the appeal.

this Court should follow its established practice of vacating the judgment below.

B. Equitable Factors Weigh in Favor of Vacatur.

Vacatur is an "equitable remedy" that is particularly appropriate in this case. *See U.S. Bancorp Mortgage Co.*, 513 U.S. at 25; *see also id.* at 24, 26 (it is the Court's practice to "dispose[ ] of moot cases in the manner most consonant to justice" and to take account of the "public interest") (internal quotation marks omitted); *id.* at 29 (noting that mootness may be appropriate even when it is produced by settlement because "exceptional circumstances may conceivably counsel in favor of such a course"); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) ("[W]e have authority to make such disposition of the whole case as justice may require.") (internal quotation marks omitted). In this case, multiple factors weigh in favor of vacatur.

First, even if this Court finds it relevant that some of the petitioners withdrew their asylum administrative appeals and that petitioner St. Pierre declined to seek judicial review of her final order of removal, this Court should vacate the decisions below based on the circumstances underlying petitioners' decisions. After their arrival by boat on December 3, 2001, petitioners Hedwiche Jeanty, Junior Prospere, and Brunt Colas were detained in overcrowded facilities for almost a year. App. at 57-59. Petitioner Laurence St. Pierre also suffered extensively during her detention of more than a year. App. at 61, 71-72. These conditions had a serious negative impact on petitioners' mental health. App. at 89-91. The choice to remain in immigration detention, given the unlikely possibility that their appeals would be granted by the Board of Immigration Appeals — solely in order to preserve the right to challenge that detention — was hardly a choice at all. The prolonged detention of these asylum

seekers constitutes a compelling, "exceptional circumstance[ ]," *U.S. Bancorp Mortgage Co.*, 513 U.S. at 29, counseling in favor of vacatur.

Second, vacatur is appropriate as an equitable matter because petitioners are seeking to represent members of a proposed class that will be affected by the lower court decision. *See Arizonans for Official English*, 520 U.S. at 72 n.27 (suggesting that whether or not petitioner sued on behalf of a class may have an effect on the appropriateness of vacatur). In this case, petitioners seek to represent a class of persons who would now be affected by the lower court decision if it is not vacated. This is a unique fact that should lead this Court to conclude that "vacatur . . . is the equitable solution." *Arizonans for Official English,* 520 U.S. at 75.

III. THE COURT OF APPEALS' OPINION CONFLICTS DIRECTLY WITH *JEAN V. NELSON.*

A. The Government Fundamentally Mischaracterizes This Court's Holding in *Jean v. Nelson.*

The government incorrectly portrays this Court's holding in *Jean v. Nelson*, 472 U.S. 846 (1985), as nothing more than an "agreement" between the parties. *Id. Jean* involved a constitutional equal protection challenge to a parole policy that discriminated against Haitians. During the course of the litigation, the government conceded that that parole regulation *and statute* prohibited discrimination based on race and/or national origin. *Id.* at 855. The Court decided the case on statutory and regulatory grounds, considering a number of factors.[9] Based on these

[9] Specifically, the Court considered that 1) the parole statute and regulation provided a list of neutral criteria for the granting of parole; 2) nationality-based criteria had been adopted in other INS regulations; and 3) the government had conceded that the statute and regulation required race- and nationality-neutral adjudications. *Id.* at 855-56.

factors, the Court interpreted the parole statute and regulation as requiring "individualized determinations of parole" that are made "without regard to race or national origin." *Id.* at 857.

That the Court was engaged in statutory interpretation is apparent throughout the opinion. The Court repeatedly referred to the fact that it was engaged in statutory interpretation. For example, it referred to "statutory construction" as a means of avoiding constitutional questions. *Id.* at 854. Elsewhere, the Court noted that "[b]ecause *the current statutes and regulations* provide petitioners with nondiscriminatory parole consideration . . . there was no need to address the constitutional issue," and observed that there are limits upon immigration officials' "broad statutory discretion." *Id.* at 854-55, 857 (emphasis added). Finally, the Court stated that immigration "officials, while like all others bound by the provisions of the Constitution, *are just as surely bound by the provisions of the statute and of the regulations. Id.* at 857 (emphasis added). The government thus distorts *Jean* by ignoring the statutory holding of the case to protect the petitioners from future discriminatory treatment.

The government's attempt to distinguish *Jean* on its facts also fails. The government characterizes the holding in *Jean* as applying only to "low-level INS personnel [who] allegedly were making parole determinations in contravention of official INS policy." Opp. Cert. at 12. The government further points out that the author of the Becraft Haitian detention policy, Peter Michael Becraft, is Acting Deputy INS Commissioner, someone who has been delegated the Attorney General's parole authority under the regulations. Opp. Cert. at 11-12. Neither of the government's observations, however, successfully rebuts petitioners' arguments. Whatever the underlying facts of *Jean*, the end result was that this Court interpreted the parole statute and regulation as precluding discrimination. This interpretation still governs today. Even if the Acting

Deputy INS Commissioner has the authority to exercise the Attorney General's parole authority, this authority must be exercised within the bounds of the parole statute. As is discussed below, the Attorney General himself does not have the authority to contravene a statute.

B. Given the Statutory Prohibition Against Parole Discrimination, the Attorney General or His Subordinates Were Not Free to Adopt the Becraft Haitian Detention Policy.

Neither the Attorney General nor his subordinates were free to adopt the Becraft Haitian detention policy because the parole statute requires nondiscriminatory parole adjudication. That the Attorney General is bound by the dictates of Congress is uncontroverted. *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (characterizing the issue as the "extent of the Attorney General's authority under the post-removal-period detention statute"); *see also U.S. v. Witkovich*, 353 U.S. 194, 199 (1957) (construing the congressional grant of authority to the Attorney General as including a limitation). The government's statement that "it is well-accepted in the immigration area that policy adjustments may be implemented 'to make a humane response to a natural catastrophe or an international political situation'" therefore misses the point. Opp. Cert. at 11 (citing *Mathews v. Diaz*, 426 U.S. 67, 81 (1976), and *Sale v. Haitian Centers Counsel, Inc.*, 509 U.S. 155 (1993)). The issue is not whether the government can make immigration policy adjustments. Rather, the issue is whether a subordinate of the Attorney General can authorize a discriminatory policy despite the fact that a statute forbids it. Thus, the government's cases in support of the exercise of discretion in the area of immigration detention are irrelevant. Opp. Cert. at 11 (citing *Demore v. Kim*, 123 S. Ct. 1708, 1718-1719 (2003) (discussing *Carlson v. Landon*, 342 U.S. 524 (1952), and *Reno v. Flores*, 507 U.S. 292 (1993)); *Lopez v. Davis*, 531 U.S. 230, 243-244 (2001)).

CONCLUSION

For the reasons stated above and in petitioners' petition for a writ of certiorari, this Court should grant certiorari in this case or, in the alternative, vacate the decisions of the court of appeals and district court as moot.

Respectfully submitted,

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