02-13009-D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-13009-D

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

Appellants,

v.

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

Appellees.

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

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Case No. 02-13009-D
Moise v. Bulger
C-1

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Case No. 02-13009-D
Moise v. Bulger
C-2

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Case No. 02-13009-D
Moise v. Bulger
C-3

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Laurence St. Pierre, Appellant

James W. Ziglar, Commissioner, Immigration and Naturalization Service

STATEMENT REGARDING ORAL ARGUMENT

Petitioners request oral argument in this appeal of a decision of the United States District Court for the Southern District of Florida. This case involves issues concerning the authority of INS officials to discriminate based on national origin and/or race and the jurisdiction of a court to review challenges to such policies. Oral argument will assist the Court in understanding, analyzing, and applying the regulation, statutes, and constitutional principles at issue in this case.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

REGULATIONS

MISCELLANEOUS

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291 to review the district court's decision.

STATEMENT OF THE ISSUES

Whether the Acting Deputy Commissioner for the Immigration and Naturalization Service possesses the authority to act contrary to a facially neutral statute and regulation as interpreted by the Supreme Court by discriminating against Haitian asylum seekers based on their nationality and/or race.

Whether the jurisdictional provision 8 U.S.C. § 1252(a)(2)(B)(ii) applies to a case that brings statutory and constitutional challenges to an INS parole policy and does not seek review of any individual discretionary parole decision.

Whether the district court erred in summarily dismissing petitioners' claims without holding an evidentiary hearing or trial or permitting discovery and without construing the facts in favor of the petitioners.

Whether the Acting INS Deputy Commissioner's Haitian detention policy constitutes a new rule within the meaning of the Administrative Procedures Act that was unlawfully adopted without being subject to notice and comment.

Whether the Acting INS Deputy Commissioner advanced a facially legitimate and bona fide reason for his Haitian detention policy, despite the facts

in the record showing that his claimed reasons were not credible.

Whether Haitian asylum seekers whom INS has determined have a credible fear of persecution have a constitutional right to consideration of their parole requests on an individualized basis untainted by invidious discrimination when other similarly situated asylum seekers are routinely released.

STATEMENT OF THE CASE

Nature of the Case

This action is an appeal from the decision of the United States District Court for the Southern District of Florida dismissing 1) petitioners' emergency motion for temporary restraining order and/or preliminary injunction or class writ of habeas corpus and for immediate hearing; 2) motion to certify class; and 3) class action petition for writ of habeas corpus and complaint for injunctive and declaratory relief.

Course of Proceedings

On March 15, 2002, Ernest Moise, Hedwiche Jeanty, Brunot Colas, Junior Prospere, Peterson Belizaire, and Laurence St. Pierre, on behalf of themselves and all other similarly situated, filed a class action petition for writ of habeas corpus and complaint for injunctive and declaratory relief. R1-1. They simultaneously filed a motion to certify the class and an emergency motion for temporary

restraining order and/or preliminary injunction or class writ of habeas corpus and for immediate hearing. R1-2, 5. Petitioners sought to certify the class of

> [A]ll detained Haitian aliens in the Southern District of Florida who arrived on or after December 3, 2001, who are applying for admission into the United States, have passed their "credible fear" interviews with the Asylum Office of the INS, and are in detention pending removal proceedings, for whom a final order of removal has not been entered.

R1-5-1.

Later that day, the district court issued an order directing the government to respond to the emergency motion by March 19, 2002 and directing the petitioners to reply to the government's response two days later. R1-12. On April 5, 2002, the court issued an order directing the parties to submit additional documentation, including additional information and documentation about the parole policy for Haitians and how it was communicated. R2-30. In response to that order, the INS submitted a declaration from Acting Deputy INS Commissioner Becraft and heavily redacted electronic mail messages, among other things. R2-39-11-23. Petitioners moved for leave to start discovery on May 7, 2002 and filed a motion to compel the redacted portions of the electronic mail messages. R2-50, 54. On May 9, 2002, the Lawyers Committee for Human Rights submitted an amicus brief in support of petitioners. R2-55.

On May 17, 2002, the court dismissed the case in its entirety. R2-65. The court held no evidentiary hearing or trial, did not rule on petitioners' motion for leave to start discovery or motion to compel, and dismissed the case on the merits before petitioners could commence discovery without leave of the court. R2-50, 51. In dismissing the case, the court found that the issues had been fully briefed by the preliminary briefing on petitioners' emergency motion for temporary restraining order and/or preliminary injunction or class writ of habeas corpus and for immediate hearing. R2-65-8. This appeal followed.

Statement of the Facts

Petitioners and class members are Haitians who have fled persecution in their home country and seek asylum in the United States. R1-4-Ex. 7. The Immigration and Naturalization Service ("INS") has determined that each has a "credible fear of persecution," which the Immigration Nationality Act ("INA") defines as a significant possibility of demonstrating eligibility for asylum. 8 U.S.C. § 1225(b)(1)(B)(v).

On or about December 14, 2001, the Acting Deputy INS Commissioner, Peter Michael Becraft, adopted a secret detention policy directed solely at Haitians, which resulted in the detention of virtually all Haitian asylum seekers in

South Florida regardless of how they arrived in the United States.[1] R1-4-Ex. 1 at 1, Ex. 2 at 4, Ex. 3 at 1, 2; R2-38-Ex. 1 at 4; R2-38-Ex.1. While adopting the Haitian policy, the INS made no changes with respect to asylum seekers of any other nationalities and continued to routinely release those who had passed their credible fear interviews. R2-38-Ex. 1 at 3, 4.

Acting Deputy INS Commissioner Becraft "instructed the INS Office of Field Operations to adjust its parole criteria with respect to inadmissible Haitians arriving in South Florida." R2-38-Ex. 1 at 4. Under the new policy, "Haitian nationals arriving in south [sic] Florida were paroled only upon the approval of INS headquarters and only in cases where continued detention would result in unusual hardship to the individual alien." R2-38-Ex. 1 at 4-6. The Becraft policy expressly applied to Haitian asylum seekers arriving both by airplane and by boat. R2-38-Ex. 1 at 5, 6.

The effect of the December 14, 2001 Becraft Haitian policy was dramatic and immediate. The release rate for Haitians who had passed their credible fear interviews dropped from 96 percent in November 2001 to 6 percent for the period December 14, 2001 to March 18, 2002.[2] Implementing the new policy, Miami INS

[1] On December 3, 2001, a boatload of approximately 187 Haitians arrived off the shores of Miami, Florida. R2-65-3.

[2] This figure is based on the fact that over 240 Haitians were in detention and only 15 were released during the period December 14, 2002 to March 18, 2002.

officials only asked INS headquarters for permission to release fifteen individuals, five of whom were pregnant women and ten of whom were unaccompanied minors. R2-38-Ex. 1 at 5. INS officials in Miami failed to consider the individual merits of the other Haitians' requests for release and instead either ignored the release requests or quickly issued virtually identical boilerplate denials. R1-4-Ex. 1 at 1, Ex. 2 at 2, Ex. 3 at 1, Ex. 6. Even Haitians who had been granted asylum and who could no longer be legally detained by INS were not immediately released.[3] R2-39-21-23. As a result of the Becraft Haitian policy, the INS refused to release over 240 Haitian asylum seekers who had passed their credible fear interviews in Miami, Florida. R2-38-Ex. 1 at 5, 6. While denying release to Haitians, INS officials continued to release asylum seekers of all other nationalities in the Miami District at an extremely high rate. R1-4-Ex. 4 at 1 (release rate for similarly situated non-Haitians was 95 percent in December 2001 and January 2002).

According to the government, the President took no action to authorize the Becraft Haitian detention policy. Nor did the Attorney General take action by

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R1-4-Ex. 4 at 1; R2-26-5.

[3] Petitioner Ernest Moise's claims were deemed moot by the district court after he was granted asylum by the immigration judge and released. R2-57. He was granted asylum by the immigration judge on February 22, 2002 and he was released on March 19, 2002. R7-17-3.

promulgating regulations or otherwise authorizing the policy. Acting Deputy INS Commissioner Becraft was the highest level executive branch official who authorized the policy. R2-38-Ex. 1 at 4. The government created no written document to communicate the policy to Miami INS officials but instead communicated the policy verbally and by electronic mail. R2-38-Ex. 1 at 4, 5; R2-39-11-16.

The Becraft Haitian detention policy represents a radical departure from INS's prior policy, which did not make distinctions based on nationality or race and expressly favored the release of asylum seekers of all nationalities who passed their "credible fear" interviews in the Miami District. R2-38-Ex. 1 at 4. Under the INS Detention Use Policy adopted in October 1998, asylum seekers of all nationalities and races who had passed their credible fear interviews were considered the lowest detention priority. R2-38-Ex. 1 at 3-6. In the Miami District, because of limited space, "most arriving aliens found to have a credible fear" were paroled, "unless they were identified as posing a danger to the community because of a criminal record or other factor." R2-38-Ex. 1 at 4. As a result of the Becraft Haitian detention policy, Haitians were no longer being considered for parole in accordance with the INS Detention Use Policy. R2-38-Ex. 1 at 2-5.

For months after the Becraft Haitian policy was adopted, INS officials from the Miami District Office denied the existence of the policy to advocates and community leaders. R1-4-Ex. 1 at 1, Ex. 2 at 4, Ex. 3 at 1-3. Moreover, the officials issued over 90 virtually identical boilerplate denials of parole which did not mention the Haitian policy but instead claimed that the Haitians were flight risks because they had failed to sufficiently prove their identity and because of unspecified "particular facts of [their] case[s]." R1-4-Ex. 2 at 1, Ex. 6. In reliance on INS's claim that the Haitians had failed to adequately prove their identity, the Haitians, their families, and their advocates spent significant time and money trying to secure identity documents in the hopes of getting the Haitians released. R1-4-Ex. 3 at 2, 3.

Only in March 2002 did INS officials finally acknowledge that they had indeed adopted a policy of detaining Haitians. R1-4-Ex. 1 at 1, Ex. 2 at 4, Ex. 3 at 2. According to Acting INS Commissioner Becraft, he adopted the December 14, 2001 policy because of concerns that there was going to be a "mass migration" of people arriving by boat from Haiti, that Haitians were risking their lives on the high seas, and that Haitians who arrived by boat were desperate and therefore might constitute flight risks. R2-25-Ex.1 at 3, 4. At no point did the Acting INS

Deputy Commissioner state that he adopted the Haitian detention policy because the Haitians had failed to sufficiently prove their identity.

On April 5, 2002, after petitioners filed suit in district court, INS changed its detention policy to permit the release of certain Haitian asylum seekers who arrived at the Miami airport or other ports-of-entry. R2-38-Ex. 1 at 6; R2-39-24-26.[4] The INS never advanced any explanation for why Haitians who arrived by air had been included in the detention policy for three months. Unlike the December 14, 2001 policy, this policy change was put in writing. R2-39-24, 26. Under the policy, all Haitians in the credible fear asylum process who arrive by boat continue to be subject to detention, with the sole exception of some pregnant women.[5] R2-39-17-20. The Haitians who arrive by airplane may now be released but are still subject to an "unusual hardship" standard and subject to burdensome "enhanced procedures" for release which INS does not apply to any other nationality. R2-38-Ex. 1 at 6, R2-39-24-26, R2-40- Ex. 2 at 1, 2.

The Haitians continue to languish in INS detention and suffer irreparable harm as a result of their detention. R1-4 Ex. 7. Unlike released asylum seekers of

[4] Petitioner Peterson Belizaire's claims were deemed moot by the district court after Mr. Belizaire was released pursuant to the changed policy for Haitians arriving by air. R2-57; R2-45-3.

[5] Some unaccompanied minors were also released. Unaccompanied minors are not generally subject to expedited removal and the credible fear process and therefore fall outside the proposed class definition.

other nationalities, they are forced to prepare for their asylum cases on an expedited, Haitian-only docket and have limited access to counsel. R1-4-Ex. 1 at 2, Ex. 2 at 2-4, Ex. 3 at 2; R2-19-Ex. 2 at 3-12. Few agencies are able to provide free legal help to the Haitians and the efforts of the Executive Office for Immigration Review and other agencies to recruit pro bono attorneys have had poor success. R1-4-Ex. 2 (letter from Steven Lang, EOIR *Pro Bono* Coordinator; letter from American Immigration Lawyers Association). Despite the extensive efforts to find attorneys to represent the Haitians, the vast majority are unrepresented. R1-4-Ex. 2 at 1-4, Ex. 7; R2-40-Ex. 3 at 1. Without attorneys, the Haitians are far less likely to win asylum than represented asylum seekers. R1-4-Ex. 2 at 2, 3; R2-40-Ex. 3 at 1. Most of the Haitians speak no English and are forced to complete asylum applications in English. R1-1-16; R1-4-Ex.2 at 2, 3. Because the Haitians are detained, their cases are expedited and those attorneys who have agreed to represent the Haitians face multiple barriers in gaining access to their clients. R1-4-Ex. 2 at 3; R2-19-Ex. 2; R2-40-Ex. 3-11. INS itself admitted that it lacks adequate visitation to meet the needs of attorneys and other advocates trying to help the Haitians. R2-26-6.

The conditions in the facilities in which the Haitians are detained further compromise their ability to seek asylum. These facilities are overcrowded,

unsanitary, and traumatizing for many. R1-4-Ex. 2 at 4-5, Ex. 2 (declaration by Rosalind LeGrand), Ex. 7; R2-40-Ex. 2. Many of the Haitians are depressed and despondent, which further affects their ability to prepare and articulate their claims. R1-4-Ex. 2 at 4, 5; R2-40-Ex. 2 at 1. In particular, the Haitian women are held in a maximum security county jail, subject to frequent strip searches, lockdowns, and hourly interruptions of sleep during the night. R1-4-Ex. 2 at 4-5; R2-40-Ex. 2.

Standard of Review

This Court reviews the district court's findings of law *de novo*. Al Najjar v. Ashcroft, 257 F.3d 1262, 1284 (11th Cir. 2001). The factual findings of the district court should not be accorded deference by this Court because the district court summarily dismissed this case after failing to permit discovery and erroneously considering as undisputed key facts presented by the government. Palmer v. BRG of Georgia, Inc., 874 F.2d 1417, 1422 (11th Cir. 1989); NAACP v. Duval County School, 273 F.3d 960 (11th Cir. 2001) (no deference to district court's findings of facts when the court applies "an incorrect legal standard which taints or infects its findings of facts").

SUMMARY OF THE ARGUMENT

The Supreme Court in Jean v. Nelson, 472 U.S. 846 (1985), conclusively interpreted the facially neutral parole statute and regulation to require that INS officials make "individualized" release determinations and do so "without regard to race or national origin." In the absence of authorization from the President or Congress, the Acting Deputy INS Commissioner lacks the authority to adopt a detention policy that contravenes the neutral parole statute and regulation. The district court correctly determined that the Becraft Haitian detention policy "differentiates between nationalities," but erroneously found that the Acting Deputy INS Commissioner possessed sufficient power to authorize such a policy.

The district court further erred in finding that it had only habeas jurisdiction over petitioners' claims and in entering a final judgment which was based on the government's disputed factual assertions and which was entered prior to an evidentiary hearing and discovery. Even if the district court was limited to habeas jurisdiction, it erred in dismissing the case in its entirety before holding an evidentiary hearing and permitting discovery. In any event, the court erred in finding that the Acting Deputy INS Commissioner had advanced a facially legitimate and bona fide reason for the Haitian detention policy.

The Becraft Haitian policy is a nonexempt rule under the Administrative Procedures Act ("APA") that was adopted without compliance with the APA's rulemaking procedures. The district court erred in finding that the policy was exempt from rulemaking as a statement of policy. The district court erred in dismissing petitioners' constitutional claims. As asylum seekers who have established a significant possibility of being eligible for asylum, petitioners have constitutional rights which require that they be considered for release on parole on equal terms with asylum seekers of other nationalities and races.

ARGUMENT

I. AS INTERPRETED BY THE SUPREME COURT IN JEAN V. NELSON, THE PAROLE STATUTE AND REGULATION REQUIRE INDIVIDUALIZED ADJUDICATIONS OF RELEASE REQUESTS WITHOUT REGARD TO RACE OR NATIONAL ORIGIN.

The INA's parole provision and implementing regulation require that INS officials consider requests for release on a case-by-case basis without regard to race or national origin. 8 U.S.C. § 1182(d)(5)(A) and 8 C.F.R. § 212.5. The parole provision and regulation are facially neutral. Nothing in the language of the statute or regulation permits the INS to consider national origin and/or race when making parole decisions. Moreover, the statute and regulation expressly require that INS officials make parole determinations on a "case-by-case" basis. 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5.

In Jean v. Nelson, 472 U.S. 846 (1985), the Court interpreted a virtually identical parole statute and regulation and found that the parole statute and regulation were "facially neutral." Jean v. Nelson, 472 U.S. 846, 852 (1985).[6] The Court further held that the statute and regulation require that INS officials make "individualized determinations of parole" and exercise their parole authority "without regard to race or national origin." Id. at 857. The Court arrived at its interpretation of the parole regulation and statute on the grounds that 1) the regulation and statute are facially neutral; 2) the Attorney General had expressly adopted nationality-based criteria in other regulations; and 3) the government agreed that the parole statute and regulation prohibit consideration of national origin and race. Id. at 856.

There is no dispute that the regulation and statute forbid consideration of national origin and race in parole decisions. At no point before the district court did the government argue that it had changed its position about the meaning of the parole statute and regulation since Jean v. Nelson. Instead, the government argued that 1) the Haitian policy does not make nationality or race-based distinctions; and 2) in the alternative, the Acting Deputy INS Commissioner possesses the authority

[6] The current parole statute and regulation are identical in all relevant respects to the parole statute and regulation at issue in Jean v. Nelson. Compare 8 U.S.C. § 1182(d)(5)(A) (1982), 8 C.F.R. § 212.5 (1985) with 8 U.S.C. § 1182(d)(5)(A) (2001), 8 C.F.R. § 212.5 (2001).

to institute a nationality-based detention policy notwithstanding the parole statute and regulation. R1-14-24-26.

The district court also did not question the Supreme Court's interpretation of the parole statute and regulation. Rather, the court found that the Haitian detention policy in fact "differentiates between nationalities" and asked "whether Becraft, as Acting Deputy Commissioner, has the authority to promulgate such a policy." R2-65-12, 24. The court ruled against petitioners after answering this question in the affirmative.

A. The Acting Deputy INS Commissioner Lacks the Authority to Violate the Facially Neutral Parole Provision and Regulation.

Contrary to the finding of the district court, the Acting Deputy INS Commissioner lacks the authority to override the neutral parole statute and regulation and institute a detention policy that differentiates based on nationality or race. The only executive official who would have had the authority to adopt such a policy is the President, who is expressly authorized by the INA to make nationality-based distinctions. 8 U.S.C. § 1182(f) (authorizing the President to "suspend the entry of all aliens or any class of aliens . . . or impose on the entry of aliens any restrictions he may deem to be appropriate"). All executive officials lower than the President are strictly bound by the neutral parole statute and regulation.

The Supreme Court has consistently recognized that executive branch officials lower than the President act in the area of immigration pursuant to authority delegated by Congress. Bridges v. Wixon, 326 U.S. 135 (1945) (courts may "inquire whether the Attorney General has exceeded his statutory authority or acted contrary to law or the Constitution") (citing Bilokumsky v. Tod, 263 U.S. 149, 153 (1923); Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 106 (1927); See also INS v. National Center for Immigrants' Rights, Inc., 502 U.S. 183 (1991) (considering whether Attorney General acted outside the scope of his delegated authority by promulgating a regulation related to employment of aliens released on bond).

While the Attorney General has broad powers to act in matters concerning immigration, neither he nor his subordinates have the authority to violate the Constitution, the INA, or INS regulations. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) (Attorney General cannot interfere with procedure established in INS regulations); Galvan v. Press, 347 U.S. 522, 531 (1954) (executive officials must respect due process in enforcement of laws); Sierra Club v. Martin, 168 F.3d 1 (11th Cir. 1999) ("'courts must overturn agency actions which do not scrupulously follow the regulations and procedures

promulgated by the agency itself'") (citing Simmons v. Block, 782 F.2d 1545, 1550 (11th Cir. 1986)).

Although the President may have power over immigration in addition to his power delegated by Congress, the Supreme Court has recognized that this power may not permit even the President to act contrary to an act of Congress. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636-37 (1952). The Attorney General, however, does not have inherent power over immigration and cannot act under the President's authority without a presidential directive. Even if he could, he could not take action that would contravene a statute passed by Congress or an agency regulation.[7]

The district court erred in determining that the Acting Deputy INS Commissioner has the authority to institute a nationality-based detention policy that contravenes the neutral parole statute and regulation. R2-65-26. The court cited to no caselaw for its conclusion, but instead analyzed the delegation of

[7] A number of cases decided by this Court suggest that the Attorney General has the authority to make nationality-based distinctions. See, e.g., Cuban American Bar Association v. Christopher, 43 F.3d 1412, 1427 (11th Cir. 1995); Haitian Refugee Center v. Baker, 953 F.2d 1498, 1507 (11th Cir. 1992); Haitian Refugee Center v. Christopher, 43 F.3d 1431, 1433 (11th Cir. 1995); Garcia-Mir v. Meese, 788 F.2d 1446, 1454 (11th Cir. 1986). In each of these cases, however, the Attorney General was acting pursuant to his authority delegated by Congress. Moreover, none of these cases suggest that the Attorney General could act in a way inconsistent with the INA.

parole authority in the statute and regulations. The court pointed out that the statute, 8 U.S.C. § 1182(d)(5)(A), grants the Attorney General parole authority and that, by regulation, the Attorney General has delegated that authority to lower-level officials, including the Deputy INS Commissioner. R2-65-25 (citing 8 C.F.R. § 212.5(a)). The court concluded that "[b]ecause the regulation explicitly delegates the Attorney General's parole authority to the Deputy Commissioner, the Court analyzes the Haitian adjustment policy established by the Acting Deputy Commissioner Becraft in the same manner as if the Attorney General himself had promulgated the policy." R2-65-25-26.

The district court's argument fails because it takes as its premise that the Attorney General would have had the power to authorize the Haitian detention policy in the face of the neutral parole statute and regulation. For the reasons discussed above, only the President has this authority. Moreover, the district court's argument also fails on its own terms. The same regulation that delegates parole power to the Deputy Commissioner also delegates parole power to local district directors and chief patrol agents.[8] 8 C.F.R. § 212.5 ("[t]he authority of the Commissioner to continue an alien in custody or to grant parole under section

[8] Although the district court quotes from the parole regulation in its decision, the court did not quote the part of the parole regulation which delegates parole authority to local district directors and chief patrol agents.

212(d)(5)(A) of the Act shall be exercised by the *district director or chief patrol agent*") (emphasis added); Jean v. Nelson, 472 U.S. at 855 (noting that the parole regulation delegates parole authority to district directors). Since local district directors and chief patrol agents are the lowest level INS officials with parole authority, if the court's rationale were correct, the Miami District Director could have adopted the Becraft Haitian detention policy. This result, however, directly conflicts with the Supreme Court's decision in Jean v. Nelson which expressly precludes the lowest level INS officials with parole authority from adopting policies that contravene the neutral parole regulation and statute.

The district court's error was to confuse the authority to parole on a case-by-case basis with the authority to adopt a nationality-based policy that contravenes the neutral parole statute and regulation. These are distinct authorities and the latter cannot be derived from the former. Rather, the neutral parole statute and regulation limit the parole authority of executive officials other than the President.[9] In the absence of a directive from the President himself, both the Acting Deputy Commissioner and the Miami District Director must follow the

[9] Courts routinely recognize limitations on discretionary authority. See, e.g., Florida, Dep't of Business Regulation v. U.S Dep't of the Interior, 768 F.2d 1248, 1257 n. 11 (11th Cir. 1985) (decisions committed to agency discretion can be reviewed for compliance with regulation); Griffin v. Harris, 571 F.2d 767, 772 (3rd Cir. 1978) (Agencies "must follow their own published regulations, even when the particular decision involves some discretion.").

neutral regulation and exercise their parole authority without regard to race or national origin.

B. Nothing in Either This Court's En Banc Decision in Jean v. Nelson or the Supreme Court's Decision in that Case Contradicts the Principle that the Attorney General is Bound by the Neutral Parole Statute and Regulation.

Both this Court, in its *en banc* decision in Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984), aff'd in judgment to remand only, Jean v. Nelson, 472 U.S. 846, 852 (1985), and the Supreme Court, in its review of that decision, recognized that the Attorney General's wide discretion in immigration matters comes from the INA and is therefore limited by it. Jean v. Nelson, 472 U.S. at 852-53 (quoting Jean v. Nelson, 727 F.2d at 963); Jean v. Nelson, 727 F.2d at 966 ("despite these broad grants of authority" executive officials cannot "'depart from the zone of authority charted in the statute'") (internal citations omitted). Both Courts considered, but did not decide, whether the Attorney General could have authorized the Haitian detention policy at issue in that case, and both Courts left open the possibility that the Attorney General could have done so. Jean v. Nelson, 472 U.S. at 852-53 (quoting Jean v. Nelson, 727 F.2d at 963). Neither Court, however, considered whether the Attorney General could have adopted the Haitian detention policy in contravention of a parole statute and regulation *that had already been interpreted* as prohibiting consideration of national origin and race. Jean v. Nelson, 472 U.S.

at 852-53 (characterizing the open question as whether the Attorney General would "'have the discretionary authority *under the Immigration and Nationality Act* to discriminate between classes of aliens '") (quoting Jean v. Nelson, 727 F.2d at 963). Moreover, neither Court suggested that the Attorney General could have adopted the policy without promulgating a new regulation permitting discriminatory parole consideration. As such, this Court must confront an issue that has not been previously considered by either this Court or the Supreme Court: whether an executive branch official lower than the President can institute a parole policy that makes distinctions based on race and/or national origin when such a policy is forbidden by statute and regulation. For the reasons discussed above, only the President has such authority.

C. In Any Event, the Acting Deputy INS Commissioner Did Not Possess the Authority to Create the Haitian Detention Policy Even if the Attorney General Could Have Done So By Regulation or By Other Action.

Even if this Court finds that the Attorney General would have had the power to authorize the Becraft Haitian detention policy, this Court should find that he would have had to promulgate an amendment to the parole regulation in order to do so. See discussion infra Part V. Even if this Court finds that no regulatory amendment would have been necessary, this Court should find that the Acting

Deputy INS Commissioner lacked the power to adopt the Haitian policy in the face of the neutral parole statute and regulation.

Neither this Court nor the Supreme Court has recognized that executive branch officials like the Acting Deputy INS Commissioner have inherent power over immigration such that they can take actions that contravene the INA and agency regulations and which are not authorized by the President. The President's inherent power over immigration, if it can be delegated at all, cannot be delegated to such a low level official. Whatever the power of the Attorney General to act contrary to the neutral parole statute and regulation, the Acting Deputy INS Commissioner is strictly bound by the dictates of the statute and regulation and therefore lacked the authority to adopt the December 14, 2001 Haitian detention policy.

D. The Acting Deputy INS Commissioner's Haitian Detention Policy Violates the Neutral Parole Provision and Regulation.

The Becraft Haitian detention policy straightforwardly violates the parole statute and regulations by 1) making Haitians' national origin and/or race a factor in release determinations; and 2) depriving Haitians of case-by-case adjudications of their release requests. The district court correctly found that the Becraft Haitian detention policy was a policy "that differentiates between nationalities." R2-65-

12. The court, however, erred in finding that the INS is adjudicating release requests filed by Haitians on a case-by-case basis. R2-65-30.

The December 14, 2001 policy, on its face, makes nationality a factor in whether to grant Haitians parole. Acting INS Deputy Commissioner Peter Michael Becraft makes clear in his declaration that the December 14, 2001 policy is directed solely at Haitians. He states: "I instructed the INS Office of Field Operations to adjust its parole criteria *with respect to inadmissible Haitians* arriving in South Florida. I instructed that office that no Haitian should be paroled without the approval of INS Headquarters (emphasis added)." R2-38-Ex. 1 at 4. This statement alone demonstrates that the INS has adopted a policy that makes nationality and/or race a factor in parole determinations.

Any doubt that the INS used nationality and/or race as a factor in denying parole to Haitians is resolved by INS's implementation of the policy. Upon receiving the above instruction from the Acting Deputy INS Commissioner, INS officials in Miami began refusing release to Haitians and only forwarded to INS Headquarters fifteen recommendations for release. R2-38-Ex. 1 at 5. Five of these were cases of pregnant women; ten were cases of unaccompanied minors. Id. As a result of the Becraft Haitian detention policy, over 240 Haitians were kept in detention notwithstanding INS's determination that they had a credible fear

of persecution. At the same time, INS continued to release asylum seekers of all other nationalities at a rate of 95 percent. R1-4-Ex. 4 at 1.

The Haitian policy also denied Haitians the opportunity to be considered for parole on the merits of their claims, unless they were pregnant women or unaccompanied minors. R2-39-111-20. INS deportation officers, in most cases, denied requests for release filed by Haitians without making individualized determinations and, in other cases, failed altogether to make decisions. R1-4-Ex. 1 at 1, Ex. 2 at 2, Ex. 3 at 1. While the INS has changed its parole policy yet again and has agreed to consider for release Haitians who arrive by airplane (or other port-of-entry) under a heightened standard not applicable to other nationalities, this change in policy does not apply to Haitians arriving by boat. R2-38-Ex. 1 at 6; R2-39-24-26.

II. THE DISTRICT COURT HAD FEDERAL QUESTION JURISDICTION AS WELL AS HABEAS JURISDICTION BECAUSE THE JURISDICTIONAL BAR WHICH PREVENTS REVIEW OF DISCRETIONARY ACTIONS DOES NOT APPLY TO PETITIONERS' CLAIMS.

The district court correctly found that it had jurisdiction under 28 U.S.C. § 2241 to consider petitioners' claims. R2-65-13-15. The court, however, erred in finding that it lacked general federal question jurisdiction over petitioners' claims. 8 U.S.C. § 1252(a)(2)(B)(ii), which bars a court from reviewing any "decision or

action of the Attorney General" which is authorized as being "in the discretion of the Attorney General," does not apply to this case. Petitioners do not challenge the Attorney General's exercise of his discretionary parole authority, but instead claim that the Acting Deputy INS Commissioner has acted beyond the scope of his delegated authority by adopting a policy that violates the facially neutral parole statute and regulation. Moreover, petitioners' challenge the Haitian detention policy as adopted in violation of the APA and the equal protection and due process protections of the U.S. Constitution. The district court fundamentally misconstrued petitioners' claims by characterizing them as seeking review of discretionary parole decisions. R2-65-3.

By its plain terms, 8 U.S.C. § 1252(a)(2)(B)(ii) only prohibits review of "decisions or actions" that are specified in the statute as "in the discretion of the Attorney General." The provision only limits review of the discretionary element of the Attorney General's "decisions or actions." In Al Najjar v. Ashcroft, 257 F.3d 1262 (11th Cir. 2001), this Court considered the scope of the jurisdictional bar in section 309(c)(4)(E) of the Illegal Immigration and Immigrant Responsibility Act of 1996 ("IIRIRA"). That provision states that "there shall be no appeal of any discretionary decision under 212(c), 212(h), 212(j), 244 or 245 of the Immigration and Nationality Act." This Court found that the bar applied only to

discretionary determinations and did not prevent review of whether the petitioner satisfied the nondiscretionary physical presence requirement for establishing eligibility under INA § 244. Al Najjar v. Ashcroft, 257 F.3d at 1298. This Court came to this conclusion notwithstanding the fact that the granting of relief under INA § 244 was ultimately within the discretion of the Attorney General, finding that "the determination of continuous physical presence is not subject to the agency's discretion, but is a matter of applying the law to the facts of the case." Al Najjar v. Ashcroft, 257 F.3d at 1298. In so holding, this Court followed the Courts of Appeals for the First, Fifth and Ninth Circuits. Bernal-Vallejo v. INS, 195 F.3d 56, 62 (1st Cir. 1999) (reviewing continuous physical presence requirement for suspension of deportation because it is "subject to legal standards that guide the inquiry"); Gonzalez-Torres v. INS, 213 F.3d 899, 901 (5th Cir. 2000) (same); Kalaw v. INS, 133 F.3d 1147, 1151 (9th Cir. 1997) (same).

The Court's reasoning in Al Najjar v. Ashcroft applies equally to this case. The language of the jurisdictional provision 8 U.S.C. § 1252(a)(2)(B)(ii) and IIRIRA § 309(c)(4)(E) is virtually identical. The former bars review of "decisions or actions" that are specified as "in the discretion of the Attorney General." The latter bars review of "any discretionary decision." Like the petitioner in Al Najjar v. Ashcroft, petitioners here do not challenge discretionary decisions of the

Attorney General. Rather, they challenge whether the Haitian detention policy was properly authorized and whether it violates the facially neutral parole statute and regulation, the APA, and the Constitution. Under this Court's decision in Al Najjar v. Ashcroft, 8 U.S.C. § 1252(a)(2)(B)(ii) does not bar jurisdiction over their claims.

Additional caselaw supports this position. The Court of Appeals for the Ninth Circuit ruled that 8 U.S.C. § 1252(a)(2)(B) only bars review of discretionary determinations of the Attorney General and does not prevent statutory and constitutional challenges to the actions of the Attorney General. Montero-Martinez v. Ashcroft, 277 F.3d 1137 (9th Cir. 2002) (upholding jurisdiction over challenge involving statutory eligibility for discretionary relief and constitutional claim); See also INS v. Yueh-Shaio Yang, 519 U.S. 26, 30 (1996) (noting distinction between "prerequisites for eligibility" and "unfettered discretion"); Foti v. INS, 375 U.S. 217, 228-29 n.15 (1963) ("finding of eligibility and an exercise of (or refusal to exercise) discretion may properly be considered as distinct and separate matters"); Chadha v. INS, 634 F.2d 408, 426 (9th Cir. 1980) (Kennedy, J.), aff'd, 462 U.S. 919 (1983) ("Each of the[] [statutory] prerequisites [for discretionary relief] requires a legal determination of a traditional sort.").

In addition, the Supreme Court has held that jurisdictional statutes like 8 U.S.C. § 1252(a)(2)(B) do not bar challenges to INS practices and policies like those brought by petitioners. In McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991), the Supreme Court dealt with a jurisdictional bar similar in all relevant respects to 8 U.S.C. § 1252(a)(2)(B).[10] Although the government in McNary v. Haitian Refugee Center claimed that the 8 U.S.C. § 1160(e) bar divested the Court of the ability to review all challenges concerning the individual application process for adjustment of status, the Court determined that the bar referred only to the "direct review of individual denials" and not to "general collateral challenges to unconstitutional practices and policies by the agency in processing applications." Id. at 492. The Supreme Court thus concluded that the jurisdictional bar did not prevent the Court from reviewing "constitutional or statutory claims" concerning the application process. Id. at 493-94.

8 U.S.C. § 1252(a)(2)(B)(ii) only limits review of discretionary determinations by the Attorney General. Because petitioners do not seek review

[10] 8 U.S.C. § 1160(e) (1991) stated "[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status." 8 U.S.C. § 1252(a)(2)(B)(ii) states "no court shall have jurisdiction to review . . . any [discretionary] decision or action of the Attorney General [under this subchapter]."

of discretionary determinations, their claims fall outside the jurisdictional bar.[11]

III. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN DISMISSING THE ENTIRE CASE WHILE RULING ON A MOTION FOR PRELIMINARY RELIEF AND BY ADOPTING THE GOVERNMENT'S VERSION OF KEY DISPUTED FACTS.

A. Because the District Court Possessed Federal Question Jurisdiction, the Court Erred in Dismissing the Case in Summary Judgment Fashion Without Construing the Facts in Favor of Petitioners.

A court cannot dismiss a case before it goes to trial unless there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Disputed facts must be construed in favor of the nonmoving party. Palmer v. BRG of Georgia, Inc., 874 F.2d 1417, 1422 (11th Cir. 1989). Moreover, a court cannot grant summary judgment without first giving the nonmoving party notice and the opportunity to file opposing affidavits.[12] FED. R. CIV. P. 56(c). The district court in this case violated these fundamental rules by dismissing the case in its entirety after only a preliminary briefing on the merits and before permitting petitioners to conduct

[11] Any doubt regarding the meaning of 8 U.S.C. § 1252(a)(2)(B)(ii) is resolved by the Supreme Court's rule that the INS "must overcome . . . the strong presumption in favor of judicial review of administrative action," INS v. St. Cyr, 533 U.S. 289 (2001).

[12] Moreover, if the nonmoving party cannot present by affidavits "facts essential to justify the party's opposition," the court must either deny summary judgment or permit discovery. FED. R. CIV. P. 56(f).

their requested discovery. In dismissing the case, the court relied on facts asserted by the government but disputed by petitioners. Moreover, the court ignored altogether material facts asserted by the petitioners. Although the court stated that it was not considering the governments' "motion for summary judgment in part," the court's action in dismissing the case amounted to an improper grant of a motion for summary judgment.[13]

Specifically, the court accepted without question the government's assertions that 1) INS officials were engaging in case-by-case determinations of release requests filed by Haitians; and 2) INS adopted the Haitian policy to prevent a mass migration and to save lives and because it believed that Haitians who arrived by boat were desperate and therefore a flight risk. R2-65-27-29, 30. Petitioners disputed each of these factual assertions. Petitioners alleged and presented ample, credible evidence that INS officials were, in fact, not adjudicating release

[13] In dismissing the case, the court stated that it "finds that the issues were fully briefed in the Petitioners' Emergency Motion for Temporary Restraining Order and/or for Preliminary Injunction or Class Writ of Habeas Corpus, and for an Immediate Emergency Hearing, Motion to Certify Class, Government's Responses, Petitioners' Replies, and the parties' submissions in response to the Court's April 5th Order Directing to Submit Additional Documentation." R2-65-8. The court found it "unnecessary to consider the Government's Motion to Dismiss and for Summary Judgment, and rules upon the basis of the Emergency Motion and related pleadings." Id. Even though the court claimed that it was not ruling on the INS's motion for summary judgment, the court in effect did just that.

determinations on a case-by-case basis. R1-1-1, R1-4-Ex. 1 at 1, Ex. 2 at 2, Ex. 3 at 1. Petitioners also alleged and pointed to substantial evidence in the record demonstrating that the INS, in fact, did not adopt the Haitian policy for the reasons they claimed they did. R1-1-15, R2-20-7-10, R2-58-2. Moreover, the district court ignored altogether petitioners' material factual assertions that INS officials deliberately denied the existence of the Becraft Haitian detention policy until March 2002 and issued numerous, summary parole decisions that contained false reasons for denial.[14] R1-1-2, 15.

The court failed to give notice to petitioners that it intended to consider summary judgment and failed to rule on petitioners' motion for leave to conduct discovery. In so doing, the court straightforwardly violated Rule 56(c) of the Federal Rules of Civil Procedure. This Court should remand this case to the district court with instructions to proceed to the merits of the case in accordance with the Federal Rules of Civil Procedure.

B. Even if the Court Only Had Habeas Jurisdiction, it Erred By Failing to Hold an Evidentiary Hearing and to Grant Petitioners Leave to Conduct Discovery.

Even if the district court was limited to habeas jurisdiction, it erred by failing to hold an evidentiary hearing to settle material disputed facts and it abused

[14] As stated above, the reasons for denying parole contained in INS's written denials conflicted with the reasons the Acting INS Deputy Commissioner later articulated during the course of this case.

its discretion by denying petitioners discovery. A district court is obligated to hold an evidentiary hearing in a habeas proceeding. 28 U.S.C. § 2243 states: "[w]hen the writ of order is returned a day *shall* be set for hearing, not more than five days after the return unless for good cause additional time is allowed (emphasis added)." Courts have recognized a limited exception to this rule only when the habeas petition raises pure questions of law. Walker v. Johnston, 312 U.S. 275 (1941) (if there is an issue of fact upon return of habeas petition, court shall proceed "to determine facts of case by hearing testimony and argument"); People ex rel. Herndon v. Nierstheimer, 152 F.2d 453 (7th Cir. 1945) (court may dispose of case on basis of return and answer where only questions of law are presented).

Petitioners raised material factual allegations in their habeas petition that were then disputed by respondents.[15] As stated above, petitioners asserted INS officials were not, in fact, giving Haitians case-by-case adjudications of release requests and Becraft Haitian detention policy was not, in fact, adopted for any of the reasons claimed by INS. The district court expressly based its decision on the

[15] The district court technically never issued an order to show cause and the respondents' never actually returned the habeas petition, as is required by 28 U.S.C. § 2241. The court ordered respondents to respond to petitioners' emergency motion for a temporary restraining order and/or preliminary injunction or class writ of habeas corpus. In compliance with the order, respondents responded.

findings that Acting Deputy INS Commissioner adopted the Haitian policy for the reasons he said he did and that "the deportation officers in Miami continued to review Haitians' parole requests on an individual, case-by-case basis." R2-65-27-9, 30. Because the parties disputed important facts, the district court was required to hold an evidentiary hearing.

Additionally, the district court erred in not permitting petitioners to conduct discovery. A court has the discretion to permit discovery in habeas proceedings under 28 U.S.C. § 2241. Rule 6, Rules Governing Section 2254 Cases (permitting discovery under Federal Rules of Civil Procedure if granted by court in the exercise of discretion and for good cause shown); Rule 1(b) (permitting the application of section 2254 rules to other habeas proceedings). The district court abused its discretion by not giving petitioners the opportunity to conduct discovery. Petitioners moved for leave to start discovery, but the district court did not rule on their motion. R2-50, 51. Specifically, petitioners asked to be able to depose the officials who had submitted sworn declarations in the case. R2-50. Petitioners also asked to be able to serve interrogatories and a request for production. R2-50, 51. Copies of the set of interrogatories and request for production were attached to petitioners' discovery motion. Id.

The discovery requests were directed at testing the veracity of the Acting Deputy INS Commissioner's reasons for adopting the Becraft Haitian detention policy as well as the claim that INS deportation officers were reviewing parole requests filed by Haitians on a case-by-case basis. The court ultimately decided the case based on these facts, even though they were disputed by petitioners. It was an abuse of discretion for the court to base its decision on these key facts without permitting petitioners to first conduct discovery.

IV. IN ANY EVENT, THERE IS NO FACIALLY LEGITIMATE AND BONA FIDE JUSTIFICATION FOR THE BECRAFT HAITIAN DETENTION POLICY.

In any event, this Court must reverse the decision of the district court because the INS has advanced no facially legitimate and bona fide reason for the policy. There is no dispute that, at a minimum, a court can review the actions of INS officials to determine whether the actions were taken for a facially legitimate and bona fide reason. Garcia-Mir v. Smith, 766 F. 2d at 1478, 1485 (11th Cir. 1985) (citing Jean v. Nelson, 72 F. at 977); See also Cuban American Bar Association v. Christopher, 43 F. 3d 1412, 1427-28 (11th Cir. 1995).

A. Facially Legitimate and Bona Fide Reason Must Be Based on the Record and Cannot Include a Noncredible Justification.

The record must reasonably support the justification put forth by the INS in order for it to be facially legitimate and bona fide. Sidney v. Howerton, 777 F.2d 1490, 1491 (11th Cir. 1985) (requiring record support for revocation of parole); Garcia-Mir v. Smith, 766 F.2d at 1485 (factual basis required for revocation of parole); Marczak v. Greene, 971 F.2d 510 (10th Cir. 1992) (parole decision "must be at least reasonably supported by the record").

B. The Government's Claimed Rationales for the Becraft Haitian Detention Policy are Not Reasonably Supported by the Record and Therefore Cannot Justify the Policy.

The district court erred in finding that the INS had put forth a facially legitimate and bona fide reason for its Becraft Haitian detention policy. R2-65-26, 27. The district court blindly adopted the rationales put forth by the INS without an inquiry into whether they were reasonably supported by the record. Review of the record reveals that none of INS's claimed justifications is credible.

The district court accepted at face value the Acting Deputy Commissioner's claim that the Becraft Haitian detention policy was justified by a concern that there was going to be a "mass migration" of people arriving by boat from Haiti, that Haitians were risking their lives on the high seas, and that Haitians who arrived by boat were desperate and therefore might constitute flight risks. R2-65-27-29. The

court failed to consider the evidence in the record which demonstrated that these reasons were not credible.

INS's claimed justifications are not credible because 1) the Becraft Haitian detention policy initially was aimed at all Haitians, regardless of whether they arrived by boat or by air; 2) the INS denied the existence of the policy until March 2002; 3) the INS issued numerous boilerplate parole decisions containing the identical false reasons for denial and, in many cases, failed altogether to make decisions on parole requests; and 4) there is no evidence that there is a threatened "mass migration" from Haiti.

None of the Acting Deputy INS Commissioner's stated reasons for detaining Haitians justify the detention of Haitians who arrive by air. Saving lives on the high seas cannot be accomplished by detaining people who arrive by air. The claimed mass exodus was an exodus by boat, not by air. And, the flight risk rationale expressly applied to boat arrivals only. The December 14, 2001 policy, however, applied to all Haitians, regardless of their manner of entry. R2-38-Ex. 1 at 4; R2-39-11-16. Indeed, INS continued to detain Haitians who had been granted asylum, despite the fact that INS no longer had the authority to detain them. R2-39-21-23. Only after the commencement of litigation did the INS alter its policy to permit the release of certain Haitians arriving at the airport or other

ports-of-entry upon their compliance with burdensome procedures required only of Haitians. R2-38-Ex. 1 at 6; R2-39-24-26. The fact that INS was initially detaining all Haitians and not just boat arrivals establishes that the Acting INS Commissioner's three reasons for adopting the policy are not credible.

The fact that INS denied the existence of the policy further undermines the INS's credibility. If the purpose of the policy was to deter additional Haitians from coming to the United States by boat, the INS would not have denied the existence of the policy until March 2002. R1-4-Ex. 1 at 1, Ex. 2 at 4, Ex. 3 at 2. To the contrary, the INS would have publicized the policy in order to send a message to other Haitians thinking of coming to the United States by boat. Moreover, the record provides no indication that anyone in Haiti is even aware of the Becraft policy.

Moreover, INS officials issued over 90 decisions denying parole to Haitians which claimed that the Haitians were being denied for a failure to prove their identity. R1-4-Ex. 2 at 1, Ex. 6. As stated above, at no point did the Acting INS Deputy Commissioner claim that the Haitians were being detained for failure to prove identity. The fact that the reasons for denying Haitians parole prior to the start of this case conflict with the reasons given during this litigation further undermines INS's credibility about why it adopted the Haitian detention policy.

There is no evidence in the record that Haitian asylum seekers who arrive by boat are more likely than other asylum seekers to abscond from INS. INS bases its reasoning solely on the Haitians' desperation to flee. This rationale, however, cannot justify the Haitian detention policy because it applies with equal force to *every* asylum seeker. Asylum seekers as a class are driven by a desperate desire to avoid persecution.

Lastly, the record does not support INS's claim that there is a threat of a "mass migration." The sole evidence that INS presented to support this claim is the Coast Guard interdiction statistic that 350 Haitians were interdicted in November 2001 compared to a total of 96 in the preceding three months. R2-25-2, 3. This statistic simply does not support INS's position. The Coast Guard statistics reveals that, over the last five years, the Coast Guard has been routinely interdicting more than 350 Haitians in months after there were very few interdictions. R1-20-7 (citing to R2-19-Ex. 1). Yet, no mass migration occurred. Nor did INS claim that one was threatened. INS provided no explanation for why the November 2001 interdiction statistic was cause for alarm while the prior increases in interdictions were not.

The INS's claim that it feared a mass exodus of the size of the Mariel boatlift is simply not supported by the Coast Guard statistics. According to these

statistics, fewer than 2,000 Haitians were interdicted last year. R2-19-Ex. 1 at 2. This figure pales in comparison with the size of the Mariel boatlift, which numbered in excess of 125,000. Moreover, the Coast Guard statistics since the adoption of the Becraft policy fail to support INS's deterrence rationale. In January and February 2002, when INS was still keeping the policy a secret, no Haitians were interdicted. R2-19-Ex.1 at 3. In March, however, after the policy became public, 319 Haitians were interdicted.[16]

INS's credibility is further undercut by the fact that it continues to release asylum seekers from other countries even when there is a large increase in interdictions. For example, the Coast Guard interdicted 481 Ecuadorians in February 2002 following a three month period during which no Ecuadorians were interdicted. R2-19-Ex.1 at 3. Yet, INS has not reacted to this increase in interdictions and Ecuadorian asylum seekers continue to be routinely released from detention. INS provided no explanation for its inconsistent policy.

In fact, maintaining the Becraft detention policy frustrates the goals of the statute if indeed there is a mass exodus because one of the main reasons that "credible fear" aliens are routinely paroled is to preserve INS's limited detention

[16] U.S. Coast Guard, Coast Guard Office of Law Enforcement Alien Migrant Inderdiction, Migrant Inderdiction Statistics (July 5, 2002) (FY 2002 Maritime Migration Flow Statistics) at http://www.uscg.mil/hg/g-o/g-opl/mle/amiostats1.htm#2000 (checked on July 11, 2002).

space. R2-38-Ex. 1 at 4. Because the record does not support any of the reasons INS claims that it adopted the Becraft Haitian detention policy, none of the reasons qualifies as facially legitimate and bona fide. This Court should find the policy unlawful.

V. THE BECRAFT HAITIAN DETENTION POLICY CREATED A NEW PAROLE RULE THAT INS WAS OBLIGATED TO SUBJECT TO THE RULEMAKING PROCEDURES OF THE ADMINISTRATIVE PROCEDURES ACT.

The Becraft Haitian detention policy constitutes a rule that must be subject to rulemaking under 5 U.S.C. § 553(b) because it substantively amends the parole regulation and statute and, moreover, it alters a longstanding substantive agency interpretation. Contrary to the finding of the district court, none of the narrow exceptions to Administrative Procedures Act's ("APA") rulemaking requirements apply. Because the INS did not submit the Becraft Haitian detention policy for notice and comment, it must be held invalid by this Court. Chrysler v. Brown, 441 U.S. 281, 313 (1979).[17]

[17] The Becraft policy clearly constitutes a rule within the meaning of the APA. 5 U.S.C. 551(4) broadly defines a rule as "[t]he whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." The district court correctly found that the Becraft policy was a rule under the APA. R2-65-31.

A. Because the Becraft Haitian Detention Policy is Inconsistent with the Existing Parole Statute and Regulation it Constitutes a New Rule Requiring Notice and Comment.

Any agency policy or position that amends a prior rule is itself a rule that must be subjected to APA rulemaking. A new rule can amend a prior rule by changing a substantive requirement or by otherwise being inconsistent with the prior rule. Guernsey v. Shalala, 514 U.S. 87, 100 (1995) (APA rulemaking required when an agency adopts a "position inconsistent with any . . . existing regulations"). As stated in American Mining Congress:

> If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative. National Family Planning & Reproductive Health Association v. Sullivan, 979 F.2d 227, 235 (D.C.Cir. 1992).

American Mining Congress v. MSHA, 995 F. 2d 1106, 1109 (D.C. Cir. 1993).

A rule need not expressly repudiate a prior rule in order to amend it. For example, in United States v. Picciotto, 875 F.2d 345 (D.C.Cir. 1989), the Park Service published a rule that expressly permitted the Service to add "reasonable conditions" to individual permits for demonstrations. The Park Service, without publication, then added a set of uniform conditions for all demonstrations occurring in one specific park. Id. at 346. The court invalidated the uniform conditions as an amendment to the published rule. Id. at 346.

The Becraft Haitian detention policy constitutes an amendment to the governing parole statute and regulation, 8 U.S.C. § 1182(d)(5)(A) and 8 C.F.R. § 212.5(b). As discussed above in Part I, the Supreme Court's decision in Jean v. Nelson fixed the meaning of the statute and regulation to require INS to make "individualized" parole determinations and to do so "without regard to race or national origin." Jean v. Nelson, 472 U.S. at 857. The Becraft Haitian detention policy is inconsistent with, and effectively repeals, the requirement in the parole regulation and statute and parole adjudications be individualized and nondiscriminatory. The policy expressly applies only to Haitians and expressly requires INS officials to consider whether parole applicants are Haitian when making parole determinations. R2-38-Ex. 1 at 4 ("I instructed the INS Office of Field Operations to *adjust its parole criteria* with respect to inadmissible *Haitians* arriving in South Florida.") (emphasis added). Moreover, it resulted in a dramatic change in parole decisions for Haitians only. R1-4-Ex. 4 at 1; R2-26-5 (drop from 96 percent grant rate to 6 percent).

The Becraft amendment to the parole regulation is substantive, as it fundamentally altered the criteria for parole determinations. Prior to the new rule, Haitians, and all others, were considered on a case-by-case basis without regard to race or nationality. R2-38-Ex. 1 at 2,3; R2-39-1-10. After the new rule, INS was

required to consider the nationality of parole applicants and treat Haitians in South Florida under a more restrictive "unusual hardship" standard that effectively barred release of Haitians who were not either pregnant or unaccompanied minors. R2-38-Ex. 1 at 6.

Because the Becraft policy expressly makes national origin a factor in parole determinations, this Court must find that the policy is inconsistent with the parole regulation and statute and that it constitutes a new rule requiring APA rulemaking.

B. Because the Becraft Haitian Detention Policy Changes INS's Longstanding Interpretation of the Parole Regulation and Statute it Must Be Subject to APA Rulemaking.

Even if the Becraft Haitian detention policy does not amend the existing rules governing parole, APA notice and comment is still required because the policy nonetheless significantly contravenes the INS's longstanding interpretation of the parole regulation and statute. The Courts of Appeals for the Fifth Circuit and the DC Circuit have held that an agency may not significantly violate a longstanding interpretive policy without engaging in notice and comment. Shell Offshore Inc. v. Babbitt, 238 F.3d 622 (5th Cir. 2001); Alaska Professional Hunters Association v. FAA, 177 F.3d 1030 (D.C. Cir. 1999).

Shell Offshore, Inc. v. Babbitt involved an agency practice spanning six years under which the Department of Interior permitted off-shore oil producers to utilize a Federal Energy and Regulatory Commission (FERC) tariff rate to calculate their royalty payments. Shell Offshore, Inc. v. Babbitt, 238 F. 3d at 624-25. In 1993, the agency questioned whether FERC had jurisdiction to approve the tariff rate and instituted a new policy requiring the oil producers to petition FERC for jurisdiction prior to using a FERC tariff rate to calculate royalties. Id. The oil producers challenged this new "jurisdiction petition policy" as violating the APA notice and comment rules. Id.

The Court of Appeals noted that the "[Department of the] Interior's new practice may be a reasonable change in its oversight practices and procedures." Id. at 630. The Court found, however, that the new practice "places a new and substantial requirement on many OCS lessees, [and] was a significant departure from long established and consistent past practice." Id. As such, the policy change "should have been submitted for notice and comment before adoption." Id.

Application of the Court of Appeals' analysis in Shell Offshore, Inc. v. Babbitt to this case demonstrates that INS was required to undergo notice and comment rule making before adopting the Becraft Haitian detention policy. Prior

to the Becraft policy, the INS had consistently maintained the position they adopted before the Supreme Court in Jean v. Nelson, 472 U.S. 846 (1985), namely that parole determinations could not be based on considerations of race or national origin:

> Respondents concede that the INS's parole discretion under the statute and the regulations, while exceedingly broad, does not extend to considerations of race or national origin.

Id. at 855.

In 1998, INS reinforced its interpretation articulated in Jean v. Nelson by adopting Detention Use Standards that are nationality and race neutral. R2-39-1-10. Nothing in these Standards alters the INS's interpretation articulated in Jean v. Nelson. To the contrary, the Standards provide that asylum seekers of all nationalities who pass their credible fear interviews should be considered the lowest priority for detention. Id. INS admits that its application of these Standards in South Florida resulted in the parole of most credible fear aliens unless they were a danger to the community. R2-38-Ex. 1 at 4.

Like the royalty calculation practice in Shell Offshore, Inc. v. Babbitt, INS's practice of interpreting the parole regulation and statute as forbidding consideration of race and national origin is a longstanding practice. Shell Offshore, Inc. v. Babbitt. It has been in place at least since the Supreme Court's

1985 decision in Jean v. Nelson, a far longer time period than the practice at issue in Shell Offshore, Inc. v. Babbitt.

Moreover, Acting Deputy INS Commissioner Becraft's December 14, 2001 policy represents an abrupt and substantial departure from INS's interpretation of the parole rule in Jean v. Nelson. By expressly making national origin a factor in parole decisions, the Becraft Haitian detention policy directly conflicts with the neutral interpretation of the parole regulation and statute articulated by the INS before the Supreme Court in Jean v. Nelson and carried forward in its Detention Use Standards. Moreover, as is expressly acknowledged by the Acting Deputy INS Commissioner, his December 14, 2001 policy resulted in Haitians (and Haitians only) no longer being considered for parole under the neutral INS Detention Use Standards. R2-38-Ex. 1 at 5,6. The fact that the Becraft policy resulted in a dramatic drop in release rates for Haitians and Haitians only is further evidence the policy represents "a significant departure" from INS's policy as articulated in Jean v. Nelson.

C. The Becraft Haitian Detention Policy Does Not Fall Within Any APA Exception to Notice and Comment Rulemaking.

Any rule adopted by an agency must be subjected to the APA's rulemaking requirements unless specifically exempted. The exceptions to rulemaking must be narrowly construed. Humana of South Carolina v. Califano, 590 F.2d 1070, 1082

(D.C. Cir. 1978); American Bus Association v. U.S.A., 627 F.2d 525, 528 (D.C. Cir. 1980); Louis v. Nelson, 544 F.Supp. 973 (S.D. Fla. 1982), aff'd, 711 F.2d 1455 (1983), vacated and rev'd on other grounds, 727 F.2d 957 (1984) (en banc), aff'd as to judgment to remand only 472 U.S. 846 (1985); Methodist Hospital of Sacramento v. Shalala, 38 F.3d 1225, 1236 (D.C.Cir. 1994). None of the APA's exceptions apply to this case.

1. The Becraft Haitian Detention Policy Does Not Fall Within the "General Statement of Policy" Exception To Notice And Comment Rulemaking.

The district court erred in holding that the Becraft policy change is exempt from the notice and comment procedures as a "General Statement of Policy" under 5 U.S.C. § 553(b)(A). In so holding, the District Court misinterpreted the term "statement of policy" and ignored the numerous cases which exclude from the exception any policy which limits the discretion of the agency. In addition, the Court's broad reading of the exception ignored the legislative history of the APA, as well as the long line of cases interpreting that history, which require that the statutory exceptions to the notice and comment requirements of the APA be interpreted narrowly.

The term "statement of policy" is not defined within the APA. When defining the term, courts rely on the Attorney General's Manual on the Administrative Procedure Act (1947):

> A general statement of policy . . . is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications.

Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974).

In contrast to a rule that creates a standard under which future cases are to be decided, a statement of policy does not "establish a 'binding norm'" and therefore does not "finally determine[]" the issues or rights to which it is addressed." Guardian Federal Savings and Loan Assoc. v. Federal Savings and Loan Insurance Corporation, 589 F.2d 658, 666 (D.C. Cir. 1978).

The Becraft Haitian detention policy is not a statement of policy because it does not merely announce a policy that INS hopes to implement in the future. Rather, it sets out a binding norm that governs parole adjudications, namely that Haitians arriving in South Florida should no longer be considered for parole on a case-by-case basis without regard to their national origin or race.

In Louis v. Nelson, the district court rejected the argument that the Haitian detention policy at issue in that case was a statement of policy. Louis v. Nelson,

544 F.Supp at 996. The district court described the policy change in Louis v. Nelson in terms virtually indistinguishable from those used by petitioners here:

> The evidence shows that prior to May 20, 1981, Haitian refugees arriving in this country, for whom the INS initiated exclusion proceedings, were detained for a brief period of time necessary for routine public health screening and released on parole into the community to relatives or voluntary agencies willing to act as sponsors. This "policy" abruptly changed sometime between May 20, 1981 and July 31, 1981; and a policy of detention was initiated. Under the new policy, parole is to be denied except for significant humanitarian reasons such as pregnancy or other health problems, extreme age or for the purpose of reuniting families.

Id. at 993. After reviewing definition of "general statements of policy" in Pacific Gas & Electric, the court found that the INS Haitian detention policy was the antithesis of a "policy statement." Id. at 996-7. A panel of this Court in Jean v. Nelson, 711 F.2d 1455 (1983), opinion vacated and rev'd on other grounds, 727 F.2d 957 (1984) (en banc), aff'd as to judgment to remand only, 472 U.S. 846 (1985), reviewed the same policy and also found that INS was required to comply with the notice and comment procedures.[18] Id. at 1475.

The district court in this case came to the opposite conclusion on the ground that the Becraft detention policy "does not finally dispose of an individual Haitian

[18] INS initiated notice and rule making procedures and, as a result, this Court sitting *en banc* found the APA publication claim to be moot. Jean v. Nelson, 727 F.3d 957 (11th Cir. 1984).

parole application." R2-65-32-33. As support for this conclusion, the court pointed to the facts that there was still some, albeit limited, discretion to parole Haitians. The court pointed to the fact that some Haitians were actually released under the Becraft policy (INS released fifteen pregnant women and unaccompanied minors out of a total of more than 240). R2-65-32.

The court erred, however, because a rule need not eliminate all discretion in order to be a "binding norm" that is subject to the APA's publication requirements of the APA. A rule need only "narrow" the determinative process in order to fall outside the "statement of policy" exception. In McClouth Steel Products, 838 F.2d 1317 (D.C. Cir. 1988), the court held that a model being used by the defendant Environmental Protection Agency ("EPA") to determine if certain wastes were "hazardous" was a "substantive rule" and thus subject to the APA procedures. The court rejected the EPA's argument that its retention of discretion to ignore the results of the model or to consider other factors exempted it from the APA's notice and comment procedures. Id. at 1321. The court quoted Pickus v. U.S. Board of Parole, 507 F.2d 1107, 1112-13 (D.C. Cir. 1974):

> legislative rules 'narrow [the decisionmaker's] field of vision' and are 'of a kind calculated to have a substantial effect on the ultimate [agency] decisions

and Guardian Federal Savings & Loan Ass'n v. FSLIC, 589 F.2d 658, 666-67 (D.C. Cir. 1978):

> If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is - a binding rule of substantive interpretation

The Becraft Haitian Detention Policy easily qualifies as setting out standards that narrow administrative discretion. The policy reverses the prior rule that Haitians be given nondiscriminatory consideration for parole on an equal basis with all other nationalities and instead subjects all Haitians in South Florida to a new set of parole criteria. R2-38-Ex. 1 at 4-6. Under the policy, the District Director in Miami is precluded from paroling Haitians without the consent of headquarters. Id. Only cases of "extreme and unusual hardship" are considered (i.e., pregnant women and unaccompanied minors), thereby lowering the grant rate from 96 percent to approximately 6 percent. At the same time, the grant rate for all other nationalities continued at the rate of 95 percent. R1-4-Ex.4 at 1. These facts demonstrate that the Becraft Haitian Detention policy limited the discretion of decision makers to parole Haitians to the extent that the policy virtually determined the outcome of parole decisions in Haitian cases.

Other caselaw interpreting the "statement of policy" exemption further supports petitioners' claim. In W.C. v. Bowen, 807 F.2d 1502 (9th Cir. 1986), the

court examined a similar change in review procedures which attempted to mask a substantive policy change. In that case, the defendant Social Security Administration changed an evenhanded policy of randomly reviewing administrative law judge ("ALJ") decisions to a policy of targeting review of decisions made by ALJs with a high grant rate. Id. at 1503. The court found that the changed policy was a rule subject to notice and comment because it affected the existing rights of claimants in two ways. Id. at 1054. First, the review was designed to, and did, affect the result. The court found that the policy "caused those judges to deny benefits in close cases where benefits previously might have been granted." Id. at 1505. Secondly, the new policy limited the discretion regarding which decisions got reviewed. Id. at 1505. The court found that "[u]nder the program, all decisions from certain 'targeted' ALJs must be screened . . . The Secretary no longer has discretion not to consider [them]." Id at 1505. Because these factors "substantially limit[ed]" the agency's discretion, the court determined they must be subjected to the APA's notice and comment procedures. See also, Prows v. U.S. Dept. of Justice, 704 F.Supp. 272, 277 (D.D.C. 1988) (program statement interpreted in a "formula-like" manner is subject to APA); Bellarno International, Ltd. v. F.D.A., 678, 415 F.Supp. 410 (E.D.N.Y. 1988) (new policy of detention subject to APA even if "no modicum of discretion exists").

The Becraft policy, like the policy at issue in W.C. v. Bowen, affects the result of determinations and limits discretion and therefore it falls outside of the statement of policy exception.

2. The Becraft Haitian Detention Policy Does Not Fall Within the Foreign Affairs Exception To Notice And Comment Rulemaking.

The Becraft Haitian Detention Policy is not exempt from publication because it involves "foreign affairs function of the United States." 5 U.S.C. § 553(b)(A). The purpose of the "foreign affairs" exception is to avoid "the public airing of matters that might inflame or embarrass relations with other countries." Zhang v. Slattery, 55 F.3d 732, 744 (2d Cir. 1995). Moreover, the court in Zhang v. Slattery, in finding that the foreign affairs exception did not apply to an attempt to overturn a Board of Immigration Appeals decision limiting amnesty for victims of China's "one couple one child" policy, quoted Yassini v. Crossland, 618 F.2d 1356 (9th Cir. 1980), stating that it should not generally apply to INS actions:

> The foreign affairs exception would be come distended if applied to INS actions generally, even though immigration matters typically implicate foreign affairs.

Id. at 744.[19] And indeed, the few times that it has been applied to INS actions, it has been in support of clearly enunciated Presidential foreign policy. See, e.g.

[19] The "foreign affairs" exception was expressly rejected by this Court's panel decision in Jean v. Nelson, 711 F.2d at 1477-78.

Yassini v. Crossland, 618 F. 2d 1356 (9th Cir. 1980) (INS action directly supporting Presidential directives attempting to obtain release of Iranian hostages); Nademi v. INS, 679 F.2d 811 (10th Cir. 1982) (same).

In the present case, there is no hint of Presidential involvement, much less of sensitive international dealings that cannot withstand public scrutiny. To the contrary, the supposed goal of the Becraft policy, i.e., deterring additional attempts at illegal entry, would be furthered by additional exposure of the policy.

VI. HAITAIN ASYLUM SEEKERS DETERMINED BY INS TO HAVE A CREDIBLE FEAR OF PERSECUTION HAVE A CONSTITUTIONAL RIGHT TO BE CONSIDERED FOR RELEASE FROM PHYSICAL RESTRAINT ON AN INDIVIDUALIZED BASIS UNTAINTED BY INVIDIOUS DISCRIMINATION.

The district court erred in summarily dismissing petitioners' constitutional claims based on the premise that "as excludable aliens, Petitioners 'have no constitutional rights with regard to their [parole] applications.'" R2-65-16. Contrary to the conclusion of the court, petitioners, as asylum seekers who have been found to have a credible fear of persecution, are entitled to bring an equal protection challenge to the Becraft Haitian detention policy.

There is no dispute that petitioners are "persons" within the meaning of the Fifth Amendment to the U.S. Constitution . U.S. Const., amend. V ("[n]o *person* shall . . . be deprived of life, liberty, or property, without due process of

law")(emphasis added). The Supreme Court has repeatedly held that the Fifth Amendment's use of the term "person" includes all aliens "within the territorial jurisdiction" of the United States. See Plyler v. Doe, 457 U.S. 202, 210 (1982), reh'g denied, 458 U.S. 1131 (1982); Wong Wing v. United States, 163 U.S. 228, 238 (1896)(citing to Yick Wo v. Hopkins, 118 U.S. 356, 369); Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 (1896). See also United States v. Henry, 604 F.2d 908, 914 (5th Cir. 1979). The debate concerning the constitutional rights of inadmissible aliens is therefore not about whether the Constitution applies to them. Rather, the debate is about the extent to which the Constitution protects inadmissible aliens raising particular constitutional claims.

The Supreme Court has consistently recognized that all aliens are entitled to the full protection of the Constitution regarding a wide range of issues. See, e.g., Plyler v. Doe, 457 U.S. 202, 210 (1982) (children of undocumented have right to public education); Graham v. Richardson, 403 U.S. 365, 371 (1971) (welfare benefits); Bridges v. Wixon, 326 U.S. 135 (1945) (rights to free speech and association); Wong Wing v. United States, 163 U.S. 228 (1896) (right to be free from imprisonment at hard labor). The Supreme Court has recognized limitations on the constitutional protections of inadmissible or excludable aliens, but only in cases involving applications for admission. Landon v. Plasencia, 459 U.S. 21

(1982); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) (hereafter "Mezei"); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892). Even in Landon v. Plasencia, 459 U.S. 21 (1982), the Court found that returning permanent residents seeking admission have constitutional rights. See also Kwong Hai Chew v. Colding, 344 U.S. 590 (1953).

Petitioners claims are not governed by the line of cases which limit the procedural rights of persons seeking admission two independent reasons. First, petitioners do not bring a challenge regarding their admission to the United States but instead challenge a detention policy that discriminates against them on account of race and/or national origin. Moreover, as asylum seekers whom INS has determined have a significant possibility of being granted asylum, petitioners are facially admissible to the United States and therefore fundamentally different from aliens who have already been ordered excluded from the United States. Second, petitioners bring an equal protection challenge to the discriminatory manner in which INS considers them for parole. Even if petitioners have diminished constitutional rights due to their status as inadmissible aliens, INS has a constitutional obligation to treat petitioners in the same way that it treats other aliens with equally diminished constitutional protection. Given the nature of their

constitutional claim as well as their status as "credible fear" aliens, petitioners fall outside of the exception to the general rule that all aliens within the United States are fully protected by the Constitution.

A. The Fifth Amendment Fully Protects Petitioners Because They are "Credible Fear" Asylum Seekers Challenging a Detention Policy Rather Than Issues Concerning Their Admission.

None of the cases limiting constitutional review of issues involving admission apply to petitioners' claim. Petitioners do not challenge any aspect of the admission process. Nor do they assert a right of entry. Rather, they challenge a detention policy that discriminates against them on the basis of national origin and/or race. Even if petitioners were to succeed with their challenge and secure nondiscriminatory review of their requests for release, the resulting fair review would in no way interfere with the ability of the Attorney General and his subordinates to determine their admissibility.

Even if petitioners were to be released upon receiving a fair review, their temporary parole into the United States would not impinge upon the admission process. Temporary release from detention does not result in an admission to the United States. 8 U.S.C. § 1225(d)(5)(A) ("[P]arole of such alien shall not be regarded as an admission of the alien . . . "); Leng May Ma v. Barber, 357 U.S. at 190 (temporary release or parole from incarceration does not create an admission

into the United States, but is "simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status . . . ."); Kaplan v. Tod, 267 U.S. 228, 230-31 (1925).

Because petitioners bring a detention challenge rather than a challenge regarding admission, none of the Supreme Court cases barring constitutional review of applications for admission applies to their case. See, e.g., United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government."); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892).

The Supreme Court's decision in Mezei, 345 U.S. 206 (1953), also does not apply to petitioners. In that case, the alien sought release from detention after having been found inadmissible to the United States. The Court expressly ruled against the alien on the premise that he, if released, would in effect be permitted to make an unlawful entry into the United States. Petitioners and class members, on the other hand, have pending immigration cases and therefore have not been found inadmissible to the United States. Moreover, because INS has already determined that petitioners and class members have a significant possibility of being granted

asylum, they are facially admissible to the country. Because petitioners are "credible fear" aliens who challenge a detention policy, they are entitled to the full scope of protection under the U.S. Constitution.

B. Petitioners May Bring Their Constitutional Challenge Because it is an Equal Protection Challenge to a Detention Policy Rather Than a Due Process Challenge.

Even if this Court accepts that petitioners have diminished constitutional protections as inadmissible aliens, petitioners are nonetheless entitled to bring an equal protection challenge to the Becraft Haitian detention policy. The government has an equal protection obligation to ensure that similarly situated inadmissible aliens are treated the same, even if all of the aliens in question possess diminished constitutional protections. The Supreme Court has long recognized that even if an individual does not have the right to a particular government benefit, the government must act in accordance with equal protection if it chooses to provide that benefit. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (no fundamental right to education, but government cannot deny access to education based on race or national origin); Shaw v. Murphy, 532 U.S. 223, 228-229 (2001) (although prisoners have diminished constitutional protection, entitlements must be distributed without consideration of race). Indeed, "[o]ur whole system of law is predicated on the general, fundamental principle of

equality of application of the law." Truax v. Corrigan, 257 U.S. 312, 332 (1921); See also Rose v. Mitchell, 443 U.S. 545, 564 (1979)(discrimination based on race and national origin "strikes at the core concerns" of the fifth and fourteenth amendment "and at fundamental values of our society and our legal system").[20]

The heart of petitioners' challenge is that they seek to be treated on equal footing with other, similarly situated asylum seekers with respect to consideration for parole. Petitioners do not claim a right to parole. Nor do they challenge the authority of the INS to detain them. Because they challenge the discriminatory way in which the government distributes the benefit of release on parole, petitioners have a right to challenge the practice as a violation of constitutional equal protection.

Because petitioners fall outside of the exception to the general rule that aliens are fully protected by the Constitution, this Court should remand this case to

[20] There is no binding precedent on this Court which states that inadmissible aliens are unable to bring an equal protection challenge to a discriminatory detention policy. The Supreme Court has never decided the issue. While this Court considered the question in Jean v. Nelson, this Court's constitutional holding in that case does not bind this Court because the Supreme Court expressly found that the constitutional question should not have been reached. Jean v. Nelson, 472 U.S. at 854-55. The Court stated that it affirmed "the en banc court's judgment insofar as it remanded to the District Court" for consideration of whether INS officials were acting in accordance with the neutral parole statute and regulation. Id. at 856.

the district court for consideration of the merits of petitioners' constitutional claims.

CONCLUSION

Based on the foregoing, Appellants request that the Court vacate the decision of the District Court for the Southern District of Florida and grant them the relief sought in their class action petition for writ of habeas corpus and complaint for injunctive and declaratory relief. In the alternative, Appellants request that the Court remand this case to the district court with instructions to proceed in accordance with the Federal Rules of Civil Procedure or, in the alternative, to hold an evidentiary hearing and grant leave for discovery.

Dated: July 12, 2002

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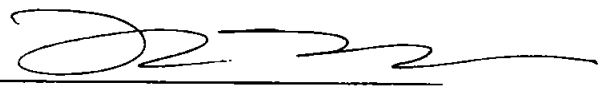
BY: 
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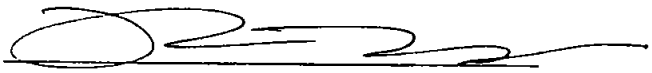
CERTIFICATE OF RULE 32(a)(7)(B) COMPLIANCE

Undersigned counsel for Appellants certifies that this Principal Brief contains no more than 14,000 words. The word processing program with which this brief was prepared calculated the number of words in this brief to be 13, 981.



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CERTIFICATE OF SERVICE

I certify that two true and correct copies of the foregoing Principal Brief was mailed to the following by Federal Express on this 12th day of July, 2002:

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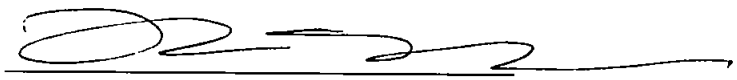

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ADDENDUM

8 U.S.C. §1182(d)(5)(A)
INA §212(d)(5)(A)

§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.

§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 district director or chief patrol agent, subject to the parole and detention authority of the Commissioner or her 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) of the Act.

(b) The parole of aliens withing the following groups who have been or are detained in accordance with §235.5(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 condition 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 district director or chief patrol agent shall follow the guidelines set forth in §236.3(a) of this chapter and paragraphs (b)(3)(i) through (iii) of this section in determining under what conditions a juvenile should 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 or chief patrol agent.

(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 or chief patrol agent 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 the 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 office at an Overseas Processing Office.

8 U.S.C. §1252(a)(2)(B)(ii)
INA §242(a)(2)(B)(ii)

§1252. Judicial review of orders of removal

(a) Applicable provisions

***

(2) Matters not subject to judicial review

***

(B) Denials of discretionary relief
Notwithstanding any other provision of law, no court shall have jurisdiction to review-

***

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter, to be in the discretion of the Attorney General, other than the granting of relief under section 1185(a) of this title