No. 05-2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBIN BAKER,
Detroit Field Office Director,
U.S. Immigration and Customs Enforcement,

Appellant,

v.

IBRAHIM PARLAK,

Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
Case No. 05-70826

APPELLEE'S RESPONSE IN OPPOSITION TO APPELLANT'S MOTION TO DISMISS APPEAL AS MOOT AND VACATE THE DISTRICT COURT'S DECISION

The issues on appeal related to Mr. Parlak's unlawful detention remain very much alive, and the order of the district court granting him liberty for the duration of his removal proceedings should stand. The Government's motion is fatally flawed for several reasons.

First, the Government fails to inform the Court of the most important fact related to its mootness challenge: that despite the claim that federal law *mandated* DHS to take Mr. Parlak into custody after the BIA dismissed his appeal last

November, no such action was taken. Why? Because Judge Cohn's order precluded such action under *any* statutory basis of detention. Thus, the legal questions raised by the Government in its appeal remain very much alive, as granting the Government the appellate relief it seeks—reversal and vacatur of the habeas order—would affect Mr. Parlak's legal interests substantially. Under these circumstances, the Government's appeal cannot be moot.

Second, nowhere in its motion does the Government address the contested issues of (a) who the proper respondent is in an alien's habeas challenge, and (b) the proper venue for such challenges—issues the Government presented in its Appellant Brief *without any reference whatsoever* to the statutory basis of detention. These issues would reappear should the Government take Mr. Parlak back into custody after vacatur of the order, which its motion indicates is a reasonable possibility. The procedural questions are thus "capable of repetition, yet evading review," and remain very much alive.

Third, should this Court dismiss the habeas appeal, vacatur of the lower court's order would not be equitable. District Judge Cohn has already determined that Mr. Parlak is a "model immigrant" who presents no threat of danger or flight risk, and is, in fact, beloved by his southwestern Michigan community. Vacating the lower court's order would allow the Government to re-incarcerate Mr. Parlak and necessitate relitigating these very same issues in another habeas proceeding, as

threat and flight risk are the applicable considerations for a District Director to grant bond. Additionally, vacatur would generate confusion among the lower courts as to whether Roman v. Ashcroft still controls in this circuit. It is in the public interest that the order stands.

ARGUMENT

I. THE GOVERNMENT'S APPEAL IS NOT MOOT.

"The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties." McPherson v. Mich. High Sch. Athletic Assoc., Inc., 119 F.3d 453, 458 (6th Cir. 1997) (internal citation and quotation omitted). The Government's appeal of Judge Cohn's habeas order seeks the following relief: reversal of the district court's decision, and remanding the case with instructions to dismiss the petition. See Govt. Br. at 21. The Government's mootness argument must therefore fail for two reasons.

First, reversing the district court's habeas decision would have a profound effect on Mr. Parlak's legal interests, as the resulting dismissal of the petition would leave Mr. Parlak exposed to re-arrest by DHS and re-incarceration without bond. Second, the procedural issues raised by the Government in its Appellant Brief—whether jurisdiction and the named respondent were proper—remain very much alive. The statutory basis for Mr. Parlak's detention is irrelevant to both questions, and there is more than a reasonable possibility that they will reappear.

A. Reversing the district court's decision on appeal would make a significant difference to Mr. Parlak's legal interests.

Presently, the district court's May 20, 2005 habeas order provides Mr. Parlak with the right to remain at liberty until his appeals of the removal order against him are exhausted. The district court's order is broadly stated: "[Mr. Parlak] is entitled to release until such time as his removal proceedings are completed." Parlak v. Baker, 374 F. Supp. 2d 551, 562 (E.D. Mich. 2005). Judge Cohn also makes clear that his reference to "removal proceedings" refers to the entire appellate process. Parlak, 374 F. Supp. 2d at 561 ("It is certain that the removal proceedings will be protracted as this case winds through the appellate process.").

Despite the breadth of the district court's order, the Government contends that it applies only to pre-final order removal detention. See Govt. Br. at 2. The Government's own actions belie this. Mr. Parlak's 90-day removal period began on November 22, 2005, the date the BIA dismissed his administrative appeal and issued a final removal order.[1] As the Government states in its motion, detention authority under these circumstances is granted pursuant to INA §241. See Govt. Mot. at 2. The Government goes on to state that "[i]n fact, INA section 241(a)(2)

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[1] The 90-day period for removing Mr. Parlak expired on February 21, 2006. See INA §241(a)(1)(A), 8 U.S.C. §1241(a)(1)(A) (setting 90-day period). Mr. Parlak is now subject to INA §241(a)(6), which governs supervision after the removal period for this type of case, and 8 C.F.R. §1241.4(a)(3), which governs custody determinations after the removal period expires.

mandates that certain aliens be detained during the removal period, which commenced *when the removal order became final*." See id. at 2-3 (emphasis supplied). Yet DHS took no such action against Mr. Parlak. Why?

The answer is obvious: the Government did not want to disobey the district court's habeas order and be cited for contempt. Their motion claims that the applicability of the district court's habeas order to present circumstances is "questionable," id. at 9, n. 9, but their actions since November 22, 2005 endorse the opposite conclusion.[2] Accordingly, the Government's current motion must be viewed as an attempt to "back door" the Court into granting the *exact same relief* it seeks in its habeas appeal—an unfettered right to re-arrest Mr. Parlak.

This appeal is not moot, therefore, as "a case is moot only where no effective relief for the alleged violation can be given." Coalition for Gov't. Procurement v. Fed. Prison Indus., Inc., 365 F.3d 435, 458 (6th Cir. 2004). The Government's requested remedy on appeal—reversing the district court's decision and remanding the case for dismissal—would, if granted, provide the "effective relief" they seek. Adjudication of the Government's appeal in their favor would

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[2] Nothing in the applicable statutes or regulations stays commencement of the removal period while a petitioner's motion to stay removal is pending. Thus, contrary to the Government's suggestion that its motion was not filed because Mr. Parlak's motion to stay removal was pending with this Court until January 27, 2006, see Govt. Mot. at 3, n.1, nothing prevented the Government from filing its motion as early as November 22, 2005—the day the removal period began.

also provide the same result as granting their motion here: elimination of precedent ruling that their 10-month incarceration of Mr. Parlak was unlawful, and allowing them to re-detain Mr. Parlak subject only to challenge in a second habeas action.

The Government compounds its erroneous mootness argument by misconstruing this Court's opinion in Ly v. Hansen. See Govt. Mot. at 5-6. Their motion fails to inform the Court that while Ly did address the INA §236(c) detention statute, its holding was far broader—after all, the Ly petitioner was subject to a final BIA removal order *well before* the Government's appeal of his habeas grant was adjudicated by this Court. Ly v. Hansen, 351 F.3d 263, 266 (6th Cir. 2003) (decided 2 ½ years after "final administrative removal order" was issued on April 30, 2001). Ly addressed "the constitutional requirement of reasonableness" for the "entire process" of removal proceedings—including "appeals and petitions for relief." 351 F.3d at 272.[3] The same question is at issue in this case.

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[3] The facts of Ly are comparable to those in Mr. Parlak's case. Ly was detained on May 10, 1999 and held without bond until a federal court granted habeas relief in September 2000, which the Government appealed to this Court. The INS released Ly, "subject to specified conditions," two months later, on November 24, 2000. The BIA issued a final removal order on April 30, 2001, five months after Ly's release. The Government then filed a motion with this Court to remand Ly's habeas petition. Ly, 351 F.3d at 265-66. Nothing in Ly indicates that he was taken back into custody by INS/DHS after the final removal order was issued.

The Government's citations to non-binding case law are equally unpersuasive. Wang and De La Teja both addressed appeals in which a district court dismissed the alien's habeas petition. Thus, no "effective relief" could be provided *to the alien* by adjudicating the §236(c) issue after the issuance of final removal orders. Wang v. Ashcroft, 320 F.3d 130, 133 (2nd Cir. 2003); De La Teja v. U.S., 321 F.3d 1357, 1359 (11th Cir. 2003). In Arevalo v. Ashcroft, the First Circuit declared moot the Government's appeal of a habeas grant because the court had previously *vacated the order of removal*. 386 F.3d 19, 19 (1st Cir. 2004). Again, no "effective relief" was available. In Marogi v. Jenifer, the alien had conceded removability, and thus did not have "the right to remain at large within the United States." 126 F. Supp. 2d 1056, 1058, 1064 (E.D. Mich. 2000). That is not the case here, as Mr. Parlak continues to contest his removability. Al Najjar is a similar red herring. The appeal of the habeas order in that case addressed the narrow issue of whether classified information could be used to deny bond in a §236(c) detention hearing. Al Najjar v. Ashcroft, 273 F.3d 1330, 1339 (11th Cir. 2001). Here, the Government is appealing entirely different issues: (a) the district court's jurisdiction; (b) the proper respondent; and (c) what constitutes an unreasonable length of detention for the *entire* removal process, and when that determination should be made. See Govt. Br. at 2.

Thus, the BIA's issuance of a final removal order did not foreclose the relief the Government seeks in its appeal. Mr. Parlak's legal interests would be profoundly affected if the relief sought in the Government's Appellant Brief were granted. Their claim of mootness must fail on this basis.

B. The issues on appeal of (1) jurisdiction and (2) the proper respondent remain a live controversy.

In its Appellant Brief, the Government states the following procedural issues:

> 1. Whether the United States District Court for the Eastern District of Michigan erred in holding that it had jurisdiction to review a habeas petition challenging only the alien's physical custody, even though the alien is detained in the facility located in the Western District of Michigan.
>
> 2. Whether the district court erred in holding that it had jurisdiction to review a habeas petition where the only proper respondent, the warden of the facility in which Parlak was held, was not named as a party to the petition.

See Govt. Br. at 2.

Nowhere in either of these issues for appeal does the Government make *any* mention of whether Mr. Parlak's detention was pursuant to INA §236 or §241. That is because §236 vs. §241 detention is irrelevant to the procedural questions the Government has appealed. As case law informs, the proper respondent in alien habeas challenges is the same for pre-final order detention as it is for post-final

order detention. Compare Vasquez v. Reno, 233 F.3d 688, 690 (1st Cir. 2000) (alien filed habeas challenge *after* BIA dismissed his appeal, resulting in final order, and he was facing "imminent removal"), Roman v. Ashcroft, 340 F.3d 314, 317 (6th Cir. 2003) (alien granted a stay of removal and thus not subject to execution of a final order of removal while appeal was pending in this Court).

In fact, the Government's motion underscores the need to resolve this question *in this case*: "[E]ven if [Mr. Parlak] were redetained, vacating the district court's order would not prejudice him from refiling and presenting a challenge to his post-removal order detention, at the appropriate time and *in the proper court.*" See Govt. Mot. at 8-9. At the heart of *this* dispute is just where "the proper court" is for Mr. Parlak's habeas challenge. The Government does not specify in its motion where "the proper court" is for a post-final order habeas petition, as they cannot. If the Government were to admit that "the proper court" is one with jurisdiction over the Detroit District Director, then they would be conceding the very issue they are appealing.[4] But if they claimed that "the proper court" were one in the alien's district of confinement, then they would be highlighting the

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[4] Notably, the Government's insistence that the availability of bond under §241 is "solely at the discretion of the District Director" reinforces Mr. Parlak's habeas argument that it is the Detroit District Director, not the Calhoun County sheriff, who is the proper respondent for an alien's habeas challenge. See Govt. Mot. at 3.

controversy that exists here. So the questions remain: what is the proper court, and who is the proper respondent?[5]

These questions also demonstrate that this is a matter "capable of repetition, yet evading review." Weinstein v. Bradford, 423 U.S. 147, 149 (1975). This doctrine is applicable if two elements are present: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. Ill. Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 187 (1979). A mere physical or theoretical possibility is insufficient to satisfy this test; instead, there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party. Weinstein, 423 U.S. at 149.

As to the first element of the Weinstein test, there can be no question that the challenged action of Mr. Parlak's detention is too short to be fully litigated "prior to its cessation or expiration." Generally, pre-final order detention is of short duration. Demore v. Kim, 538 U.S. 510, 529 (2003) (stating that the average time to complete removal proceedings for aliens detained under §1226(c) is 47 days). Actual removal once a final order has been issued is expected to be completed

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[5] Were DHS to re-arrest Mr. Parlak, they could avoid the jurisdictional question by detaining him in a facility located near Detroit. But doing so would still not eliminate the proper respondent question presented in the Government's Appellant Brief.

within 90 days, with an outside limit of six months. See 8 U.S.C. §1231(a)(1)(A) (requiring the Attorney General to remove an alien within 90 days); see also Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (imposing a six-month benchmark of reasonableness for post final-order detention). These periods for both pre- and post-final order detention are of much shorter duration than the time normally required for appellate review.[6] If DHS re-arrested Mr. Parlak, then it is highly unlikely that he would have time to fully litigate the issue of the proper court and respondent unless DHS incarcerated him *indefinitely*.[7]

As to the second prong of the Weinstein test, the Government makes plain in its statement "even if [Parlak] were redetained," Govt. Mot. at 8, that arresting and detaining Mr. Parlak is far more than a "theoretical" possibility. In fact, the Government goes so far as to urge the Court to remove any restraints from re-detaining him. Id. at 9, n. 6. There is thus a "reasonable expectation" that "the complaining party" (Mr. Parlak) "would be subject to the same action again"—being stripped of his liberty and necessitating a habeas challenge. Sandison v. Mich. High Schl. Athletic Ass'n, Inc., 63 F.3d 1026, 1029-30 (6th Cir. 1995). This

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6 As an example, the district court issued its order in this case on May 20, 2005. Nine months later, this appeal has still not been fully briefed.

7 As discussed in his 1/17/06 Appellee Brief, Mr. Parlak has received an administrative stay of removal from DHS as a result of private legislation on his behalf introduced in both houses of Congress. See Parlak Br. at 8. Under applicable DHS custom, this stay is effective until February 2007.

would require contesting the very same issues the Government presents on appeal here—the proper respondent and proper venue. These issues remain a live controversy.

II. VACATING THE DISTRICT COURT'S ORDER WOULD BE INEQUITABLE.

Even if the Court rules that the Government's appeal is moot—which Mr. Parlak contests—vacating the district court's order would be an "extraordinary equitable remedy." Blankenship v. Blackwell, 429 F.3d 254, 258 (6th Cir. 2005). The Government baldly claims that "vacating the order harms neither party"—even though doing so would give DHS a green light to re-detain Mr. Parlak and hold him without bail. See Govt. Br. at 9. In any event, the Government cannot satisfy the equitable factors that would warrant vacatur here.

"It is [Appellant's] burden, as the party seeking relief from the status quo of the [judgment below], to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur." U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 26 (1994). Such entitlement must take the public interest into account. U.S. Bancorp, 513 U.S. at 27. The Government makes no suggestion that Mr. Parlak had any responsibility for the alleged mooting of this case, and it is plain that vacatur here would not serve the public interest.

In the habeas decision below, District Judge Cohn found Mr. Parlak to be a "model immigrant...[who] is not a threat to anyone nor a risk of flight." Parlak, 374 F. Supp. 2d at 562. These are *precisely* the same substantive issues that would have to be re-litigated in a second habeas proceeding. Under the applicable regulations for post-final order detention, the District Director would only release Mr. Parlak from custody "if [Mr. Parlak] demonstrates to the satisfaction of the Attorney General or his designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight, pending...removal...." 8 C.F.R. §1241.4(d). Assuming the Detroit District Director refused to grant bond—despite Mr. Parlak's *perfect* compliance with the terms of his release since June 2005 (including a bi-weekly, 7 hour drive to and from Detroit to report in person, a condition DHS refuses to modify)—Mr. Parlak would be required to remain in jail for the duration of a new round of habeas proceedings to contest these same issues. *For what purpose?*

Furthermore, "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." U.S. Bancorp, 513 U.S. at 26-27 (citation omitted). As a matter of public policy, the contested question of whether Rumsfeld v. Padilla overrules Roman v. Ashcroft in determining the proper respondent to an alien's

habeas petition in this circuit requires judicial guidance. See Parlak Br. at 11-26. Otherwise, the Government will continue to take both sides of this issue to frustrate aliens' habeas challenges. Compare Parlak, 374 F. Supp. 2d at 556 (Government claims warden is the proper respondent), Somir v. U.S., 354 F. Supp. 2d 215, 217 (E.D.N.Y. 2005) (Government claims District Director is the proper respondent). Vacatur here would leave this question unresolved in this Circuit and would in fact suggest that Roman's rule no longer applies—even though this Court has never expressly made such a ruling. For public policy reasons, the district court's order should be allowed to stand.

CONCLUSION

For the foregoing reasons, this Court should deny Appellant's motion.

Respectfully submitted,

February 28, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2006, a copy of the foregoing was served upon Appellant's counsel by United States Express Mail, overnight delivery, addressed to:

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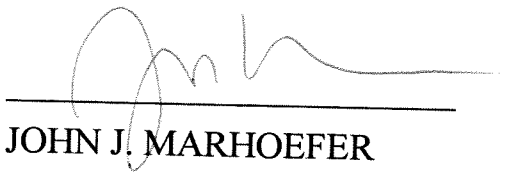

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