No. 20-1828

In the United States Court of Appeals for the Fourth Circuit

MARVIN DUBON MIRANDA, ET AL.

Petitioners-Appellees,

v.

MERRICK B. GARLAND, ET AL.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
DISTRICT COURT NO. 20-CV-01110-CCB

PETITIONERS-APPELLEES' SUPPLEMENT TO THEIR PETITION FOR REHEARING *EN BANC*

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August 25, 2022

Petitioners-Appellees respectfully file this supplement to their petition for rehearing *en banc*, Dkt. 98, in light of the government's pending request to extend its time to file its response to the petition to September 30, 2022, *see* Dkt. 110—a request Petitioners-Appellees have not opposed, but which, if granted, will bring questions of mootness that were not addressed in their petition into the foreground. As explained below, this case will not become moot on October 1, 2022, even if all existing agreements between counties and U.S. Immigration and Customs Enforcement ("ICE") to detain immigrants in Maryland have ended, as required by recent legislation.

On December 7, 2021, the Maryland legislature enacted the Dignity Not Detention Act, Md. H.B. 16. The Act requires Maryland localities to end all Intergovernmental Service Agreements with ICE by October 1, 2022, so that local jails can no longer serve as immigration detention centers. Md. Code Ann., Corr. Servs. § 102(c)(2). Should all localities comply with the Act as planned, immigration detention in Maryland will end as of October 1, 2022—i.e., one day after the government files its response to the pending petition for rehearing *en banc*, if its request for an extension is granted.

The end of immigration detention in Maryland, however, will *not* render this case moot. Immigration enforcement through removal proceedings against detained noncitizens in Baltimore Immigration Court in the District of Maryland will

continue. The case encompasses individuals who are detained outside Maryland, but whose bond hearings are heard via videoconference by the Baltimore Immigration Court. Petitioners-Appellees brought this case on behalf of a proposed class of "all people who, now or at any future time, are detained pursuant to § 1226(a), and either had or will have a bond hearing *in the Baltimore Immigration Court*."[1] On May 29, 2020, the district court granted Petitioners-Appellees' motion for a class-wide preliminary injunction and ordered the government to provide fundamental due process protections at bond hearings. Specifically, the injunction provides that:

> The Executive Office of Immigration Review ("EOIR") SHALL ENSURE that all future bond hearings *conducted in the District of Maryland* for individuals held pursuant to 8 U.S.C. § 1226(a) adhere to the following requirements: (1) the government must bear the burden of proving, by clear and convincing evidence, that a noncitizen is a flight risk or a danger to the community in order to justify detention; and (2) the IJ must consider a noncitizen's ability to pay a set bond.[2]

Thus, the proposed class includes, and the preliminary injunction order applies to, all bond hearings *conducted by* the Baltimore Immigration Court—regardless of

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[1] Class Action Compl. ¶ 4, *Dubon Miranda v. Barr*, No. 1:20-cv-01110 (D. Md. Apr. 30, 2020) (ECF No. 1) (emphasis added).

[2] Order ¶ 2(b), *Dubon Miranda v. Barr*, No. 1:20-cv-01110 (D. Md. May 29, 2020) (ECF No. 27) (emphasis added); *see also* Order ¶ 3(b) (ordering the parties to "develop[] instructions to *all IJs in the District of Maryland* who conduct § 1226(a) bond hearings to inform them of the requirements of this Order") (emphasis added). The district court stayed proceedings pending the government's appeal of the preliminary injunction, ECF No. 70, and denied Petitioners-Appellees' motion for class certification without prejudice to renewal after conclusion of the appeals process. ECF No. 75.

where the individuals receiving those hearings are detained. At present, the preliminary injunction specifically applies to bond hearings conducted by the Baltimore Immigration Court via videoconference for individuals detained in Pennsylvania.[3] It will likewise apply to any future bond hearings for individuals detained elsewhere conducted by the Baltimore Immigration Court.[4]

Thus, even if detention in Maryland ends as planned, this case will not be moot, and this Court should grant the *en banc* petition and vacate the panel decision for the reasons already set forth: The divided panel decision conflicts with the Supreme Court's case law on civil detention and procedural due process, *see* Dkt. 98 at 6-15, as well as recent Supreme Court precedent on the proper interpretation of 8 U.S.C. § 1252(f)(1), *id.* at 15-16 (discussing *Biden v. Texas*, 142 S. Ct. 2528 (2022)). It also creates a circuit split on the precise issue before the Court: the due process requirements for immigration bond hearings under 8 U.S.C. § 1226(a). *Id.* at 3-6 (discussing, *inter alia*, the First Circuit and Ninth Circuit's conflicting

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[3] *EOIR Immigration Court Listing*, Exec. Office of Immigr. Review, https://www.justice.gov/eoir/immigration-court-administrative-control-list#Baltimore (last visited Aug. 24, 2022) (listing Baltimore Immigration Court as court of administrative control for detention facilities in Pennsylvania); *see also* 8 C.F.R. § 1003.19(c)(2) (providing for venue of bond hearings in court with administrative control of the case).

[4] *Cf. Herrera-Alcala v. Garland*, 39 F.4th 233, 240 (4th Cir. 2022) (construing 8 U.S.C. § 1252(b) and holding that venue for review of a removal order lies in judicial circuit where the immigration judge completed proceedings, and not where the petitioner is physically detained).

decisions, *Brito v. Garland*, 22 F.4th 240 (1st Cir. 2021); *Hernandez-Lara v. Lyons*, 10 F.4th 19 (1st Cir. 2021); and *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017)).

If the petition is granted and the Court later decides that the case has become moot, the Court should simply dismiss the appeal, leaving its vacatur of the panel decision in place. Vacatur is warranted under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), as Petitioners-Appellees will have been deprived of an opportunity to obtain appellate review as a result of developments over which they had no control. *See also Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322, 325 (4th Cir. 2021), *cert. denied sub nom. Marshall v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 142 S. Ct. 1447 (2022) (citing similar reasons for vacating panel opinion in case which became moot while a petition for rehearing *en banc* was pending). Should the appeal become moot before the petition is granted, vacatur of the panel decision is warranted for the same reasons.[5]

[5] In the event that the Court denies the *en banc* petition as moot, Petitioners-Appellees respectfully request that the Court indicate in its order that it has denied the petition due to mootness, so that Petitioners-Appellees may move for vacatur of the panel decision under *Munsingwear*.

Respectfully Submitted,

Dated: August 25, 2022

/s/ Deborah K. Marcuse

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2022, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

Date: August 25, 2022

/s/ Deborah K. Marcuse
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