No. 22-2252

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nyynkpao BANYEE,

Petitioner-Appellee,

v.

Merrick B. GARLAND, United States Attorney General, et al.,

Respondents-Appellants.

On Appeal from a Final Judgment of the United States District Court for the District of Minnesota
Case No. 21-1817

PETITIONER-APPELLEE'S OPPOSED MOTION FOR VACATUR BASED ON MOOTNESS

Pursuant to Federal Rule of Appellate Procedure 27(a) and Local Rule 27A(c), Petitioner-Appellee, Nyynkpao Banyee ("Mr. Banyee"), respectfully moves the en banc Court or, in the alternative the panel, for vacatur of the decision in this case, *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024), because it has become moot pending consideration of his petition for rehearing en banc. Mr. Banyee has therefore been deprived of the opportunity to obtain review of the decision—one which creates

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a circuit split on an issue of exceptional importance regarding the due process limits on immigration detention under 8 U.S.C. § 1226(c).

On January 23, 2025, in its response to Mr. Banyee's petition for rehearing, the federal government informed the Court that Mr. Banyee's motion for a stay of removal pending the petition for review of his removal order had been denied and that, as a result, he is now detained "post-final order" under 8 U.S.C. § 1231(a). Respondents-Appellants oppose this motion. Good cause supports this motion as follows:

1. This appeal arises from an April 14, 2022 order of the United States District Court for the District of Minnesota granting Mr. Banyee's petition for a writ of habeas corpus under 28 U.S.C. § 2241.

2. On September 17, 2024, this Court issued an opinion, reversing the district court's grant of habeas relief. In doing so, the Court held that due process imposes no time limit on mandatory detention under 8 U.S.C. § 1226(c) "as long as [removal] proceedings are still 'pending,'" and that Mr. Banyee's detention for over 12 months without a bond hearing was constitutionally valid. *Banyee*, 115 F.4th at 933–34 (citation omitted).

3. On December 2, 2024, Mr. Banyee filed a timely petition for rehearing en banc. Mr. Banyee sought rehearing on the important issue of whether due process limits the government's authority to detain a lawful permanent resident under

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§ 1226(c) without any review of the necessity of detention, even when it grows prolonged, in his case for over a year. Mr. Banyee sought rehearing based on the panel decision's conflict with recent decisions from sister courts of appeals on this very issue; Supreme Court precedent on civil detention, including immigration detention; and the government's own prior concessions that individuals can raise as-applied due process challenges to prolonged detention under § 1226(c).

4. On December 9, 2024, the State of Minnesota, the Constitutional Accountability Center, and the American Immigration Counsel jointly with the National Immigration Project, submitted altogether three amicus briefs in support of Mr. Banyee's petition for rehearing en banc.

5. On December 16, 2024, the Court issued an order requesting a response to Mr. Banyee's petition for rehearing en banc.

6. Respondents-Appellants sought two extensions for their response to the petition for rehearing en banc. In their second request, submitted on January 14, 2025, Respondents-Appellants explained recent developments in Mr. Banyee's immigration case and how these might impact the pending appeal.

7. Respondents-Appellants noted that on December 11, 2024, the Board of Immigration Appeals ("BIA") denied Mr. Banyee's appeal of his removal order, thereby making the order administratively final; that on December 23, 2024, Mr. Banyee filed with this Court a petition for review of that removal order, *see Banyee*

v. Garland, No. 24-3590 (8th Cir.); and, that on January 14, 2025, Mr. Banyee filed a motion for a stay of his removal pending the petition for review, *see* Pet'r's Unopposed Mot. for a Stay of Removal, *Banyee v. Garland*, No. 24-3590 (8th Cir. Jan. 14, 2025).

8. Respondents-Appellants further stated that Mr. Banyee's filings in this companion case, and the Court's rulings on those requests, "may affect certain arguments in the government's response to Mr. Banyee's petition for rehearing en banc in this case. For instance, the Court's ruling on Mr. Banyee's stay motion may determine which statute currently provides the authority for Mr. Banyee's detention."

9. This Court set January 23, 2025, as the new deadline for Respondents-Appellants' response to the petition for rehearing. On the morning of January 23, Mr. Banyee's motion for a stay of removal was denied. *See* Order, *Banyee v. Garland*, No. 24-3590 (8th Cir. Jan. 23, 2025).

10. That same day, Respondents-Appellants submitted their response to the petition for rehearing en banc. In their response, they stated that the BIA's dismissal of Mr. Banyee's appeal of his removal order "converted Banyee's detention status from 'pre-final order' to 'post-final order,'" and that "[a]s a result, Banyee is no longer covered by section 1226(c)." Gov. Br. at 3. Respondents-Appellants further explained that "[Mr. Banyee's] detention will be governed by section 1231(a)"

unless his removal order is reopened or this Court orders a stay of his removal order. *Id*. at 3–4. Respondents-Appellants then acknowledged that Mr. Banyee's motion for a stay had been denied by this Court. *Id*. at 4.

11. Petitioner agrees that Mr. Banyee is no longer detained under § 1226(c), and is, by virtue of the denial of the stay of removal, detained under § 1231(a). Mr. Banyee's habeas petition challenged his prolonged detention under § 1226(c), the statute mandating detention of certain noncitizens who are removable based on their criminal history "pending a decision on whether [they are] to be removed from the United States." When a noncitizen receives an administratively final order of removal, the detention authority shifts to § 1231(a), the "post-removal-period detention statute," which establishes a different set of rules governing mandatory and permissive detention during this period. *Zadvydas v. Davis*, 533 U.S. 678, 683 (2001).

12. As a result, the issue in this appeal—whether Mr. Banyee's prolonged detention under § 1226(c) violates due process—is no longer live and the appeal is moot. *See Ali v. Cangemi*, 419 F.3d 722, 723 (8th Cir. 2005) (en banc) ("When, during the course of litigation, the issues presented in a case 'lose their life because of . . . a change in circumstances . . . and a federal court can no longer grant effective relief, the case is considered moot.'" (citations omitted)).

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13. When a case becomes moot on appeal, this Court has explained "the customary form of disposition" is to vacate the decision, remand to the district court, and instruct the district court to dismiss without prejudice. *Id*. at 724 (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950)).

14. This practice aligns with Supreme Court precedent on vacatur. The general principle is "that vacatur must be decreed for those judgments whose review is, in the words of *Munsingwear*, 'prevented through happenstance'—that is to say, where a controversy presented for review has 'become moot due to circumstances unattributable to any of the parties.'" *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) (quoting *Karcher v. May*, 484 U.S. 72, 82 (1987)) (cleaned up). "From the beginning [courts] have disposed of moot cases in the manner 'most consonant to justice' . . . in view of the nature and character of the conditions which have caused the case to become moot.'" *Id*. at 24 (quotation marks and citation omitted). Thus, courts have granted vacatur when mootness, through no fault of the parties, has frustrated review of a decision—as compared to situations where a party "slept on its rights," *see Munsingwear*, 340 U.S. at 41, or the parties chose to settle, *see U.S. Bancorp Mortg. Co.*, 513 U.S. at 29.

15. Here, Mr. Banyee has diligently pursued his rights. When the panel issued its decision, he petitioned for rehearing en banc. And when the BIA dismissed his appeal, he filed a petition for review and sought a stay of removal from this Court.

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While the government did not formally oppose the stay, it simultaneously filed a statement with the Court, stating that its "decision not to oppose the stay of removal at this time is not a concession that Petitioner has met his burden of proof for a stay." Resp't's Non-Opposition to Pet'r's Mot. to Stay the Order of Removal, *Banyee v. Garland*, No. 24-3590 (8th Cir. Jan. 16, 2025). In doing so, it increased the chances of the stay being denied, thereby rendering this appeal moot.

16. Because of his removal order from the BIA and this Court's denial of a stay of removal, Mr. Banyee is no longer able to challenge the panel's decision—one that has created a circuit split on a significant issue regarding the due process constraints on prolonged mandatory pre-removal-order detention. He therefore is unable to seek review either through the rehearing process or certiorari. The equities thus weigh in favor of vacatur. *See Panera, LLC v. Dobson*, 999 F.3d 1154, 1158 (8th Cir. 2021) (courts considering vacatur weigh "the twin considerations of fault and public interest").

17. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 25. Whether described as a ruling in a companion proceeding or "general 'happenstance,'" the change in Mr. Banyee's detention authority occurred "for reasons beyond [his] control." 13C Wright & Miller, *Federal Practice & Procedure* § 3533.10 (3d ed.

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2024 Update). Because of the intervening events of his final order of removal and the Court's stay denial, Mr. Banyee can no longer contest the panel's decision regarding the prolonged period of § 1226(c) detention that he was subject to—even though the government would continue to benefit from that decision, against him and other noncitizens subject to prolonged § 1226(c) detention.[1] *See, e.g.*, *Gach v. Charles*, No. 24-CV-583 (JWB/JFD), 2024 WL 4774175, at *3 (D. Minn. Oct. 23, 2024), *report & recommendation adopted*, 2024 WL 4772413 (D. Minn. Nov. 13, 2024) ("Under *Banyee*, the Court is not permitted, in ruling on a petition for a writ of Habeas Corpus, to evaluate the proceedings in the immigration court. It is permitted to ask only one question: Are deportation proceedings ongoing? If so, the petitioner's detention is *per se* constitutional, and the petition must be denied.").

18. "The point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences,' so that *no* party is harmed by what we have called a 'preliminary' adjudication." *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (emphasis added) (quoting *Munsingwear,* 340 U.S. at 40–41); *see also*

[1] Indeed, the government has sought vacatur where the court finds a case is mooted by developments in the petitioner's immigration proceedings impacting the detention authority over the petitioner. *See, e.g.*, Certified Order, *Gutierrez v. Garland*, No. 20-2781 (2d Cir. Oct. 25, 2022) (granting vacatur where detention authority shifted from § 1226(c) to § 1231(a)); *see also Ali v. Sessions*, No. CV 18-2617 (DSD/LIB), 2019 WL 5420785, at *2 (D. Minn. Oct. 23, 2019) (vacating order granting release because "[petitioner] was held in custody under § 1231, not § 1226" when the BIA dismissed his appeal, rendering the case moot).

Munsingwear, 340 U.S. at 40 ("When that procedure [of vacatur] is followed, the rights of all parties are preserved; none is prejudiced by a decision which . . . was only preliminary."). Like in *Camreta*, the "constitutional ruling" here "is a legally consequential decision" that impacts other litigants down-the-line. 563 U.S. at 713. And the equities especially weigh in favor of vacatur in cases where, as here, the decision creates a circuit split. *See, e.g.*, *Kendall v. Doster*, 144 S. Ct. 481 (2023) (vacating panel decision that created a circuit split, citing *Munsingwear*, based on independent government action mooting the case before parties could seek rehearing en banc or certiorari); *Turtle Mountain Band of Chippewa Indians v. N. Dakota Legis. Assembly*, 144 S. Ct. 2709 (2024) (vacating panel decision that created a circuit split, citing *Munsingwear*, based on parties' dispute becoming moot two weeks before deadline to seek certiorari).

19. Thus, either the en banc Court or the panel should vacate the panel opinion and remand to the district court with instructions to dismiss without prejudice. *See Ali*, 419 F.3d at 723.

20. On January 27, 2025, Mr. Banyee's undersigned counsel, My Khanh Ngo, contacted counsel for Respondents-Appellants, Courtney Moran and Sarah Wilson, regarding this motion. On January 31, 2025, Ms. Moran conveyed that Respondents-Appellants oppose this motion and intend to file a response.

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WHEREFORE, for these reasons, Mr. Banyee respectfully requests that the Court vacate the panel decision. Alternatively, Mr. Banyee respectfully requests the Court grant en banc rehearing and order supplemental briefing.

Dated: January 31, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,072 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f), and this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Rome 14-point font.

Dated: January 31, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Dated: January 31, 2025

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