No. 20-2056

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Adham Amin Hassoun,
Appellee-Petitioner,

v.

Jeffrey Searls, in his official capacity as Acting Assistant Field Office Director and Administrator, Buffalo Federal Detention Facility,
Appellant-Respondent.

On Appeal from the United States District Court for the Western District of New York

APPELLANT'S REPLY IN SUPPORT OF MOTION TO DISMISS AND TO VACATE THE DISTRICT COURT'S DECISIONS AND ORDER GRANTING JUDGMENT TO APPELLEE

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This Court should vacate the district court's judgment under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Hassoun's arguments to the contrary fail.

ARGUMENT

A. This Appeal Is Moot

The parties agree the case is moot. *See* Mot. 12-14 (C.A. Dkt. 82); Opp. 2, 7 (C.A. Dkt. 86). The Court should dismiss this appeal.

B. This Court Should Vacate the Rulings Below Under *Munsingwear*

As the government has explained, this Court should adhere to its "general practice" by vacating the judgment and all rulings on all claims that are now moot and covered by this appeal—i.e., all rulings on or pertaining to 8 C.F.R. § 241.14(d)—and remanding with instructions to dismiss the entire habeas petition. Mot. 14-16. Hassoun's arguments to the contrary, *see* Opp. 9-17, lack merit.

First, Hassoun contends that vacatur is not warranted because this appeal was not "mooted by happenstance," Opp. 8: the government, according to Hassoun, mooted the appeal by taking action that "was exclusively within" "the government's control" when it removed him from the United States. Opp. 9; *see also* Opp. 8-10. Hassoun is wrong on multiple grounds. To start, he is simply wrong that vacatur is warranted only upon "happenstance." That is just a shorthand term to describe certain circumstances in which *Munsingwear* vacatur is warranted. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) ("The reference to 'happenstance' in *Munsingwear* must be understood as an allusion to this equitable tradition of vacatur."). Vacatur is an equitable remedy, and the Court's

focus in evaluating whether to grant it is on whether the party who lost below should, "in fairness," have to "acquiesce in the judgment" when that party has lost his ability to challenge that judgment on appeal. *Id.*

Indeed, Hassoun concedes that an appeal need not be mooted by happenstance for vacatur to be warranted: he acknowledges that courts grant vacatur even "when an appellant moots a case through 'voluntary' or 'non-accidental conduct' that is 'entirely unrelated to the lawsuit.'" Opp. 10-11. The government's removal of Hassoun was independent of this lawsuit: the law imposed on the government a mandatory duty to remove Hassoun. *See* Mot. 16-17 (citing 8 U.S.C. § 1231(a)(1)(A), (4)(A)). Hassoun says that is not enough—that the government "must demonstrate that its role in the timing of Petitioner's removal was neither related to the case nor driven by an interest in taking advantage of the *Munsingwear* doctrine." Opp. 11. Hassoun cites no authority for that assertion. And it is well settled that "not all actions taken by an appellant that cause mootness necessarily bar vacatur of the district court's judgment." *Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet*, 260 F.3d 114, 121-22 (2d Cir. 2001). Here, the government removed Hassoun in accordance with its statutory obligations and in light of the agencies' threat assessments of him—which shows that vacatur is appropriate. Mot. 5-8.

Even under the rule that Hassoun advocates, his arguments against vacatur would still fail. Hassoun's lead argument in opposing vacatur is that the government mooted this appeal by taking action that "was exclusively within" "the government's

control" when it removed him from the United States. Opp. 9. As Hassoun is well aware, that is untrue: Removal requires coordination and agreement with a sovereign foreign nation. It is not "exclusively within" the U.S. government's control. It is true that the U.S. government is—obviously—involved in that removal effort. *See* Opp. 9. But the U.S. government's actions are *necessary* but *not sufficient* to effectuating removal. Mot. 6-7, 9, 16-17; *see* Opp. 9 (noting "the foreign country's agreement to accept Petitioner for resettlement"), 11 (similar). Even where the alien will be repatriated to his native country, the U.S. government's power to deport aliens who have unlawfully entered the country must contend with "the power of the native sovereignty to refuse to receive the alien if it so chooses." *United States ex rel. Hudak v. Uhl*, 20 F. Supp. 928, 929 (N.D.N.Y. 1937), *aff'd*, 96 F.2d 1023 (2d Cir. 1938); *see also Matter of Anunciacion*, 12 I. & N. Dec. 815, 817 (B.I.A. 1968) ("[T]he question of whether or not a specified country will accept the alien as a deportee is one of comity concerning solely the United States and the country in question . . ."). A foreign government's agreement is particularly critical for hard-to-remove aliens like Hassoun—a stateless terrorist. As the government has chronicled, it took the U.S. government years to secure a country that would accept Hassoun. Mot. 5-8. In short, the government did not unilaterally moot the case on appeal. Vacatur is appropriate.

Hassoun also claims that the government's removal of him "bespeaks a deliberate strategy carefully orchestrated to end this case by effectuating Petitioner's removal, rather than risk his release under supervision." Opp. 10. He offers no

support for that conspiratorial view, however, and that speculation defies reason: If the government could have at any time removed Hassoun in short order and with ease, as Hassoun seems to suggest, it would make no sense for the government to have waited until an adverse final judgment (and multiple adverse district-court rulings, including the constitutional invalidation of a critical regulation), in an extraordinarily resource-intensive case that demanded massive effort by many government agencies. Nor is there a basis for faulting the government for pressing hard to achieve Hassoun's removal, *see* Opp. 11-12, and for "avoid[ing] the risk that Petitioner would ever be set free on U.S. soil by court order," Opp. 13. Hassoun is a convicted terrorist whom three agency heads have deemed to be too great a risk for release into the United States. Mot. 5-8. The government cannot be faulted for seeking to avoid the risk he posed on U.S. soil.

Second, Hassoun contends that vacatur is not warranted because the government did not seek appellate review of the district court's interlocutory December 2019 ruling on the regulation at issue here. *See* Opp. 12-13. That is irrelevant to *Munsingwear* vacatur, and Hassoun tellingly cites no case where this Court held against the party seeking mootness the fact that the party did not earlier seek to file a permissive interlocutory appeal. Filing a notice of appeal at the conclusion of this case hardly evidences a manipulative intent, let alone demonstrates that the government took affirmative action to render this case moot at a particular time. *See NML Cap., Ltd. v. Republic of Arg.*, 497 F. App'x 96, 99 (2d Cir. 2012) (summary order) (noting, in granting vacatur, that appellant

"continuously pursued its rights in this case by timely appealing"). "While courts have recognized that a party waives its right to vacatur for failing to appeal or to follow statutory obligations in pursuit of an appeal, this Court has never held that a party forfeits its right to vacatur of an order simply by failing to file [an optional] motion to stay . . . while timely pursuing reconsideration and appeal." *Id.* So too here: the equities do not disfavor the government because it declined to attempt a discretionary interlocutory appeal. *See id.* And Hassoun neglects to mention that an interlocutory appeal of the district court's December 2019 ruling was not available as of right: it would have required the consent of *both* the district court and this Court, and such an appeal is "reserved for those cases where an intermediate appeal may avoid protracted litigation." *Koehler v. Bank of Berm. Ltd.*, 101 F.3d 863, 865-66 (2d Cir. 1996); 28 U.S.C. § 1292(b). This argument has no force against *Munsingwear* vacatur.

Third, Hassoun contends that vacatur is not warranted because the district court's rulings "will not exert unjust legal consequences if left undisturbed." Opp. 13 (emphasis omitted); *see also* Opp. 13-15 & n.4. That position is hard to square with Hassoun's counsel's steadfast opposition to vacatur and their express contemplation of using the district court's decisions before "future courts." Opp. 15 n.4. In any event, the point of *Munsingwear* vacatur is to clear the pathway to future litigation on the regulation at issue in this case. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997). It is true that district-court decisions are not precedential, *see* Opp. 14-15, but that is *always* true when a court of appeals

nonetheless vacates district-court decisions under *Munsingwear*. That fact provides no basis for denying vacatur here.

The inequity of not granting vacatur is also particularly stark here because of the strong likelihood that the government would have prevailed on appeal— a point supported by the fact that the Court granted a stay pending appeal in the appeal from the district court's ruling invalidating the regulation at issue in this case. *See* Opinion 23-25 (C.A. Dkt. 76); Mot. 15-17. Hassoun contends that "the Supreme Court has explicitly rejected that as a valid ground for vacatur under *Munsingwear*." Opp. 15; *see* Opp. 15-16. Not so. The Supreme Court remarked it "seems to us inappropriate" to vacate cases on "the basis of assumptions about the [cases'] merits," but it made that statement in response to the specific argument (not advanced by the government here) that "appellate judgments in cases that we have consented to review by writ of certiorari are reversed more often than they are affirmed, are therefore suspect, and should be vacated as a sort of prophylactic against legal error." *U.S. Bancorp*, 513 U.S. at 27. In other words, the Supreme Court declined to consider the merits as part of an argument made "on systemic grounds," without foreclosing the need to consider the merits of a particular case.

Indeed, as the government has explained, denying vacatur would be wholly inequitable here: the government would either have to relinquish its right to appellate review by removing a terrorist alien or instead preserve its right to appellate review by potentially releasing him. Mot. 16. Hassoun claims that this is "flatly wrong," Opp. 16, but his arguments are unsound. First, Hassoun contends that the

Court should deny vacatur because Hassoun's removal was not "attributable to happenstance," and that other removals in the future may be different and thus subject to vacatur. Opp. 16. This just sidesteps the untenable choice that Hassoun is insisting on in this case. Second, Hassoun contends that it is not inequitable for the United States to relinquish its right to vacatur because of "the government's special position as a litigant" that extends broader than prevailing in any particular case. Opp. 16-17. But the reason the United States is seeking vacatur is to clear the path for future litigation and to eliminate the inequity of the district court's flawed and now unreviewable rulings from having future effect. That is the equitable result and it promotes the public interest. *Contra* Opp. 17.[1]

CONCLUSION

This Court should vacate the district court's judgment and all decisions on or pertaining to 8 C.F.R. § 241.14(d) and remand with instructions to dismiss the entire habeas petition.

[1] Hassoun inaccurately states that the government "concede[d] its factual case." Opp. 10; *see also* Opp. 1, 5 (similar). The record, however, shows that Respondent "preserve[d] all of his arguments" and maintained that it was entitled to judgment under a correct understanding of the law. Dkt. 226 at 1; *cf. id.* at 2 (for the statute, advising the district court that its "prior legal and evidentiary rulings, which inappropriately raise[d] the Respondent's burden and standard of proof and prevent[ed] the Respondent from introducing certain evidence establishing that Petitioner's release will threaten the national security of the United States" left Respondent with "evidence . . . insufficient to meet the standard set by the Court").

Dated: August 24, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this reply complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2,045 words according to the count of Microsoft Word, excluding the materials permitted to be excluded by Rule 32(f).

/s/ Steven A. Platt

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2020, I filed this motion through the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Steven A. Platt

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