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 OPPOSITION TO APPELLEE'S MOTION TO VACATE MOTIONS PANEL'S OPINION

ETHAN P. DAVIS
Acting Assistant Attorney General

WILLIAM C. PEACHEY
Director

TIMOTHY M. BELSAN
Chief
National Security & Affirmative Litigation Unit

JAMES P. KENNEDY, JR.
United States Attorney

DANIEL B. MOAR
Assistant United States Attorney

STEVEN A. PLATT
Counsel for National Security
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044

JOHN J.W. INKELES
Counsel for National Security

INTRODUCTION

Appellant-Respondent, the U.S. government, opposes Appellee-Petitioner Adham Amin Hassoun's request to vacate this panel's stay opinion (C.A. Dkt. 87). Hassoun has failed to demonstrate equitable entitlement to vacatur. Contrary to Hassoun's unsupported suggestion otherwise, the case was not moot at the time the Court entered its stay, and the Court fairly used its later opinion to explain the reasoning for granting the stay. Nor should the Court apply *Munsingwear* vacatur, which is not appropriate in these circumstances with respect to this Court's stay order. *See, e.g.*, *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). This Court should deny Hassoun's motion.

BACKGROUND

Hassoun was born in Lebanon to Palestinian parents. Michael Bernacke Decl. ¶ 4 (Dkt. 17-1).[1] He was admitted to the United States in 1989 as a nonimmigrant visitor. *Id.* He failed to comply with the visa requirements, and in 2002 he was ordered removed. *Id.* ¶¶ 4-5.

Before he could be removed, Hassoun was taken into custody on criminal charges, including Conspiracy to Murder, Kidnap, and Maim Persons in a Foreign County; Conspiracy to Provide Material Support for Terrorism; and Material Support to Terrorists. *Id.* ¶ 7; Judgment, *United States v. Hassoun* ("*Hassoun I*"), No. 04-cr-60001 (S.D. Fla. Jan. 22, 2008) (Dkt. 13-3). The indictment alleged that "it was the purpose and object of the conspiracy to advance violent jihad, including

[1] References to the district court docket are marked as "Dkt." References to the docket in this appeal are marked as "C.A. Dkt."

supporting and participating in armed confrontations in specific locations outside the United States, and committing acts of murder, kidnapping, and maiming for the purpose of opposing existing governments." *United States v. Jayyousi*, 657 F.3d 1085, 1105 (11th Cir. 2011) (appeal in Hassoun's criminal case). To prevail, the government had to prove that Hassoun knew that he was "supporting mujahideen who engaged in murder, maiming, or kidnapping in order to establish Islamic states." *Id*. at 1105. Hassoun was convicted and found to have engaged in this criminal conduct beginning in 1993 and continuing beyond October 26, 2001. *See id*. at 1091-92. "[T]he record show[ed] that the government presented evidence that [Hassoun and his co-defendants] formed a support cell linked to radical Islamists worldwide and conspired to send money, recruits, and equipment overseas to groups that [they] knew used violence in their efforts to establish Islamic states." *Id*. at 1104. "[I]n finding [Hassoun and his co-defendants] guilty, the jury rejected the . . . premise that they were only providing nonviolent aid to Muslim communities." *Id*. at 1115. Hassoun was sentenced to 188 months in prison. Judgment, *Hassoun I*, No. 04-cr-60001 (S.D. Fla. Jan. 22, 2008).

Upon Hassoun's release from prison in October 2017, U.S. Immigration and Customs Enforcement (ICE) detained him in Batavia, New York, under 8 U.S.C. § 1231. Bernacke Decl. ¶ 8 (Dkt. 17-1), *Hassoun v. Searls* ("*Hassoun II*"), No. 18-586 (W.D.N.Y.).

While Hassoun was litigating the lawfulness of his detention, the government was undertaking extensive efforts to remove him from the United States. Beginning

in October 2017, the Department of Homeland Security, and later the Department of State, engaged with multiple foreign governments in seeking to remove Hassoun, a stateless individual. Bernacke Decl. ¶¶ 9-12. Lebanon, the country of Hassoun's birth, refused to accept him because he is not a Lebanese citizen. Order 5 (Dkt. 55). The government tried to remove Hassoun to the West Bank, but the Palestinian Liberation Organization would not issue a travel document unless Israel acquiesced, which Israel did not. Bernacke Decl. ¶¶ 9-12. ICE unsuccessfully sought travel documents for Hassoun from Egypt, Iraq, Somalia, Sweden, the United Arab Emirates, and three unidentified countries. *Id.* The government convened a working group to find a country for Hassoun. *Id.* ¶ 12. Hassoun himself "wr[ote] unsuccessfully to more than 100 countries in the hopes of finding a country that will accept him, but all these requests ha[d] been denied or gone unanswered." Reply/Traverse in Support of Pet. for Writ of Habeas Corpus 2, 7, *Hassoun II*, Dkt. 29. He "also enlisted his family to try to speed his removal." *Id.* at 8; *see also* Adham Amin Hassoun Decl., *Hassoun II*, Dkt. 29-1; Jonathan Manes Decl., *Hassoun II*, Dkt. 29-6. The efforts to identify a country of removal were high-reaching and wide-ranging (*see, e.g.*, Resp.'s Supp. Report, *Hassoun II*, Dkt. 51), yet, for a long time, the government's efforts to remove Hassoun were not successful.

Throughout the years the government sought to remove Hassoun, there were times when the government thought it was close to securing his removal. For instance, the government told the district court in Hassoun's first habeas proceeding

that, as of July 2018, it was ICE's "professional judgment" that Hassoun's removal was likely to occur in the reasonably foreseeable future. *Hassoun II*, No. 18-cv-586, 2019 WL 78984, at *1-2 (W.D.N.Y. Jan. 2, 2019). But, "[o]bstacles" arose that "complicate[d]" Hassoun's removal. *Id.* at *2. Some of those obstacles were completely unrelated to Hassoun—for example, the closure of the Palestinian Liberation Organization's Washington office and Jordan's termination of an agreement under which it coordinated Palestinian removals with ICE. *Id.*

Indeed, although the government believed it was close to removing Hassoun on several occasions, *see* Vacatur Mot. 5-7 (C.A. Dkt. 82), Hassoun himself regularly argued that his removal was unlikely given his status as a convicted terrorist, who is stateless. *See, e.g.*, Reply/Traverse 1, 26-29, *Hassoun II*, Dkt. 29 (arguing that it was not reasonable to expect a country to which he lacked personal ties to agree to accept him for resettlement, especially in light of his terrorism convictions). Although a country could have agreed to accept Hassoun for resettlement at any time, none did until July 2020.

In June 2020, the government made progress in negotiations with a foreign country. To expedite the flow of information regarding the U.S. government's efforts to remove Hassoun and adequately protect confidential information, on June 26, 2020, the parties entered into a stipulation to include confidential information regarding removal within the district court's protective order. Dkt. No. 249 ¶ 4.

On June 29, 2020, the district court granted the habeas petition and ordered Hassoun's release. Dkt. 256. Notwithstanding its progress toward securing a

country for Hassoun's removal, on June 29, 2020, the government appealed the adverse judgment below. Dkt. 259.

On June 30, 2020, the government moved for a stay of the district court's order pending appeal. C.A. Dkt. 9-1. The Court granted an administrative stay until July 15, 2020. Order (C.A. Dkt. 16). This panel later extended that stay "until further order of the Court." Order (C.A. Dkt. 41).

As the government's reply filing deadline approached, on July 13, 2020, the government filed a consented motion for an extension of time to file the reply stay brief. Mot. 1 (C.A. Dkt. 43). The government represented that there had been "material progress in achieving [Hassoun's] removal" and that "[a]bsent extraordinary or unforeseen circumstance, the government intend[ed] to remove" Hassoun within the next two weeks, by July 27. *Id*. The government did not represent to the Court that removal was a certainty. *Id*. The Court did not act on the motion, so the government timely filed its reply stay brief. *See* Appellant's Reply (C.A. Dkt. 49).

Three days later, on July 16, the government updated the district court, letting it know that the "U.S. government has reached an agreement with a third country to accept [Hassoun] upon his removal from the United States," and "ICE is unaware of any obstacles that would prevent [Hassoun]'s removal as scheduled." Notice (Dkt. 277) (citing Decl. of Marlen Piñeiro). The accompanying declaration stated that ICE was "in the process of finalizing the logistical arrangements required to effectuate

such removal, which is scheduled to occur during the week of July 20, 2020." Piñeiro Decl. ¶ 6 (Dkt. 277-1); *accord* Notice (C.A. Dkt. 67).

However, during this period—and unbeknownst to the government—Hassoun, by his own admission, violated the protective order and the stipulation that was just filed with the district court. Notice, Dkt. 277 ¶ 5. He thus imperiled the government's efforts to remove him by disclosing the identity of the country of removal to his sons. *See id.*

On July 16, 2020, the Court granted the government's motion for a stay pending appeal. Order (C.A. Dkt. 60). The Court noted, "An opinion will be forthcoming." *Id.*

On July 21, 2020, as the government later notified the Court, ICE removed Hassoun from the United States to the foreign country. Appellant's Notice of Removal (Dkt. 72).

On July 30, 2020, the Court issued an opinion "[f]or the purpose of explaining" its July 16 stay order. Opinion 3 n.1 (C.A. Dkt. 76). Hassoun now seeks to vacate that opinion. Mot. (C.A. Dkt. 87).

ARGUMENT

Hassoun argues that the opinion should be vacated for two reasons: first, because the case was supposedly moot at the time the July 16 stay order was issued, and second, as a matter of equity under *United States v. Munsingwear, Inc.*, 340 U.S.

36 (1950). Neither argument justifies vacatur.

A. The Court Should Not Vacate Its Opinion as Improvidently Issued

The parties agree that this action is moot due to Hassoun's removal on July 21, 2020, and subsequent release into the foreign country. Mot. 11. Yet Hassoun sets forth an unusual argument that the case was actually moot *before* his removal and release. *See* Mot. 6-9. He contends the case "became practically moot" upon the government's July 13 notice that removal was expected, but not guaranteed, to take place within the next two weeks. *Id.* at 6. Hassoun argues that the Court lacked jurisdiction to grant the government's stay motion, and, consequently, jurisdiction to enter the July 30 opinion. Alternatively, he asks the Court to vacate its July 30 opinion as a matter of "judicial restraint." *Id.* at 14-15. The Court should decline both entreaties.

1. Because Hassoun's removal and release were never guaranteed until effectuated, this case was not moot prior to those events. Hassoun cites no case establishing that a habeas petition seeking release can be moot *before* release—even under his "flexible" mootness theory. Mot. 11.[2] That is unsurprising, as "[m]ootness arises when 'the issues presented are no longer "live" or the parties lack a legally

[2] To be clear, "significant likelihood of removal in the reasonably foreseeable future" is the standard by which a court determines whether continued detention under 8 U.S.C. § 1231(a)(6) is justified. *See, e.g.*, *Hassoun II*, 2019 WL 78984, at *1-2 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001)). While that is not the standard applied in 8 C.F.R. § 241.14(d) cases, even in standard § 1231(a)(6) cases, that showing does not moot the case; it merely establishes that the government has a sufficient legal basis to continue holding the detainee.

cognizable interest in the outcome.'" *N.Y. State Nat'l Org. for Women v. Terry*, 159 F.3d 86, 91 (2d Cir. 1998). The party seeking to establish mootness caries a "heavy" burden. *Id.* The party "must demonstrate that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* For at least five reasons, Hassoun cannot show that the case was moot before his removal.

First, Hassoun's habeas petition sought an order directing "the government to release [him] immediately." Am. Pet. 20 (Dkt. 13); *accord* Pet. 19 (Dkt. 1). Hassoun's release from immigration detention was the central focus of this habeas case. Hassoun did not achieve that relief until July 21, 2020, when he was removed and released. *See, e.g.*, *Nieto-Ayala v. Holder*, 529 F. App'x 55 (2d Cir. 2013) (holding that a petitioner's removal from the United States renders moot his claims challenging immigration detention). Until then, the case was not moot.

Second, the government continued Hassoun's confinement until the moment of his removal, seeking stays from this Court and D.C. Circuit to ensure it could do so despite the district court's order that he be released. Stay Mot. (C.A. Dkt. 9-1); Stay Mot., No. 20-5191 (D.C. Cir. July 1, 2020). Hassoun thus incorrectly suggests that the parties agreed the case was moot prior to Hassoun's removal on July 21. *See, e.g.*, Mot. 12 (suggesting that there was no longer a live controversy solely because "the parties jointly agreed . . . to postpone the government's reply deadline . . . with two indefinite administrative stays in place . . ."). Hassoun further incorrectly states, without any citation, that both parties agreed there were "no questions requiring any answer from any court." *Id.* Rather, the record establishes

that *after* filing the extension motion, the government detained Hassoun until removal was effectuated, and *continued to defend* its detention of Hassoun by filing a reply brief in support of a stay of release. *See* Stay Reply (C.A. Dkt. 49). The fact that material progress had been made in removal efforts is why the parties, at that time, consented to a mere 14-day extension of the administrative stay, Extension Mot. (C.A. Dkt. 43), and *not* to a dismissal on mootness grounds. While Hassoun is correct that the parties both *desired* Hassoun's removal, that aspiration has been true for almost two years. Under Hassoun's mutual-desire theory, this case has been moot since July 2018 when ICE declared it was trying to remove Hassoun. But that clearly cannot be the case. Hassoun's theory flounders.

Third, the history of this very case shows that expectant removals can fall through. In 2018 and 2019 the government was confident that there was a significant likelihood that it could remove Hassoun. Yet those efforts did not succeed at that time. Countries declined, and removal did not happen—sometimes for unpredictable reasons unrelated to Hassoun (for example, the Palestinian Liberation Organization closing an office or Jordan terminating a memorandum of understanding). *Hassoun II*, 2019 WL 78984, at *1-2. Hassoun fails to explain how "formal mootness" was "certainly impending" such that no obstacles could have arisen at the last minute here. The inquiry is guided by the certainty—or rather, lack thereof—at the time in question, not viewed in hindsight.

Fourth, around July 13, Hassoun himself was jeopardizing the government's removal efforts. The parties stipulated that the country's identity and terms of

removal would be subject to the district court's protective order. Dkt. 249. Hassoun then knowingly violated the protective order despite being given actual notice of the stipulation. *Id.* Hassoun's protective-order violation had the real potential to negatively impact the plans for his removal, either by delaying the removal schedule due to operational security issues or perhaps negating the foreign country's willingness to accept him. Hassoun himself previously acknowledged that his removal was precarious, as he did not believe it was reasonable to expect a country to which he lacked personal ties to accept him. *Hassoun II*, Dkt. 29 at 26-28.

Fifth, the government has made clear that it strongly opposed the release in the United States of Hassoun—a convicted-terrorist alien who three agency heads had determined posed a present threat to the national security. *See generally* Stay Mot. Although Hassoun suggests that there was no likelihood of such release, Mot. 13 ("As the D.C. Circuit's staying of its hand makes clear, there was no reason to even grant the government's motion for a stay in the first place."), that is incorrect. Two weeks prior, on June 29, the district court ordered his release. Dkt. 256. Until the Court granted a full stay pending conclusion of the appeal on July 16, both courts had only agreed to an administrative stay "until further order of the Court." Order (C.A. Dkt. 41); *Hassoun v. Searls*, No. 20-5191 (D.C. Cir. July 13, 2020) (similar). Either or both courts could have lifted the stays at any time, a possibility bolstered by the fact that this Court declined to adjudicate a consented motion for a brief extension of the stay.

Hassoun has not met his heavy burden of showing the case was moot before July 21. Because the case was still "live" when the Court entered its July 16 order, the order is valid and should not be vacated.

2. Hassoun argues that even acknowledging July 21 as the date of mootness, it was "entirely unwarranted, and likely unprecedented," for the Court to issue a reasoned opinion on July 30. Mot. 13. Hassoun asks the Court to vacate its "improvidently issued" opinion as a matter of discretion. *Id.* at 15. The Court—which was well aware on July 30 that the case was moot, yet legitimately issued an opinion carefully explaining its earlier order—should decline to do so.

Hassoun ignores the important distinction between an order and an opinion. As the Supreme Court has explained, a "court's decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests." *Rogers v. Hill*, 289 U.S. 582, 587 (1933). Consistent with that principle, "the courts of appeals should have wide latitude in their decisions of whether or how to write opinions." *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972).

Indeed, the Supreme Court—as this Court did here—has issued an opinion after the case became moot, to explain a summary order issued before mootness. *Ex parte Quirin*, 317 U.S. 1, 1, 20 (1942) (issuing an order in a habeas case on July 31, 1942, and an opinion explaining that order on October 29, 1942); Fed. Bureau of Investigation, *Nazi Saboteurs & George Dasch*, https://www.fbi.gov/history/famous-cases/nazi-saboteurs-and-george-dasch (last visited Aug. 27, 2020) (noting six of the *Quirin* petitioners were executed on August 8, 1942). It is also not

uncommon for this Court to issue an order first, and then follow up with the reasoning for that order at a later date, particularly in circumstances where quick court action is requested. *See, e.g.*, *United States v. Watkins*, 940 F.3d 152, 157 (2d Cir. 2019) (noting that the court had "entered an order denying Watkins's motion for bail, 'with an opinion forthcoming'"); *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP*, 654 F.3d 276, 282 (2d Cir. 2011) (noting that the Court had "entered an order affirming on CSX's appeal [more than two years prior], but deferred until now our discussion of the reasons for that order"); *Yang v. Kosinski*, 805 F. App'x 63, 65 (2d Cir. 2020) (summary order providing "[a]n opinion of this Court will follow explaining its reasoning in further detail"); *United States v. Grimm*, No. 12-4310, 2013 WL 6405019, at *1 (2d Cir. Nov. 26, 2013) (summary order; similar).

Being well-advised that the case was already moot, the Court fairly exercised its "wide latitude" to explain why it had earlier issued a stay, especially when the district court had reached the opposite conclusion. *Taylor*, 407 U.S. at 194 n.4. Indeed, the Court elected to publish its opinion, signifying it found the opinion to serve a "jurisprudential purpose." I.O.P. 32.1.1. Further, Hassoun identifies no requirement that *opinions* relating to past orders, as opposed to the *orders themselves*, must be issued only in live cases. *See Quirin*, 317 U.S. at 20; *see also Coal. to End Permanent Cong. v. Runyon*, 979 F.2d 219, 221 (D.C. Cir. 1992) (Silberman, J., dissenting from the per curiam disposition) (in this circumstance, electing to "honor [his] commitment to fully explain [his] reasons for joining the judgment"). The Court properly used its July 30 opinion to explain its July 16 order.

B. The Policy Underlying *Munsingwear* Does Not Support Vacatur of the Panel's Stay Opinion

Hassoun argues that this Court should also "vacate the panel's stay opinion under *Munsingwear*." Mot. 15. The policy underlying *Munsingwear*, however, does not apply to the panel's stay opinion.

Under *Munsingwear*, an appellate court's "general practice" is to vacate a lower court's judgment when "a civil case becomes moot while an appeal is pending." *Bragger v. Trinity Cap. Enter. Corp.*, 30 F.3d 14, 17 (2d Cir. 1994). "Vacating the judgment below properly 'clears the path for future relitigation of the issues between the parties.'" *NMI Cap., Ltd. v. Republic of Arg.*, 497 F. App'x 96, 99 (2d Cir. 2012) (summary order) (quoting *Munsingwear*, 340 U.S. at 40). This policy of vacating the underlying judgment is premised on the equitable principle that "those who have been prevented from obtaining the review to which they are entitled [are] not . . . treated as if there had been a review." *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (alteration and ellipses in original). "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance" or the "unilateral action of the party who prevailed below," "ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg.*, 513 U.S. at 25.

But those concerns do not apply to the motions panel's opinion explicating the basis for a stay order. The *Munsingwear* doctrine hinges, in part, on the effect of the court decision under review. *Munsingwear*, 340 U.S. at 40-41 (vacatur's aim is to prevent an unreviewable decision "from spawning any legal consequences"); *Assoc. Gen. Contractors of Conn., Inc. v. City of New Haven*, 41 F.3d 62, 67 (2d Cir.

1994). In particular, this Court has noted that a "party should not suffer the adverse *res judicata* effects of a district court judgment when it is denied the benefit of appellate review through no fault of its own." *Assoc. Gen. Contractors*, 41 F.3d at 67. Appellate decisions granting stays do not "spawn[] legal consequences." *Munsingwear*, 340 U.S. at 40-41. "The principle that some issues decided by a motions panel are only provisional or interlocutory permits us to reconsider [an issue already decided by the motions panel]." *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144 (2d Cir. 1999); *see also NML Cap., Ltd.*, 497 F. App'x at 99 ("Only final judgments are accorded preclusive effect."). Indeed, when, as here, a panel of this Court grants a stay of the district court's order after allowing all sides to brief the factors germane to the stay analysis, the discrete question of whether to grant a stay—which is distinct from the underlying merits of the case—has already been fully litigated and resolved by the court, and is not subject to appellate review. Similarly, Amicus's citation of *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018), is inapposite because that case involved no reasoned opinion; the vacated en banc D.C. Circuit was written in an expedited fashion. *See* Amicus Br. 7; *see Garza v. Hargan*, 874 F.3d 735, 736 (D.C. Cir. 2017) (en banc) (stating only that it was acting "substantially for the reasons set forth" in the panel's dissent). Amicus argues that, under *Trump v. Hawaii*, 138 S. Ct. 377 (2017), vacatur is necessary here because, regardless of who caused the case to be moot, the decision in question "could spawn[] . . . legal consequences in future cases on critical issues including justiciability." Amicus Br. 9-10 (quoting Letter Brief 1, *Trump v. Int'l Refugee*

Assistance Proj., 138 S. Ct. 353 (2017) (mem.) (No. 16-1436)). Those cases did not involve the vacatur of a motion panel's stay request. *See Hawaii*, 138 S. Ct. at 377; *Int'l Refugee Assistance Proj.*, 138 S. Ct. at 353.

Although this Court does not appear to have addressed the issue, two other courts of appeals have declined to vacate a prior stay-panel opinion on the ground that such an opinion cannot create binding legal consequences on the merits. *Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 795 (11th Cir. 2020); *Hand v. DeSantis*, 946 F.3d 1272, 1275 n.5 (11th Cir. 2020); *FTC v. Food Town Stores, Inc.*, 547 F.2d 247, 249 (4th Cir. 1977). The Eleventh Circuit recently held that "vacatur of a prior stay-panel opinion once a case becomes moot on appeal is inappropriate—precisely because that stay-panel opinion *cannot* spawn binding legal consequences regarding the merits of the case." *Democratic Exec Comm.*, 950 F.3d at 795. Similarly, the Fourth Circuit reasoned that a stay order "is not a final adjudication of the merits of the appeal," and therefore it "has no res judicata effect and the rationale of the *Munsingwear* doctrine thus is inapplicable." *Food Town Stores*, 547 F.2d at 249; *accord Hand*, 946 F.3d at 1275 n.5 (following *Food Town Stores*: "We find the Fourth Circuit's reasoning persuasive and hereby adopt it and decline to vacate our prior stay-panel opinion.").

Here, the Court's stay opinion and corresponding stay order have not created any legal consequences on the merits that justify vacatur. The stay does not force Hassoun to take, or refrain from taking, any action going forward. It is "necessarily tentative and preliminary." *Democratic Exec. Comm.*, 950 F.3d at 795.

Accordingly, the Court's stay opinion does not fall within *Munsingwear*'s concern for a party who "is frustrated by the vagaries of circumstance [and] ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg.*, 513 U.S. at 25. The Court should decline to vacate its stay opinion.

The government notes that it is, of course, seeking *Munsingwear* vacatur of the district court's decisions. But there is no tension between that motion and the government's position here, and vacatur of the district court's ruling on the merits—as opposed to a stay ruling—instead falls comfortably within the *Munsingwear* doctrine. There is precedent for vacating some but not all decisions in a case. *See, e.g.*, *Selig v. Pediatric Speciality Care, Inc.*, 551 U.S. 1142 (2007) (vacating the court of appeals decision); *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, No. 05-1668 Docket Entry (8th Cir. Sept. 17, 2007) (dismissing the appeal without specifying vacatur of district court opinion on same topic). Thus, vacatur of one set of rulings in a case does require vacatur of all rulings in the case.

Even if *Munsingwear* did apply, the government strongly rejects Hassoun's contention that it unilaterally mooted this case and that vacatur is therefore "required" if sought by Hassoun. Mot. 16-17; *see* Vacatur Reply 2-5 (C.A. Dkt. 103). Moreover, to Amicus' suggestion that that vacatur is required under *Munsingwear* because Hassoun's removal "was *not* mooted by any action of" Hassoun is likewise incorrect. Amicus Br. 10 (C.A. Dkt. 93) (referring to it as a "separate reason[]" "militat[ing] in favor of vacatur"). These arguments ignore Supreme Court precedent holding that vacatur is an "equitable" determination not

solely reliant on which party caused the action to become moot. *U.S. Bancorp Mortg.*, 513 U.S. at 23-25; *see Microsoft Corp. v. Bristol Tech., Inc.*, 250 F.3d 152, 155 (2d Cir. 2001) ("exceptional circumstances" can justify vacatur even where the losing party helped cause mootness through settlement); *United States v. Weatherhead*, 528 U.S. 1042 (1999); Br. of Pet'rs, *id.*, 1999 WL 988266 (ordering vacatur where the losing party involved, the U.S. government, conceded in its brief it had some minimal involvement). They also do not account for the fact that Hassoun received the relief he was seeking in this litigation and that the district court ordered: release from custody.

Hassoun argues the Court should withdraw its opinion because the ruling was wrong and went beyond the parties' briefing. Mot. 14-15, 18-20. For example, he argues the panel should not have reached jurisdictional issues (that Hassoun himself had raised, Stay Opp. 11-13 (C.A. Dkt. 37)) and should not have "adopted arguments concerning numerous federal statutes and cases that neither party discussed in their stay briefing." Mot. 15-15, 18-19.[3] These are not *Munsingwear* arguments and should not factor into that analysis. Further, Hassoun does not identify the basis for his claim that the Court cannot cite cases neither party did. As for his argument that

[3] Relatedly, Hassoun claims that "had the district court not invalidated the regulation," then "two different appellate courts would have been asked to review the same evidentiary rulings, findings of fact, and conclusions of law simultaneously." Mot. 19 n.7. That is incorrect; had the district court upheld the regulation, then the case would have ended, as there would have been a lawful basis for Hassoun's detention, and no court would have needed to examine the legality of detention under the statute. *See* 8 U.S.C. § 1226a(a)(6) (providing authority to detain an alien "for additional periods of up to six months" where the alien "is detained *solely* under" § 1226a) (emphasis added).

the Court should not have conducted an analysis under *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), Mot. 20, Hassoun neglects to mention that the district court explicitly relied on *Brand X*, Order 17-19 (Dkt. 55), which was discussed during the only oral argument on the regulation, Tr. of Nov. 22, 2019 Argument 8-17, 48-49 (Dkt. 56). That argument was fairly before this Court.

Amicus also suggests the stay should be vacated because the parties were not afforded sufficient time for briefing and oral argument. Amicus Br. 10. There is no indication in the record that Hassoun lacked sufficient time to draft his opposition papers. Indeed, Hassoun consented to the briefing schedule this Court imposed, *see* Stay Mot. 5, and never moved for an extension of time thereafter. This Court was certainly entitled to explain the basis for its stay ruling, as it advised the parties. Thus, the record is devoid of indicia that the Court lacked sufficient briefing or argument to be fully apprised of the legal issues presented in the government's stay motion.

Finally, Hassoun's and Amicus' suggestion the government was dilatory in waiting to file the instant appeal, Mot. 17-18; Amicus Br. 11, is baseless. As the government explained in its own *Munsingwear* vacatur reply, the government cannot be faulted for declining to attempt to take an interlocutory appeal that both this Court and the district court had to approve and that the Court has never required an appellant to take in order to secure *Munsingwear* relief. Vacatur Reply 5-6.

CONCLUSION

This Court should deny Hassoun's motion for vacatur.

Dated: August 27, 2020

Respectfully submitted,

JAMES P. KENNEDY, JR.
United States Attorney

DANIEL B. MOAR
Assistant United States Attorney
Western District of New York
138 Delaware Ave.
Buffalo, NY 14202
(716) 843-5833

ETHAN P. DAVIS
Acting Assistant Attorney General

WILLIAM C. PEACHEY
Director

TIMOTHY M. BELSAN
Chief, National Security & Affirmative Litigation Unit

/s/ Steven A. Platt
STEVEN A. PLATT
Counsel for National Security
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
(202) 532-4074
steven.a.platt@usdoj.gov

JOHN J.W. INKELES
Counsel for National Security

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing opposition 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 opposition complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,197 words according to the count of Microsoft Word, excluding the materials permitted to be excluded by Rule 32(f).

/s/ Steven A. Platt

STEVEN A. PLATT
Counsel for National Security

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 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

STEVEN A. PLATT
Counsel for National Security