No. 20-2056

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ADHAM AMIN HASSOUN,

Petitioner–Appellee,

v.

JEFFREY SEARLS, in his official capacity as Acting Assistant Field Office Director and Administrator, Buffalo Federal Detention Facility,

Respondent–Appellant.

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

PETITIONER–APPELLEE'S REPLY IN SUPPORT OF MOTION TO VACATE MOTIONS PANEL'S OPINION GRANTING THE GOVERNMENT'S MOTION FOR A STAY

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INTRODUCTION

Petitioner's motion to vacate the stay panel's opinion made two independent arguments: first, the opinion should be vacated because it was an improvidently issued advisory opinion; second, the opinion should be vacated because *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), requires it. The government hardly engages with either argument. Instead, it evades concrete points, misrepresents Petitioner's arguments, and makes bare assertions.

None of these tactics change the bottom line: At the time the motions panel issued a one-line order staying Petitioner's release into the United States, three things were true: (1) Petitioner's removal from the country was imminent and virtually assured; (2) the government, with Petitioner's consent, had moved to postpone briefing on its own motion to stay while that removal went forward; and (3) Petitioner's release into the United States, which had been ordered by the district court, could not be effectuated unless the panel itself dissolved the indefinite administrative stay it had already put into place. Given this, the panel's order was entirely unnecessary; in practical terms, neither the order nor the opinion—which the panel issued more than a week after Petitioner was freed from government custody—affected any live controversy between the parties. The opinion is advisory, and the Court should vacate it for that reason.

Alternatively, the Court should vacate the opinion under *Munsingwear* because the government mooted its own appeal, and further because leaving the opinion on the books would, under the circumstances, be inequitable.

ARGUMENT

I. The motions panel's opinion should be vacated as an improvidently issued advisory opinion.

The government's efforts to defend the propriety of the opinion fail.

1. The government argues that because Petitioner has not cited any case "establishing that a habeas petition seeking release can be moot *before* release," his first argument for vacatur fails. ECF 107 at 8. This elides Petitioner's actual argument: that the controversy over the government's motion for a stay was practically (not formally) moot. Whether a prior habeas case has presented this circumstance is neither here nor there; as Petitioner argued, this is the "rare" and "special" case meriting vacatur of an improvidently issued advisory opinion. ECF 87 at 15.

2. The government contends that because Petitioner's habeas petition sought his immediate release, its motion to stay that release could not have been moot (practically or formally) prior to his actual removal. ECF 107 at 8. But what is relevant here is the relief *the government itself* sought in its motion to stay Petitioner's release pending appeal—namely, a pause in the order of release while the government litigated its appeal. By July 15, the government's own position was

that this relief was, barring an extraordinary development, unnecessary. *See* ECF 43-1 (sworn agency declaration concerning Petitioner's imminent removal in support of government's consent motion to postpone deadline for its reply brief). Thus, the questions presented by the government's stay motion "require[d] no answer." *Mo., Kan. & Tex. Ry. Co. v. Ferris*, 179 U.S. 602, 606 (1900); *see* ECF 87 at 12–15.

The government points to the fact that it did file a reply brief—in this Court, though not in the D.C. Circuit, where it sought an identical stay—as evidence that it "continued to defend its detention" of Petitioner. ECF 107 at 10. That carries little weight: the government moved this Court to *postpone* the filing of its brief. The motions panel did not act on that motion, leaving the government with little choice but to file against its own express wishes. *See* ECF 87 at 7–8.

The government also suggests that under Petitioner's argument, because the government "desired" Petitioner's removal for almost two years, "this case has been moot since July 2018." ECF 107 at 10. But that is unserious. It was the parties' ultimate alignment on the result in this case—culminating in the government's consent motion to postpone its reply brief deadline upon the government's sworn representations that Mr. Hassoun would be removed imminently absent extraordinary, unforeseen events—that caused the government's motion to become practically moot, not any vague desire that had

existed for years as the parties engaged in adversarial litigation. *See* ECF 87 at 12–13.

3. The government recites the history of its attempts to remove Petitioner in this case as proof that "expectant removals can fall through." ECF 107 at 10. That history hardly helps the government's cause. At no other point in this litigation did the government express anything close to the certainty it expressed to this Court; at most, it represented that it had made a request to another country but had not yet received a response. *See Hassoun v. Sessions*, 2019 WL 78984, at *2 (W.D.N.Y. Jan. 2, 2019). The trial court concluded that the government's plans at that point were essentially speculative. *Id.*, at *5. The government then certified Petitioner for indefinite detention under the regulation and then the statute, both of which apply only where removal is *not* reasonably likely to occur.[1]

4. The government suggests that only an order granting its motion to stay—as opposed to the multiple administrative stays already in place—could have prevented Petitioner's release. *See* ECF 107 at 11. Not so. It is true that "[e]ither or both courts"—this Court or the D.C. Circuit—could have lifted their administrative

[1] The government asserts that, while its motion to stay was pending, Petitioner was "jeopardizing the government's removal efforts" in ways that had the "real potential to negatively impact the plans for his removal." ECF 107 at 10–11. Yet on July 20, an agency official swore that Petitioner's removal would happen that week and that the "logistical arrangements" were being "finaliz[ed]," with "*no known obstacles that would prevent*" it. ECF 67 ¶ 6 (emphasis added).

stays "at any time." *Id.* But Petitioner had *consented* to these administrative stays to facilitate his removal from the country. *See* ECF 87 at 8–9. And whether or not the D.C. Circuit—which, in an order noticed to this Court, ECF 87 at 8, deferred action on the government's motion until at least July 28, DC-ECF 1851462—eventually denied the government's motion, *this* Court's administrative stay would have continued to prevent Petitioner's release.

In other words, the motions panel's July 16 order was improvident because that the *same panel* had already effectively ordered the *same relief* through its indefinite administrative stay; the opinion explaining that order is improvident and advisory in turn. *See* ECF 87 at 13.

5. Contrary to the government's assertion, *see* ECF 107 at 13, Petitioner does not argue that a court may *never* issue an order and later explain it. Rather, he argues that, *in this case*, "there was nothing necessary about either *the order or the explanation*," and that the panel should not have issued either one. ECF 87 at 13 (emphasis added). Indeed, the government itself points out that the order-and-later-opinion procedure is "particularly" appropriate "where quick court action is requested," ECF 107 at 13—yet as explained above, far from requesting quick "court action," the government sought to *delay* it.

To support its argument that it is appropriate for a court to quickly issue an order in a case with constitutional significance and only explain it later in a

reasoned opinion, the government turns to a truly striking—and inapposite—example: *Ex parte Quirin*, 317 U.S. 1 (1942). There, the Supreme Court issued a short per curiam opinion denying the habeas petitions of alleged Nazi saboteurs (including one U.S. citizen) in the custody of the United States military. Three months later, it issued an opinion explaining its reasoning. But in *Quirin*, unlike here, there *was* a pressing and practical need for the Court to issue the initial order. President Roosevelt had sought to swiftly proceed with the military trial—and execution—of the alleged enemy saboteurs during the height of World War II, which the petitioners sought to halt. *Id.* at 24. So urgent was it to "consider and decide" the "public importance of the questions raised by their petitions" "without any avoidable delay" that the Supreme Court convened a special session to hear argument, and then issued the order denying the petitions two days later. *Id.* at 19–20. And that order *did* affect the parties: by denying habeas relief, it allowed the military trial to proceed, and six of the eight petitioners (including the U.S. citizen) were executed.[2]

[2] *Quirin*, has come in for blistering criticism. Indeed, members of the *Quirin* Court (including its author) regretted the decision and the procedure that produced it. *See* Br. of Historians and Scholars of *Ex Parte Quirin* as Amicus Curiae in Supp. of Pet'r, *Al-Marri v. Spagone*, No. 08-368, 2009 WL 230946, at *15–19 (U.S. Jan. 28, 2009); *see also* David J. Danelski, *The Saboteur's Case*, 21 J. Sup. Ct. Hist. 61 (1996) (explaining that *Quirin* was "an agonizing effort to justify a *fait accompli*"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 569–72 (2004) (Scalia, J., dissenting) ("[*Quirin*] was not this Court's finest hour").

6. The government has nothing at all to say about the gravamen of Petitioner's first argument: that the panel's stay opinion is impermissibly advisory and violates the longstanding principle of judicial restraint. *See* ECF 87 at 10–15.

II. The motions panel's opinion should be vacated under *Munsingwear*.

The government argues that *Munsingwear* vacatur is inappropriate here because the "policy underlying *Munsingwear* . . . does not apply" to the stay opinion. ECF 107 at 14. The government is wrong for multiple reasons.

1. According to the government, *Munsingwear* never applies to stay opinions because they do not "spawn legal consequences." ECF 107 at 15 (quoting *Munsingwear*, 340 U.S. at 40–41). For support, it cites three decisions in which the Eleventh and Fourth Circuits declined to vacate to stay opinions when the litigation underlying the opinions had become moot. *Id.* at 16 (citing *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)). All three decisions held that the stay opinions under consideration did not require vacatur because they lacked *res judicata* effect.

As Petitioner explained, ECF 87 at 20–21, even under the reasoning that guided those decisions, *Munsingwear* vacatur may be justified when a stay opinion could have a precedential effect, *see Democratic Exec. Comm. of Fla.*, 950 F.3d at

795 n.2. Here, the motions panel's ruling on jurisdiction—at least—may be precedential. *See* ECF 87 at 19–20, 21. The government does not address this argument.[3]

2. In any event, appellate opinions can have significant legal consequences even if they are neither preclusive nor precedential. *See id.* at 21 (discussing *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam); ECF 93 at 7 (Br. of Amicus Curiae Stephen I. Vladeck). In *Garza*, the Supreme Court held that an interim appellate order lacking preclusive effect "[fell] squarely within the Court's established practice" of granting equitable vacatur in the wake of mootness. 138 S. Ct. at 1793. The government brushes *Garza* aside, speciously asserting that it does not count because the appellate order under consideration there "was written in an expedited fashion." ECF 107 at 15. But the *Garza* Court made clear that the order represented a wheelhouse *Munsingwear* case.

Moreover, the opinion at issue here is far *more* likely to spawn significant legal consequences than the order the Supreme Court vacated in *Garza*. *See* ECF 93 at 4–7. As the government observes, *Garza* "involved no reasoned opinion." ECF 107 at 15. The motions panel's stay opinion, by contrast, contains extensive

[3] *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 149 (2d Cir. 1999), held that a motions panel's rulings on jurisdiction do not bind a later merits panel under the law-of-the-case doctrine, but there will be no merits panel here.

reasoning on novel statutory and constitutional questions that go to the heart of the executive's detention power and the Judiciary's relationship thereto. There is no body of law on the questions the Court decided regarding jurisdiction, the validity of the regulation under 8 U.S.C. § 1231, and the constitutional problems the regulation raises. *See* ECF 87 at 18–20. The panel's stay opinion is the *only* appellate opinion that addresses them—not just in the Second Circuit, but in the entire nation. As amicus observes, "a published, 25-page opinion in support of a stay . . . would be treated as a strongly persuasive, if not binding, precedent in the relevant jurisdictions." ECF 93 at 5.[4]

3. The government argues that even if stay opinions are not categorically exempt from *Munsingwear* vacatur, vacatur is nevertheless inappropriate because the government did not unilaterally moot Petitioner's case. *See* ECF 107 at 17. Petitioner has explained that that is not correct. *See* ECF 87 at 16–18 (explaining why the government bears responsibility for mooting its own appeal); *id.* at 18–19 (explaining why Petitioner bore no such responsibility). Vacatur is therefore necessary. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994)

[4] Contrary to the government's assertion, ECF 107 at 18, Petitioner nowhere argued that the opinion should be vacated because it is wrong. Regardless, the government's critique is rich: in its own motion to vacate the district court's decisions, it argued that vacatur was appropriate because "this Court likely would have ruled in the government's favor and reversed the district court's judgment." ECF 82 at 1, 15.

(vacatur "must be granted" whenever "mootness results from the unilateral action of the party who prevailed"). But even if it were true that the government did not *unilaterally* moot this appeal, its actions were indispensable to the appeal's mootness and Petitioner's inability to seek further review—and that weighs heavily in favor of vacatur. While vacatur is "not solely reliant on which party caused the action to become moot," ECF 107 at 17–18, that hardly makes the government's role in causing mootness here irrelevant.

4. Contrary to the government's assertion, Petitioner did not argue that courts "cannot cite cases neither party did," ECF 107 at 18, or that he "lacked sufficient time to draft his opposition papers," *id.* at 19. Petitioner merely noted that the motions panel's opinion went beyond the parties' briefing (which is severely limited by the Federal Rules) in explaining its conclusions. As a matter of equity, that fact supports *Munsingwear* vacatur. Likewise, Petitioner did not argue that it was a "require[ment]" under *Munsingwear* for the government to file an interlocutory appeal in December 2019, ECF 107 at 19, but that the government's decision not to seek such an appeal fact contributes to the inequity of allowing the panel's opinion to stand. *See* ECF 87 at 17–18.

CONCLUSION

Respectfully, the Court should vacate the motions panel's stay opinion.

Date: September 3, 2020

Respectfully submitted,

/s/ *Jonathan Hafetz*

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2020, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. No party is unrepresented in the appellate CM/ECF system.

Date: September 3, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,479 words. This brief also 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 was prepared in Microsoft Word and uses 14-point Times New Roman, a proportionally spaced typeface.

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