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 CONSOLIDATED AND OVERSIZED PETITION FOR REHEARING EN BANC CONCERNING THE PARTIES' RESPECTIVE MOTIONS TO VACATE DISTRICT COURT AND APPELLATE OPINIONS

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STATEMENT OF RATIONALE FOR GRANTING *EN BANC* REVIEW

The panel's disposition of the parties' dueling motions for vacatur raises serious questions about the proper role of Article III judges in our constitutional system, the fundamental prohibition on advisory opinions, and the role of motions panels in the Court's generation and supervision of judicial precedent. These questions, which at their core relate to the propriety of past and future conduct of this Court's esteemed judges, are matters of exceptional importance warranting review by the full Court.

In addressing the government's motion to stay Petitioner's release upon a grant of habeas, the motions panel issued a wide-ranging opinion as part of a highly unusual process. After the government abandoned any attempt to prove Petitioner's factual detainability on the eve of trial in the district court, it appealed the district court's release order simultaneously to this Court and the D.C. Circuit, contending that it could take bifurcated appeals concerning the two authorities upon which it relied to detain Petitioner. (Petitioner argued that the D.C. Circuit maintained jurisdiction over the entire appeal.)

The government then sought a stay of Petitioner's release in each circuit court while it concurrently engaged in rapid and intense negotiations with both Petitioner and a third country to effectuate Petitioner's removal. It then informed both circuits, by sworn agency declaration, that such removal was

imminent, and as a result it asked both courts (with Petitioner's consent) to defer resolution of its stay motions.

But this Court's motions panel—unlike the D.C. Circuit's—ignored the consent request and quickly issued a one-line order granting the stay. Ultimately, it published a twenty-five page opinion "explaining" its rushed order seven days after the government had actually removed Petitioner from the United States. In that opinion, the panel not only endorsed the government's jurisdictional theory permitting bifurcated appeals, but rejected the district court's conclusion, issued six months prior, that a regulation relied upon by the government to indefinitely detain Petitioner was not authorized by Congress and violated due process. The panel subsequently granted the government's motion to vacate the district court's judgment and rulings on the regulation, and it denied Petitioner's motion to vacate its own stay opinion.

Petitioner now seeks *en banc* review of the panel's two rulings on the parties' cross-motions to vacate.

First, the Court should grant *en banc* review of the panel's decision denying Petitioner's motion to vacate its prior stay opinion as an improvidently issued advisory opinion and under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The panel's stay opinion was entirely unnecessary and is fundamentally advisory. Indeed, the government asked the panel *not* to issue

it: it filed a consent motion to postpone its briefing deadline on the stay motion because Petitioner's removal (and mootness) was imminent "[a]bsent an extraordinary or unforeseen circumstance." ECF 43-1 at 1.

Nonetheless, the panel quickly issued its one-line order and after Petitioner's removal issued an opinion that reaches out to decide difficult and exceptionally important questions of first impression concerning the executive's unilateral authority to detain non-citizens without judicial factfinding. The panel's opinion ranges over questions about the government's authority to subject non-citizens to indefinite detention inside the United States; the federal courts' authority even to question the executive's factual assertions in habeas proceedings; and this Court's jurisdiction over half of the government's bifurcated appeal. Petitioner was unable to seek further review of the panel's opinion because the government rendered this case moot by removing him. Neither the opinion nor the order it explains were necessary to the resolution of this case, and leaving the now-unreviewable opinion in place would encourage similar excesses in future motions panels.

Second, the Court should grant *en banc* review of the motions panel's decision to grant the government's motion to vacate the district court's ruling on the regulation purporting to authorize Petitioner's indefinite detention. That ruling held that the regulation was *ultra vires* and raised grave constitutional

problems. The panel's decision to vacate that ruling, while preserving its own opinion on the regulation's validity, raises serious questions about the proper role of a motions panel in the appellate process. Among other things, the panel's application of *Munsingwear* ignores the factual record, and it conflicts with the D.C. Circuit's refusal—in response to the government's near-identical motion in this same case—to vacate the district court's opinion concerning a parallel detention authority. Finally, the panel's grant of the government's vacatur motion incentivizes the government to utilize its near-unchecked power over the timing and circumstances of a non-citizen's removal to use mootness as a means to wash away adverse lower-court rulings in this and future cases.

STANDARD FOR *EN BANC* REVIEW

In this Court, "[a]n en banc hearing . . . is not favored and ordinarily will not be ordered *unless*: . . . (2) the proceeding involved a question of exceptional importance." FRAP 35(a)(2) (emphasis added).

BACKGROUND

The history of this case is long and, unfortunately, sordid. It involves the year-plus detention of an individual on factual grounds the government eventually abandoned after six months of discovery exposed them as, in the district court's words, unable to "bear meaningful scrutiny." WDNY-ECF 256

at 20 (district court opinion denying government's request for a stay of Petitioner's release pending appeal). It further involves government misconduct and misrepresentations that the district court continues to evaluate as sanctionable. WDNY-ECF 225, 258, 281. This history is more fully described in Petitioner's opposition to the government's stay motion and his motion to vacate the stay opinion. ECF 37-1 at 3–9; ECF 87 at 2–9.

District Court Habeas Litigation

Petitioner, a stateless Palestinian, completed a criminal sentence in October 2017 following his conviction for conspiracy and material support for terrorism. This conviction was predicated on, in the sentencing court's words, "provid[ing] support to people sited in various conflicts involving Muslims" abroad that had "no identifiable victims." WDNY-ECF 248-16 at 6, 14. Notably, at Petitioner's sentencing, the court rejected "the government's argument that Petitioner pose[d] such a danger to the community that he need[ed] to be imprisoned for the rest of his life" and imposed a sentence nearly fifteen years *below* the Guidelines range—a sentence the government did not appeal. *Id.* at 8, 16–17.

After completing his sentence, Petitioner was placed in immigration detention in Buffalo, New York, pending removal. In February 2019, Petitioner won his first habeas petition because his removal was not reasonably

foreseeable. *Hassoun v. Sessions*, 2019 WL 78984, at *6 (W.D.N.Y. Jan. 2, 2019) (applying *Zadvydas v. Davis*, 533 U.S. 678 (2001)). The government then moved to certify him for indefinite detention as dangerous to national security. WDNY-ECF 256 at 3–4. The government initially indicated it would rest its detention authority on a regulation, 8 C.F.R. § 241.14(d). Months later, the government formally certified Petitioner under that regulation *and* an alternative authority: a provision of the USA PATRIOT Act, 8 U.S.C. § 1226a. These certifications were made by the Secretary of Homeland Security, without a hearing before an immigration judge or other neutral decisionmaker, and without any opportunity for Petitioner to examine the evidence underlying the government's allegations. Petitioner's amended habeas petition challenged his detention under both authorities.

In December 2019, the district court invalidated 8 C.F.R. § 241.14(d) as *ultra vires* because (1) the Supreme Court had interpreted the authorizing statute, 8 U.S.C. § 1231(a)(6), "not [to] allow for indefinite detention of any class of aliens that it covers," and (2) the regulation lacked fundamental due process safeguards, such as a neutral decisionmaker and a clear burden and standard of proof. WDNY-ECF 55 at 25.

As to the PATRIOT Act, the court reserved decision on Petitioner's constitutional challenges, ordered an evidentiary hearing, WDNY-ECF 55 at

26–27, and permitted limited discovery, WDNY-ECF 58. Over the next six months, the government's case unraveled. As the district court later explained, the factual basis for Petitioner's detention rested solely on an "administrative record" that includes *nothing* postdating Petitioner's criminal conviction except an FBI "letterhead memorandum . . . summarizing allegations that various other detainees at the BFDF had made against Petitioner." WDNY-ECF 256 at 19 (discussing Admin. R., WDNY-ECF 17-2, Ex. A, Attachment 1). The district court found that these allegations were "an amalgamation of unsworn, uninvestigated, and now largely discredited statements by jailhouse informants, presented as fact," *id.* at 24, that "cannot bear meaningful scrutiny," *id.* at 20. It further concluded that "[f]ar from demonstrating that Petitioner is so dangerous that he must be detained, the [FBI letterhead memorandum] illustrates a more potent danger—the danger of conditioning an individual's liberty on unreviewable administrative factfinding." WDNY-ECF 256 at 34.[1]

[1] The government's false allegations have generated sanctions proceedings that remain ongoing below. WDNY-ECF 225, 258, 281. For example, Petitioner independently discovered evidence that the core allegation levelled by the government's key witness precisely matched an allegation that the same witness had levelled against *someone else* a decade earlier while working as an FBI informant. *See* WDNY-ECF 256 at 20–21. Evidence of this cut-and-paste fabrication had been in the government's central file all along—yet the government had failed to disclose it. It was only after Petitioner's counsel

On June 18, six days before the scheduled evidentiary hearing, the government moved to cancel it and asked the court to enter judgment in Petitioner's favor. WDNY-ECF 226. The government conceded on the record that it could not have proved its case by clear and convincing evidence, WDNY-ECF 241 at 6:6–7, or even by a preponderance of the evidence, WDNY-ECF 244 at 9:19–21. *See* WDNY-ECF 256 at 30 & n.12. Before the district court acted, on June 24, the government moved to stay Petitioner's release pending its forthcoming appeal. WDNY-ECF 242.

On June 26, while the parties briefed its stay motion in the district court, the government publicly filed a joint stipulation that, for the first time since the commencement of the litigation, extended the parties' protective order to permit confidential discussion of "information regarding the U.S. government's efforts to remove Petitioner from the United States." WDNY-ECF 249 at 2.

On June 29, the district court denied the government's motion to stay, ordered Petitioner's release under agreed-upon conditions of supervision, and entered final judgment. WDNY-ECF 256; WDNY-ECF 264.

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independently obtained this evidence, and presented it to the Court, that the government withdrew the witness because of concerns about his "ability to truthfully testify." WDNY-ECF 180 at 2.

Appellate Litigation & Removal Efforts

The government appealed the district court's ruling on the regulation in this Court and simultaneously appealed the relevant PATRIOT Act rulings to the D.C. Circuit. WDNY-ECF 259; WDNY-ECF 260. On June 30, the government moved in both this Court and the D.C. Circuit to stay the district court's release order. *See* ECF 9-1; DC-ECF 1849825.[2]

After the government moved for a stay in this Court, the parties consented to a briefing schedule and the imposition of an administrative stay of Petitioner's release. ECF 9-1 at 1, 5. The parties' agreement—and the Court's quick endorsement of it, ECF 16—ensured Petitioner would remain in government custody until and unless the government's entitlement to a stay was ultimately decided in Petitioner's favor, whether by the motions panel, the *en banc* Court, or the Supreme Court. Indeed, because the government filed twin appeals (and twin stay motions) in this Court and the D.C. Circuit, Petitioner would have remained in government custody until *both* of the government's motions to stay were finally adjudicated—unless the government itself chose another course, as it ultimately did.

[2] The government's D.C. Circuit appeal is No. 20-5191.

Initially, this Court's administrative stay extended only through July 15, ECF 16, but on July 13, the motions panel extended it indefinitely, "until further order of this Court." ECF 41. That matched the action of the D.C. Circuit's motions panel on July 1. DC-ECF 1849887; *see* ECF 25.

That same day, the government moved in both courts—again, with Petitioner's consent—to postpone briefing on its motion to stay, "based on material progress in achieving Petitioner–Appellee's removal from the United States." ECF 43-1 at 1. That removal, a government official represented under penalty of perjury, would happen by July 27 "[a]bsent an extraordinary or unforeseen circumstance." *Id.* The D.C. Circuit promptly granted the government's motion. DC-ECF 1851462. This Court, however, took no action on the government's request.

Facing an unchanged briefing deadline in this Court, the government filed its reply. ECF 49. Even so, on July 14, the government notified the Court that the D.C. Circuit had, the day before, granted its identical consent motion in that court, postponing any reply brief and ultimate decision until at least July 28, and reiterating that the D.C. Circuit's administrative stay preventing Petitioner's release remained in effect indefinitely, until further order of the court. ECF 56-1.

At that point—the end of the day on July 14—the government had represented to two appellate courts that Petitioner's removal was imminent and as close to guaranteed as possible. Two administrative stays of indefinite duration were in place, both of which would have had to be actively dissolved by their respective motions panels before Petitioner's release could be effectuated. And Petitioner—who had weeks earlier won his release after eighteen months of litigation—had consented to all of this upon the same government representations about imminent release it had made to multiple courts. *See* WDNY-ECF 277-1 ¶ 5 (government counsel's declaration describing "at least eight" phone calls between the parties' counsel between June 26 and July 15). Petitioner was leaving the country, and the government had effectively—with the protection of two consented administrative stays—abandoned its request for emergency relief pending his removal, which was a foregone conclusion.

Nevertheless, on July 16, this Court's motions panel granted the government's motion for a stay pending appeal in a one-line order, noting only that an opinion would be "forthcoming." ECF 60.

On July 20, the government filed another notice reiterating that Petitioner's removal would happen that week. ECF 67. That notice included another sworn agency declaration representing that the government "is now in

the process of finalizing the logistical arrangements required to effectuate [Petitioner's] removal," and "there are no known obstacles that would prevent Mr. Hassoun's removal as scheduled." Decl. of Marlen Piñeiro ¶ 6, ECF 67 at 3. Two days later, on July 22, the government removed Petitioner and notified this Court. ECF 72.

On July 30, more than a week after Petitioner had been resettled, the panel issued an opinion deciding important jurisdictional and merits issues of first impression that, because of Petitioner's removal, would never conceivably be subject to a merits panel's review. ECF 76.

First, the panel concluded that it had jurisdiction, rejecting Petitioner's argument that the D.C. Circuit, by statute, has exclusive jurisdiction over the entirety of the government's appeal. ECF 76 at 8–14. The panel's lengthy discussion relied on arguments concerning numerous federal statutes and cases that the parties had not briefed.

Second, the panel concluded that the government had made a "strong showing of a likelihood of success" on its argument that the regulation was not *ultra vires*. ECF 76 at 14. The panel relied principally on an argument that the government had affirmatively waived below relating to deference under *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005)

(citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44, 843 n.11 (1984)). ECF 76 at 16, 18; WDNY-ECF 56 at 48–49 (waiver).

Third, the panel indicated that detention under the regulation "might not violate the Due Process Clause" even if there were no judicial review of the "Secretary's factual determinations." ECF 76 at 20 n.2. This proposition is radical and incorrect. "The Supreme Court has been unambiguous that executive detention orders, which occur without the procedural protections required in courts of law, call for the most searching review." *Velasco Lopez v. Decker*, No. 19-2284, 2020 WL 6278204, at *5 (2d Cir. Oct. 27, 2020).

Fourth, the panel determined that a mere "preponderance of the evidence" would likely be enough to justify indefinite detention in this context. *See* ECF 76 at 21–23. This pronouncement also breaks with settled principles. "The Supreme Court has consistently held the Government to a standard of proof higher than a preponderance of the evidence where liberty is at stake, and has reaffirmed the clear and convincing standard for various types of civil detention." *Velasco Lopez*, 2020 WL 6278204, at *9 (clear-and-convincing evidence standard applies to detaining non-citizens in removal proceedings). The panel also ignored that the government had *conceded* its inability to prove that Petitioner was detainable even by a preponderance of the evidence.

Fifth, the Court found that the equities favored a stay, focusing primarily on Petitioner's supposed dangerousness. But the panel utterly ignored the district court's determination that the government's allegations against Petitioner were not credible, and it relied on his criminal conviction as evidence of a "recidivism" risk even though the sentencing court "expressly found that Petitioner was unlikely to reoffend upon completion of his sentence." WDNY-ECF 256 at 40 (citing Sentencing Transcript, *United States v. Hassoun*, No. 04-cr-60001 (S.D. Fla. Jan. 22, 2008)).

Finally, the panel indicated that "[i]n the interest of judicial economy, any future proceedings on appeal shall be assigned to this panel." ECF 76 at 25.

Parties' Motions for Vacatur

On August 5, the government moved in both this Court and the D.C. Circuit for assorted relief. ECF 82; DC-ECF 1855258. First, it sought to dismiss its appeals as moot, given Petitioner's removal. Second, it sought to "vacate the district court's judgment and all rulings on or pertaining to 8 C.F.R. § 241.14(d)," ECF 82 at 2, and 8 U.S.C. § 1226a, DC-ECF 1855258 at 2, under *Munsingwear*. As to the latter, the government argued that *Munsingwear* vacatur was appropriate because the government's ability to

appeal the district court's rulings had been frustrated not by its own actions but by "a foreign country's sovereign decision to accept" Petitioner. ECF 82 at 13.

On August 17, Petitioner did not oppose dismissal of the appeal as moot, but opposed the government's *Munsingwear* motion. Petitioner explained that the government bore responsibility for the timing of Petitioner's removal and the mootness of its own appeal. As Petitioner showed, ECF 87 at 16–18, the government's relevant removal efforts surfaced only as it prepared to file emergency motions to stay in two appellate courts. Indeed, it was not until June 26, while its emergency motion to stay Petitioner's release was already pending in the district court, that the government approached Petitioner's counsel to amend the parties' protective order to be able to share information about Petitioner's removal. WDNY-ECF 249. Moreover, this flurry of activity immediately followed the government's abrupt, eleventh-hour decision to cancel the evidentiary hearing, abandon its opportunity to examine Mr. Hassoun under oath, concede its factual case, and acquiesce in the district court's grant of Petitioner's habeas petition.

Also on August 17, Petitioner cross-moved in this Court to vacate the motions panel's July 30 stay opinion for two independent reasons. ECF 87. First, vacatur was appropriate because the stay opinion was an improvidently issued advisory opinion. *Id.* at 10–15. Second, vacatur was proper under

Munsingwear, principally because the government bore responsibility for the mootness, which precluded further review, and the equities favored relief. *Id.* at 15–22.

On September 22, in a twenty-three page opinion, the motions panel granted the government's motion to dismiss the appeal as moot, granted the government's motion for vacatur, and denied Petitioner's motion for vacatur. ECF 116-1.

First, the panel concluded that vacatur of the district court's rulings on the regulation was appropriate under *Munsingwear* because "the government's appeal was frustrated by the vagaries of circumstance . . . and the removal of Hassoun to a third country was the natural and apparently long-anticipated result of the government's immigration enforcement efforts." *Id.* at 16 (quotation marks and citations omitted). The panel wrote that Petitioner "points to no evidence—beyond speculation—that the government acted for reasons other than its statutory obligation to effectuate a removal." *Id.* at 18.[3] The panel further concluded that "the district court's decisions could have a preclusive effect in future litigation between the parties over the lawfulness of

[3] That assertion is incorrect. As Petitioner explained, the history of this litigation leaves no doubt that the timing of the government's removal efforts hinged on the progress of Petitioner's habeas suit. ECF 87 at 16–18.

[Petitioner's] detention." *Id.* at 19–20. The panel did not elaborate on what that effect might be—and as noted below, the panel concluded that its own opinion granting a stay of Petitioner's removal would have *no* future legal consequences.

Second, the panel concluded that its post-removal stay opinion "was not advisory" because the opinion merely "explained its previous order," which itself was appropriate because "the controversy between the parties remained live as long as Hassoun was detained." *Id.* at 9. Further, it rejected the significance of the government's representations about Petitioner's imminent removal because that removal was not an absolute "certainty." *Id.* at 10 n.2 (quoting the government's argument, in vacatur litigation, that its previous sworn representations about the imminence of Petitioner's removal were essentially unreliable). Critically, the panel only obliquely addressed the government's motion to postpone its briefing in light of Petitioner's imminent removal, suggesting that the government's consent request was irrelevant to mootness because "there remained a case or controversy unless and until Hassoun obtained the release he sought in his petition and the government no longer sought to detain him." *Id.* at 9 n.1 (citing *In re Flynn*, No. 20-5143, 2020 WL 5104220, at *1 n.2 (D.C. Cir. Aug. 31, 2020)). The panel did not explain why it had ignored that motion rather than granting it, as the D.C. Circuit had

done. Moreover (and remarkably), the panel suggested it was, in effect, *duty bound* to issue its one-line order when it did. ECF 116-1 at 13 n.5 (suggesting that staying its hand by relying on its own indefinite administrative stay and the government's request for adjournment "would arguably [have been] an abuse of discretion").

Third, the panel rejected Petitioner's *Munsingwear* argument in favor of vacatur of the stay opinion, principally because it concluded that "there are no legal consequences of the court's opinion for the parties, in terms of preclusion or even precedent," because it was issued by a motions panel. *Id.* at 22.

On October 13, the D.C. Circuit granted the government's motion to dismiss the appeal as moot, declined to grant the government's motion to vacate the district court's judgment and all rulings concerning 8 U.S.C. § 1226a, and "remanded to the district court with instructions to consider appellant's request for vacatur as a motion for relief from an order pursuant to Federal Rule of Civil Procedure 60(b)." DC-ECF 1865943.

ARGUMENT

I. The panel's refusal to vacate its stay opinion raises questions of exceptional importance with enormous consequences for this Court, its tradition of panel adjudication, and the Article III judiciary.

The panel's denial of Petitioner's vacatur motion was erroneous, and because of its implications, it merits correction by this full Court. But

regardless of whether the full Court ultimately agrees with Petitioner's position, the issues raised by the panel's conduct are of such exceptional importance that their scrutiny by the *en banc* Court is imperative.

A. The panel's stay opinion was purely advisory.

The panel here violated "the oldest and most consistent thread in the federal law of justiciability," which "is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, *Federal Courts* 34 (1963)). That rule "was established as early at 1793," and "has been adhered to without deviation." *Id.* at 96 n.14. And this Court has recently recognized that "it is well settled that this Court cannot offer advisory opinions on moot questions or abstract principles." *Baron v. Vullo*, 699 F. App'x 102, 103 (2d Cir. 2017) (citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)). Nor does a federal court have authority "to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895).

This principle is based in Article III's requirement that a court's jurisdiction is limited to "live cases and controversies." *In re Burger Boys, Inc.*, 94 F.3d 755, 759 (2d Cir. 1996). And this constitutional rule restrains the courts from deciding legal questions, or issuing judicial opinions, absent "'flesh-and-blood' legal problems" before them. *New York v. Ferber*, 458 U.S.

747, 768 (1982) (quoting Alexander Bickel, *The Least Dangerous Branch* 115–16 (1962)). That principle extends to "issues which are . . . , as a *practical* matter, moot," *U.S. ex rel. Ellington v. Conboy*, 459 F.2d 76, 79 (2d Cir. 1972) (emphasis added). As a result, no court can—and this Court will not—address issues in written opinions that are "moot for all practical purposes." *Sloan v. N.Y Stock Exch., Inc.*, 489 F.2d 1, 4 (2d Cir. 1973).[4] This judicial restraint is not only sensible, but required, because where events and circumstances "make[] it impossible" to grant "effectual relief," the federal courts are powerless to act. *Church of Scientology of Cal.*, 506 U.S. at 12 (quotation marks and citation omitted).

The motions panel ignored these restraints. It reached out to decide a motion that both parties had asked the court to defer; it did so fully aware that there was no actual dispute for it to resolve; it explicitly reserved the right to issue a subsequent opinion when it had been told by the government that the case would imminently be over; and after the case was over, it issued an opinion that reached out to answer several significant constitutional and other legal questions. The panel's opinion was advisory, and it should be vacated.

[4] *See, e.g.*, *In re Feit & Drexler, Inc.*, 760 F.2d 406, 413 (2d Cir. 1985) (describing multiple cases where the Supreme Court refused to hear appeals of criminals' convictions because their fugitive statuses meant "their challenges to their convictions might very well be moot as a practical matter").

In its vacatur opinion, the panel defended its actions by contending that the controversy was still technically live when it issued its order, as Petitioner was still detained. ECF 116-1 at 9. But Petitioner had in fact *consented* to his continued detention pending his imminent removal. The issue before the motions panel was moot, for all practical purposes. As the Supreme Court has recognized, mootness is not a formalistic exercise and has "become a blend of constitutional requirements and policy considerations." *Flast*, 392 U.S. at 97. For example, in the context of declaratory judgments, the Supreme Court, has "held that, basically," the question is whether the facts and circumstances present a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance" of a judgment or opinion. *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975) (emphasis omitted) (quotation marks and citation omitted). Such disputes must involve the "honest and actual antagonistic assertion of rights," and a "real, earnest, and vital controversy." *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892). And they must pit "conflicting and demanding interests" against one another, thereby presenting a question "necessary for decision from a clash of adversary argument." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). To the contrary, "[m]oot questions require no answer." *Mo., Kan. & Tex. Ry. Co. v. Ferris*, 179 U.S. 602, 606 (1900).

By the time the motions panel granted a stay, there was no longer a controversy for the court to resolve. Both parties had by then agreed to keep in place the status quo—*i.e.*, Petitioner's continued detention pending imminent removal. The government had represented to Petitioner (and two circuit courts) that this litigation would come to a close "[a]bsent an extraordinary or unforeseen circumstance," ECF 43-1 at 1, and, according to both parties, as of July 13, the questions presented by the government's motions to stay Petitioner's release required no answer from any court. Instead, at that point, the parties' interests and positions were *aligned*.

This alignment makes this Court's issuance of its order—and then a substantive judicial opinion eight days after Petitioner was actually released—entirely unwarranted, and likely unprecedented.[5] As the D.C. Circuit's staying

[5] Perversely, the panel turned to a truly striking—and inapposite—precedent for its conduct: *Ex parte Quirin*, 317 U.S. 1 (1942) (cited at ECF 116-1 at 13). 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.

of its own hand makes clear, there was no reason to grant the government's motion for a stay. The panel nevertheless did so, indicating that its late-issued opinion sought to "explain the reasons for [its July 16] ruling" granting the government's motion for a stay. ECF 76 at 4. But that only underscores its advisory nature: there was nothing necessary about the order or, therefore, its subsequent explanation. Neither the order nor opinion had any "tangible, demonstrable consequence." *Chathas v. Local 134 IBEW*, 233 F.3d 508, 512 (7th Cir. 2000); *cf. Coal. to End Permanent Cong. v. Runyon*, 979 F.2d 219, 219–20 (D.C. Cir. 1992) (explaining it is "imprudent" to issue an opinion explaining a past order after a case becomes moot because "several of the reasons behind the mootness doctrine and the bar against rendering advisory opinions . . . counsel strongly in favor of restraint" (emphasis removed)).

It is irrelevant whether the panel employed its highly unusual procedure to intentionally preempt the obvious mootness of the case upon Petitioner's removal. *See, e.g.*, 13B Fed. Prac. & Proc. Juris. § 3533.1 (3d ed.) ("[P]reliminary injunctive relief should not be given merely to forestall possibly mooting events."); *cf. Michel v. INS*, 206 F.3d 253, 267 (2d Cir. 2000)

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.

(Cabranes, J., concurring) (contrasting the "venerable ground of judicial restraint" with "judicial usurpation"). The panel's vacatur opinion hardly musters a defense of its one-line order: it contends that the controversy between the parties on the stay motion remained live so long as the government refused to release Petitioner into the United States. *See* ECF 116-1 at 9–13. But it does not even attempt to grapple with the significance of its decision to ignore the government's consent motion to delay the briefing and adjudication of its motion for a stay.[6] The bottom line is that the panel's stay opinion was unnecessary and purely advisory.

B. The panel's application of *Munsingwear* in denying Petitioner's motion to vacate its stay opinion conflicts with Supreme Court precedent.

When an appeal becomes moot "while on its way" to further appellate review, the "established practice" is to "vacate the judgment below." *Munsingwear*, 340 U.S. at 39. *Munsingwear* vacatur serves important purposes: "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

[6] The panel's suggestion that *not* issuing the one-line order when it did might have amounted to an "abuse of discretion," ECF 116-1 at 13 n.5, is startling—not least because it implies that by granting the government's motion and declining to insert itself into a non-controversy whose final resolution was imminent, the D.C. Circuit *did* abuse its discretion.

prevailed below," "ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). At the same time, "[v]acatur clears the path for future relitigation by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (quotation marks and citation omitted).

These principles apply with particular force in this case.

First, the government's removal of Petitioner from the country formally mooted its own appeal before the panel's stay opinion even issued, let alone became subject to further review, making further review of the stay opinion impossible. Vacatur under *Munsingwear* "*must* be granted" whenever "mootness results from the unilateral action of the party who prevailed." *Bonner Mall*, 513 U.S. at 23 (emphasis added). As the Supreme Court has remarked, "[i]t would certainly be a strange doctrine that would permit a [party] to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (quoting *Arizonans for Official English*, 520 U.S. at 75).

Second, even accepting the panel's (flatly implausible) conclusion that the mootness of this appeal was caused not by the government but by "the

vagaries of circumstance," ECF 116-1 at 16 (quotation marks omitted),[7] vacatur of the motions panel's stay opinion is appropriate as a matter of equity. *Munsingwear* vacatur is grounded in equitable principles. *Bonner Mall*, 513 U.S. at 25. Here, of course, Petitioner bears no fault for the mootness. *See id.* at 24–25 (explaining that the "principal condition" relevant to *Munsingwear* vacatur is whether the party seeking vacatur "caused the mootness by voluntary action"). His removal came days after the motions panel granted the government's motion to stay, without even issuing an opinion from which Petitioner could have sought immediate review. And when the panel granted the stay, Petitioner's removal was both imminent and practically assured—indeed, Petitioner had consented to a delay of this Court's and the D.C. Circuit's stay proceedings (and his own continued detention) to facilitate that removal. The equities plainly justify *Munsingwear* vacatur.

The panel nevertheless concluded that *Munsingwear* does not require the vacatur of its stay opinion because "there are no legal consequences of the court's opinion for the parties, in terms of preclusion or even precedent." ECF 116-1 at 22. As a practical matter, that is incorrect. As *amicus* Professor

[7] As Petitioner has explained, the panel's assertion that the government's sudden removal-related action was coincidental ignores the factual record. ECF 87 at 16–18.

Stephen I. Vladeck made clear in his submission to the motions panel in support of Petitioner's vacatur motion, "as appellate rulings on stays have become more common and significant in recent years, they have also been given increasing precedential value and prominence by lower courts." ECF 93 at 3. As a result, "it is not only possible, but likely, that the motions panel's opinion would impact future cases if left in place; indeed, that may have been the point." *Id.*; *see id.* at 5–6 ("Indeed, that likelihood is only magnified because the motions panel's opinion addresses two important legal questions for which there are *no* other on-point appellate precedents."). The panel did not address *amicus*'s brief at all. In any event, appellate opinions can have significant legal consequences even if they are neither preclusive nor precedential. *See* ECF 87 at 21 (discussing *Garza*, 138 S. Ct. at 1792); ECF 93 at 7.

C. The panel's conduct in issuing its stay opinion and in declining to vacate it has serious implications for judicial decision making in this Circuit.

In discussing the standard for *en banc* review, multiple judges of this Court have praised this "Circuit's longstanding tradition of general deference to panel adjudication—a tradition which holds whether or not the judges of the Court agree with the panel's disposition of the matter before it." *Ricci v. DeStefano*, 530 F.3d 88, 89 (2d Cir. 2008) (Katzmann, J., concurring in the denial of rehearing *en banc*); *United States v. Taylor*, 752 F.3d 254, 255–57

(2d Cir. 2014) (Cabranes, J., dissenting from the denial of rehearing *en banc*) (similar). That tradition has meant that, "[t]hroughout [its] history," the Court has "proceeded to a full hearing en banc only in rare and exceptional circumstances." *DeStefano*, 530 F.3d at 89–90; *see generally* Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 Hofstra L. Rev. 297, 311–12 (1986); Jon O. Newman, *In Banc Practice in the Second Circuit, 1989–93*, 60 Brook. L. Rev. 491 (1994).

But the strength of that tradition emanates from the members of this Court's longstanding adherence to appropriate modes of judicial conduct—what, in the context of vacatur, this Court once called "basic notions of fair play and justice." *Ass'd Gen. Contractors of Conn., Inc. v. City of New Haven*, 41 F.3d 62, 67 (2d Cir. 1994). This case presents a serious question about whether that tradition was followed in a case that—as the panel's stay opinion, which without *en banc* review will remain Second Circuit law, makes clear—involved many issues that judges of this Court have in the past declared to be worthy of the full Court's review.[8]

[8] *See, e.g.*, *Citizens for Responsibility & Ethics in Wash. v. Trump*, 971 F.3d 102, 102 (2d Cir. 2020) (Cabranes, J., dissenting from the order denying rehearing *en banc*) ("the limits of the judicial power under Article III of the Constitution"); *Young v. Conway*, 715 F.3d 79, 87 (2d Cir. 2013) (Raggi, J., dissenting from the order denying rehearing en banc) ("habeas jurisprudence"); *Matter of Warrant to*

Whether or not the Court accepts this case *en banc*, a significant precedent concerning the norms of motions panel practice in this Circuit will have been set, and that precedent will affect the conduct of this Court, its judges, and its litigants going forward. Here, a three-judge motions panel that had no practical reason to act, and had explicitly been asked *not* to act by the moving party, ignored that request, rushed out a one-line decision that had no arguable effect on the parties, and weeks later, after all parties agreed the case had become moot, issued a substantive and far-reaching opinion that will undoubtedly guide lower courts on issues of first impression going forward.

Regardless of whether a majority of the full Court ultimately agrees with Petitioner's arguments for vacating the motions panel's stay opinion, the circumstances of this case require that the full Court—and not just the same panel whose conduct Petitioner has disputed—have the final word. If this case involved acceptable judicial conduct, the full Court should make that clear—and if not, the full Court should correct it.

Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp., 855 F.3d 53, 62 (2d Cir. 2017) (Cabranes, J., dissenting from the order denying rehearing *en banc*) ("public safety and national security").

II. The panel's decision to vacate the district court opinion at the government's request even though the government was responsible for its mootness raises a question of exceptional importance.

While it refused to vacate its own opinion favorable to the government, the motions panel agreed to vacate the district court's rulings on 8 C.F.R. § 241.14(d)—even though the government itself was responsible for preventing appellate review. That decision is wrong on the merits and threatens to unfairly empower the government to manufacture a basis to vacate adverse detention decisions.

A. The district court's opinions should not have been vacated.

The panel misrepresented the factual record in granting the government's vacatur motion under *Munsingwear*, and its disposition conflicts with the D.C. Circuit's disposition of the government's near-identical motion in the same case.

First, the panel ignored the facts when it concluded that the government had no significant role in mooting its own appeal for purposes of *Munsingwear.* The panel asserted that the government did not bear responsibility for Petitioner's removal because the government had a background statutory duty to remove Petitioner all along. But, as Petitioner explained, record evidence makes clear that Petitioner's ultimate removal was part of a concerted strategy by the government initiated after he had spent thirty-two months in detention

and just as the government prepared to appeal the case it had conceded below. This removal was not "typical" in any sense, contrary to the panel's suggestion. ECF 116-1 at 16 (citation omitted).

On the eve of trial, and after months of intensive litigation that succeeded in discrediting or disqualifying all of the government's witnesses, the government shocked the district court and Petitioner by moving to cancel the hearing (at which it could have examined Petitioner) and asking the district court to enter judgment in Petitioner's favor. It then sought to stay that judgment through emergency motions in the district court and two appellate courts. During the entire litigation, the government had not sought to discuss a specific potential country of removal with Petitioner—until the district court's order of release was imminent. And then it finalized those plans in a flurry of discussions with Petitioner's counsel over the span of slightly more than two weeks.

The timing of Petitioner's removal, and its mooting of the government's appeal, was the farthest thing from "happenstance." *Munsingwear*, 340 U.S. at 40. The panel's disregard of that reality is untenable. *Cf. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (Roberts, C.J.) ("[W]e are 'not required to exhibit a naiveté from which ordinary citizens are free.'" (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.))).

Second, the panel's vacatur of the district court's judgment and rulings on the regulation conflict with the D.C. Circuit's handling of the government's near-identical motion for vacatur of the same judgment and rulings on 8 U.S.C. § 1226a. On September 22, this Court's panel granted the government's vacatur motion, and the government notified the D.C. Circuit. Nonetheless, the D.C. Circuit did not follow suit. Instead, on October 13, it declined to grant the vacatur motion and "remanded to the district court with instructions to consider appellant's request for vacatur as a motion for relief from an order pursuant to Federal Rule of Civil Procedure 60(b)." DC-ECF 1865943. Remanding makes particular sense given that there is, at best, a disputed factual issue about whether the government bears responsibility for mooting the case. In any case, the two diverging dispositions mean that while this Court's motions panel has required the district court to vacate its judgment granting Petitioner's habeas petition (as well as its rulings on the regulation), a different appellate court did not believe such vacatur was justified with respect to the rest of the judgment and rulings on *exactly* the same record.

B. The panel's endorsement of the government's abuse of the appellate stay process creates troubling incentives and merits this full Court's review and correction.

The panel's grant of the government's vacatur motion creates a troubling precedent that invites the government to strategically vacate adverse lower

court decisions. In particular, the panel's vacatur decision rests on its credulous determination that Petitioner's removal was not caused by the government but was mere happenstance—or what the panel called "the vagaries of circumstance." ECF 116-1 at 16 (citation omitted). But the course of events in this case belies that conclusion.

As explained, the record strongly suggests that the government never intended to litigate its appeals to completion but used its stay motions to buy itself enough time to complete Petitioner's removal. Moreover, the notion that Petitioner's removal was purely the result of fortuitous decisions by a foreign government is belied by the government's own representations to the Court and Petitioner. The government extracted Petitioner's consent to defer the government's stay motion (and extend the administrative stay) because of its sworn representation that his removal was imminent and all but assured—but then, in its vacatur briefing, the government portrayed its previous representations as essentially unreliable. *See* ECF 107 at 6.

To be sure, the government has some measure of prerogative to make decisions about the removal of non-citizens under removal orders. But to reward the government by wiping off the books an adverse set of rulings (and judgment) on the basis of the fiction that the entire course of events was a coincidence creates a template through which the government can vacate

adverse opinions even when it is—as is usually the case—the driving force causing removal.

Indeed, the panel-approved path for the government in future cases of indefinite detention of non-citizens under the same (highly questionable) legal authorities is clear: Litigate at leisure in the district court without concern for adverse rulings, and if and when the risk of actual release under habeas or an adverse appellate ruling surfaces, simply accelerate removal efforts to ensure that the legal books will be wiped clean. After all, the "government's ongoing effort[s]" to remove a habeas petitioner will be taken as an article of faith and statutory duty. In such cases, then, vacatur will always be appropriate to accommodate the "unfairness" of the government not being able to fully see through appeals of adverse district court rulings (that it hardly even need attempt to win). ECF 116-1 at 18.

This is an unacceptable incentive in our judicial system. It undermines the role of district courts in adjudicating the centuries-tested right of habeas, and makes relief through habeas petitions a mere chimera. The writ of habeas corpus is the "stable bulwark of our liberties." 3 W. Blackstone, *Commentaries on the Laws of England* 137 (1768). Its role and value—demonstrated so clearly in this case—is "to test the power of the state to deprive an individual of liberty in the most elemental sense." *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 806

(D.C. Cir. 1988). By blessing the government's manipulation of the stay process in a case involving such time-honored and structural rights, the panel has guaranteed the further erosion of those rights as well as the standards for appropriate and fair judicial conduct. The full Court should remedy this perversion.

CONCLUSION

Respectfully, the Court should grant *en banc* review of the motions panel's denial of Petitioner's motion to vacate the panel's prior stay opinion and the motions panel's grant of the government's motion to vacate the district court's rulings regarding 8 C.F.R. § 241.14(d).

Date: November 3, 2020

Respectfully submitted,

/s/ *Jonathan Hafetz*

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CERTIFICATE OF SERVICE

I hereby certify that on November 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: November 3, 2020

/s/ Jonathan Hafetz
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CERTIFICATE OF COMPLIANCE

On October 26, 2020, the Court granted Petitioner's motion to file an oversized Petition for Rehearing and Rehearing En Banc not to exceed 7,800 words. ECF 132. This brief complies with that order because it contains 7,789 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 Calisto MT, a proportionally spaced typeface.

Date: November 3, 2020

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