[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA 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.	No. 20-5191

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

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

Petitioner Adham Amin Hassoun is a convicted terrorist who had been ordered removed from the United States. This case involves U.S. Immigration and Customs Enforcement's (ICE) detention of Hassoun in accordance with a federal regulation authorizing preventive detention for profoundly dangerous aliens. The district court held the regulation is facially unlawful. The United States promptly appealed, but the case is now moot: Hassoun is no longer in ICE's custody because, as required by 8 U.S.C. § 1231(a), he was removed to a foreign country upon that country's decision to accept him.

This Court should apply the "established practice" in cases that become moot while on appeal: the Court should vacate the district court's judgment and remand the case with instructions to dismiss the habeas petition. *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018). The case for applying that established practice is especially strong here. Absent mootness, this Court likely would have ruled in the government's favor and reversed the district court's judgment. Given the importance of the statute at issue here and the flaws in the district court's rulings, the district court's judgment should not be left on the books. This Court should clear the path for future litigation by granting vacatur. No exception to vacatur applies: the government did not voluntarily or unilaterally moot this case. Rather, this case was mooted after a third country agreed to allow Hassoun to remain within its borders and when the government in turn effectuated its mandatory obligation to

remove him. By not granting vacatur here, the United States would be put in the inequitable position of having to delay petitioner's removal (and, in the absence of an appellate stay, release him into the United States) just to keep the case alive long enough to obtain appellate review. The United States should not have to choose between either relinquishing its right to seek appellate review of the district court's judgment by removing a terrorist alien in accordance with the mandatory directives of Congress, or instead preserving its right to appellate review by keeping a terrorist in the United States and potentially having to release him into the community even though three agency heads determined that he could not be safely released into the United States and even though it took years to secure a country that would accept him. This Court should vacate the district court's judgment and all rulings on or pertaining to 8 U.S.C. § 1226a.

Government counsel notified Hassoun's counsel about this motion. Hassoun's counsel responded that Hassoun does not oppose the motion to dismiss the appeal as moot, but he does not agree that the Court should vacate any district-court rulings. Hassoun's counsel intend to file a response.[1]

STATEMENT

Legal Background. Title 8 U.S.C. § 1231 provides that the government "shall," during an initial 90-day "removal period," detain an alien who has been

[1] Hassoun's counsel's full statement is: "1. Petitioner does not oppose the government's motions to dismiss both appeals as moot. 2. Petitioner opposes the government's motions to vacate any district court rulings under *Munsingwear*; Petitioner intends to respond to the government's motions; and Petitioner requests 10 days to file those responses, as is the ordinarily rule under FRAP 27(a)(3)(A)."

ordered removed. 8 U.S.C. § 1231(a)(2). Section 1231(a)(6) provides that an alien "may be detained beyond the removal period" if the alien falls within a certain category, including aliens whom the Secretary of Homeland Security determines to be a risk to the community. *Id.* § 1231(a)(6). The government has a continuing obligation to remove such aliens. *Id.* § 1231(a)(1)(A) ("[W]hen an alien is ordered removed, the [Secretary] shall remove the alien from the United States . . ."), (a)(4)(A) ("Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.").

This case involves two sets of authorities for detaining aliens who have been ordered removed from the United States.

The first authority is a statute that permits preventive detention for dangerous aliens who have been ordered removed, 8 U.S.C. § 1226a. Section 1226a authorizes the Secretary of Homeland Security to detain any alien whom the Secretary certifies, under § 1226a(a)(3), as being "described in" various terrorism-related inadmissibility provisions or being "engaged in any other activity that endangers the national security of the United States." 8 U.S.C. § 1226a(a)(1), (3). (The district court in this case recognized that § 1226a(a)(3)'s factual requirement is satisfied with Hassoun's criminal conviction. Jan. 24, 2020 Order (Dkt. 75).) Section 1226a(a)(6), in turn, provides that "[a]n alien detained solely under [§ 1226a(a)(1)] who has not been removed under section 1231(a)(1)(A) of this title [the general authority authorizing removal after that alien has been ordered removed], and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten

the national security of the United States or the safety of the community or any person." *Id.* § 1226a(a)(6). Thus, to authorize detention under § 1226a(a)(6), the Secretary must determine that the alien's release "will threaten the national security of the United States or the safety of the community or any person." *Id.* The Secretary must review his certification every six months. *Id.* § 1226a(a)(7).

The second authority is a regulation that permits preventive detention for dangerous aliens who have been ordered removed, 8 C.F.R. § 241.14(d). That regulation permits the detention of an alien when: (1) the alien is described in certain terrorism- or national-security-related inadmissibility provisions; (2) the alien's "release presents a significant threat to the national security or a significant risk of terrorism"; and (3) there are "[n]o conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism." 8 C.F.R. § 241.14(d)(1)(i)-(iii).

Factual Background and Proceedings Below. Adham Amin Hassoun was born in Lebanon to Palestinian parents. Michael Bernacke Decl. ¶ 4 (Dkt. 17-1).[2] 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*, No. 04-cr-60001

[2] References to the district court docket are marked as "Dkt."

(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 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*, No. 04-cr-60001 (S.D. Fla. Jan. 22, 2008).

Upon Hassoun's release from prison in October 2017, ICE detained him in Batavia, New York, under 8 U.S.C. § 1231(a)(2)—the default authority for detaining an alien who has been ordered removed—and later under § 1231(a)(6). Bernacke Decl. ¶ 8 (Dkt. 17-1).

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 refused to accept Hassoun 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. *Id.* ICE unsuccessfully sought travel documents for Hassoun from Egypt, Iraq, Somalia, Sweden, and the United Arab Emirates, as well as from three unidentified countries. *Id.* The government also convened a working group to find a country for Hassoun. Dkt. 17-1 ¶ 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 v. Searls*, No. 18-cv-586, Dkt. 29. He "also enlisted his family to try to speed his removal." *Id.* at 8; *see also* Adham Amin Hassoun Decl., No. 18-cv-586, Dkt. 29-1; Jonathan Manes Decl., No. 18-cv-586, Dkt. 29-6. The efforts to identify a country of removal were high-reaching and wide-ranging. *See, e.g.*, Resp.'s Supp. Report, No. 18-cv-586, Dkt. 51 (listing démarche efforts to countries in multiple continents); Decision and Order, No. 18-cv-586, Dkt. 46 at 3 (listing the Governments of Egypt, Iraq, Israel, Lebanon, the Palestinian Territories, Somalia, Sweden, and the United Arab Emirates, and Saudi Arabia), 4 (noting Ambassador-level engagement); Tr. of Nov. 22, 2019, Argument, No. 19-cv-370,

Dkt. 56 at 34:18-25, 35:2-5 (noting engagement of United States cabinet-level officials). But for a long time, they were not successful.

Hassoun sought a writ of habeas corpus in 2018. *Hassoun v. Sessions*, No. 18-cv-0586, 2019 WL 78984, at *1 (W.D.N.Y. Jan. 2, 2019). The district court concluded that there was no significant likelihood of Hassoun's removal in the reasonably foreseeable future (which the Supreme Court has concluded to be a limit on detention under § 1231(a)(6), *see Zadvydas v. Davis*, 533 U.S. 678, 701 (2001)) and that, therefore, the government had "exceeded its authority to detain [Hassoun] under" 8 U.S.C. § 1231(a)(6). *Id.* at *8. The court ordered his release. *Id.*

In February 2019, ICE notified Hassoun that it intended to detain him under a separate provision authorizing an alien's detention in certain circumstances—8 C.F.R. § 241.14(d). *See* Dkt. 17-2. In a new habeas proceeding commenced in March 2019, Hassoun claimed that 8 C.F.R. § 241.14(d) was ultra vires and unconstitutional. Dkt. 13.

On August 9, 2019, as removal efforts continued, the Secretary certified Hassoun for continued immigration detention under the authority of both 8 C.F.R. § 241.14(d) and 8 U.S.C. § 1226a, a provision of the USA PATRIOT Act that authorizes preventive detention of dangerous terrorist aliens. *See* Dkts. 26-1, 26-2 (certification orders). Hassoun challenged his detention in the habeas petition.

In December 2019, the district court issued an order concluding that (1) Hassoun's continued detention is not lawfully authorized by 8 C.F.R. § 241.14(d) and (2) an evidentiary hearing would be necessary regarding whether his continued detention is lawfully authorized by 8 U.S.C. § 1226a(a)(6). Dec. 13, 2019 Order at

1-2 (Dkt. 55). The district court rejected the government's argument that the administrative record, under a "properly deferential standard of review," demonstrated the lawfulness of Hassoun's detention. Dkt. 30 at 32. The court ruled that "the current record"—which included the Acting Secretary's certification that Hassoun must be detained—is "insufficient" and ordered an evidentiary hearing on the statute. Order at 27, Dkt. 55.

In January 2020, the district court issued an order addressing the parameters of the evidentiary hearing. Jan. 24, 2020 Order (Dkt. 75). The court clarified that the hearing would be limited to whether the factual basis for continued detention under § 1226a(a)(6) is satisfied—that is, "whether Hassoun's release would threaten the national security of the United States or the safety of the community or any person." *Id.* at 5. On that issue, the court rejected the government's argument that Hassoun should bear the burden of proving by a preponderance of the evidence that his release would not threaten national security or safety. Rather, the court held that the government bears the burden of proving by clear and convincing evidence that the factual basis for continued detention under § 1226a is satisfied. *Id.* at 5-12. The court also rejected the government's argument that, "[r]egardless of the burden and the standard of proof, the district court should grant broad deference to the factual conclusions drawn by the Acting Secretary." *Id.* at 12 (citation omitted). The court thought such deference inappropriate because the administrative record in Hassoun's case had not been developed after an adversarial proceeding. *Id.* at 13. The court also concluded that such deference is inconsistent with § 1226a(b)(1)'s authorization of judicial review of the "merits." *Id.*

In February 2020, six months after the Acting Secretary's initial certification of Hassoun's detention, the Acting Secretary re-certified Hassoun's continued detention under 8 U.S.C. § 1226a(a)(6). Dkt. 226-1.

On June 18, 2020, the district court issued an order denying the government's request to rely on out-of-court hearsay statements from three witnesses—Ahmed Abdelraouf, Hector Rivas Merino, and Abbas Raza. June 18, 2020 Order at 41 (Dkt. 225). Abdelraouf's statements were within an FBI interview report wherein he stated Hassoun affirmed it was good to kill women and children for religion. *See* Abdelraouf FD-302 (Dkt. 169-3). Rivas Merino's statements were also within an FBI interview report wherein he stated "Hassoun talked about how to make explosives and to plan attacks." Rivas Merino FD-302 (Dkt. 169-8). Raza's statements were reported in emails from an ICE officer where Raza indicated Hassoun had "pledged support for ISIS." June 18, 2020 Order at 31. The court concluded that it would not "be unduly burdensome to present Abdelraouf's testimony by nonhearsay means," *id.* at 28, and that Rivas Merino's and Raza's statements were "insufficiently reliable to be given probative weight," *id.* at 29; *see id.* at 31.

On June 18, the government moved the district court to cancel the evidentiary hearing. Dkt. 226. The government maintained that "under the law, [the government] has met [its] burden of justifying [Hassoun's] continued detention," but explained that, in light of "th[e] Court's prior rulings" on legal and evidentiary matters to which the government maintained its objections, the government could

not "meet the burden and standard of proof that th[e] Court has held to apply in this case." *Id.* at 1, 3. The court canceled the evidentiary hearing. Dkt. 238.

On June 29, 2020, the district court granted the habeas petition and ordered Hassoun's release. Dkt. 256. The district court denied the government's motion for a stay pending appeal. *Id.*

The government appealed to both this Circuit and the Second Circuit, *Hassoun v. Searls*, No. 20-2056 (2d Cir.). (The jurisdictional scheme channels rulings on § 1226a to this Circuit. *See* 8 U.S.C. § 1226a(b)(3).) The government filed, in both courts of appeals, an emergency motion for a stay of the district court's judgment pending appeal. Both courts issued administrative stays, on the agreement of the parties. On July 16, 2020, the Second Circuit stayed the district court's judgment pending appeal, noting that it would issue an opinion on its decision in due course. *Hassoun v. Searls*, Dkt. 60 (2d Cir. July 16, 2020). This Court has not ruled on the stay motion filed by the government.

On July 21, 2020, ICE removed Hassoun to a foreign country. Appellant's Notice of Removal. Hassoun is no longer in U.S. government custody. *Id*. The government notified this Court, the Second Circuit, and the district court of Hassoun's removal on July 22, 2020, and told this Court and the Second Circuit that the government would, in due course, advise it on how the Court should proceed in light of Hassoun's removal. *Id.*; *see also* Notice (Dkt. 274). On July 29, the Court ordered the government to file a motion addressing how to proceed by August 5. Order of July 29, 2020.

On July 30, the Second Circuit issued an opinion explaining its order granting a stay pending appeal. *Hassoun v. Searls*, No. 20-2056, — F.3d —, 2020 WL 4355275 (2d Cir. July 30, 2020) (Op.). The court concluded that "the government made a strong showing that it was likely to succeed on the merits and that it would suffer irreparable harm absent a stay." Op. 25. The court held that the government had made a strong showing that 8 C.F.R. § 241.14(d) is a "permissible" reading of its enabling statute, 8 U.S.C. § 1231(a)(6), and is not inconsistent with Supreme Court precedent. Op. 14-15. The court also concluded that such a focused regulation was a "reasonable" interpretation of the ambiguous § 1231(a)(6), Op. 18; *see* Op. 18-23, and does not "implicate[] serious constitutional concerns" because it "provides adequate due process," Op. 19 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The regulation, this court explained, "features procedural protections to minimize Hassoun's risk of being erroneously deprived of liberty," such as: notice of intent to detain; a description of the factual basis for the detention; a "reasonable opportunity" to examine the evidence and present information on Hassoun's own behalf; the opportunity to participate in an interview and produce a sworn statement; and habeas review. Op. 20. The court also found "substantial reason to doubt" the district court's conclusion that the clear-and-convincing evidence standard was appropriate, and that the government was "likely to prevail" that the correct standard was a preponderance of the evidence. Op. 21-22.

The Second Circuit also concluded that the equities favored granting a stay pending appeal. Op. 23-25. It recognized the government's paramount interests in protecting the national security, and that three agency heads had each concluded that

Hassoun's release could endanger the national security. Op. 23-24. Thus, a burdensome release of Hassoun pending appeal would have irreparably injured the government. *Id.* As for Hassoun, the court found he had a substantial interest in release, but given his terrorism convictions and the possibility of recidivism, and the fact that he "concededly has no legal right to be in the United States . . . [and] does not have a right to be released into the United States," "the balance of the equities favors granting the government's motion for a stay." Op. 25.

ARGUMENT

The district court's judgment is flawed and erroneously impairs ICE's ability to use a lawful statute authorizing preventive detention of certain dangerous aliens. This case has become moot on appeal, however, by Hassoun's removal from the United States and release from custody. This Court should vacate the judgment and all rulings on or pertaining to 8 U.S.C. § 1226a and remand with instructions to dismiss the habeas petition as moot. All relevant considerations strongly support vacatur.[3]

A. This Appeal Is Moot

The mootness doctrine requires that a live case or controversy "subsist[ ] through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). A case is moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the

[3] The government is today moving the Second Circuit to vacate the district court's judgment and all rulings on or pertaining to 8 C.F.R. § 241.14(d). *See Hassoun v. Searls*, No. 20-2056 (2d. Cir.).

outcome," and the court can no longer provide any relief that could effectively redress a party's claimed injuries or affect his rights. *Roane v. Leonhart*, 741 F.3d 147, 150 (D.C. Cir. 2014) (quotation marks omitted).

This case become moot while the government's appeal was pending. Hassoun has already received all the relief he requested: release from detention. Hassoun's July 2020 removal to a third country, which occurred after the district court's June 2020 judgment in his favor, mooted this case. *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). Because he is no longer detained, Hassoun retains no cognizable interest in enforcing the terms of the district court's judgment ordering his release, even if the district court were found to possess jurisdiction to do so. *Roane*, 741 F.3d at 150.

No exception to mootness applies here. The exception to mootness for matters that are "capable of repetition yet evading review" does not apply. That exception applies only where "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Columbian Rope Co. v. West*, 142 F.3d 1313, 1317 (D.C. Cir. 1998). There is no realistic probability that Hassoun could in the future be in a position to allege that he had been injured by the statute, because any future invocation of the statute against him would require him to return to the United States, meet the criteria for detention under the statute, and have the Secretary certify him for detention under the statute. That chain of events does not establish "capable of repetition" because repetition is, at most, a "theoretical[ ]

possib[ility]." *Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1088 (D.C. Cir. 2017).

The exception to mootness for a defendant's "voluntary cessation of allegedly illegal conduct" also does not apply here. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982). That exception rests on the understanding that "a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 285 n.1 (2001). This case does not involve a defendant's unilateral, voluntary cessation of allegedly wrongful conduct. Congress directed ICE to remove aliens, like Hassoun, who have final removal orders. *See* 8 U.S.C. § 1231(a)(1)(A), (a)(4)(A). Since 2017, the government has been acting to effectuate that directive, *see supra* at 5-6; Bernacke Decl. ¶¶ 9-12, so the effort to comply with that duty was not recent. Removal of Hassoun—a stateless individual convicted of terrorism offenses—rested on a foreign country's sovereign decision to accept him. A foreign country agreed to accept Hassoun while this case was on appeal; thus, ICE complied with the congressional mandate and removed him. There is no "reasonable expectation that the same complaining party" (Hassoun) will again become detained under § 1226a and seek his release from U.S. government custody. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted).

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

Now that this case is moot, this Court should apply the normal practice of vacating the judgment of the district court and vacating all rulings on all claims that

are now moot and covered by this appeal—*i.e.*, all issues on or pertaining to 8 U.S.C. § 1226a—and remand with instructions to dismiss the entire habeas petition. The circumstances of this case strongly support vacatur.

When a civil case becomes moot while an appeal is pending, it is the "general practice" of this court to vacate the unreviewed judgment granted in the court below and remand the case to that court with directions to dismiss it. *United States v. Garde*, 848 F.2d 1307, 1310 (D.C. Cir. 1988); *see also Clarke v. United States*, 915 F.2d 699, 706 (D.C. Cir. 1990) (en banc) ("[The] established practice [is to] reverse or vacate the judgment below and remand with a direction to dismiss."); *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018) ("When a civil case from a court in the federal system . . . has become moot while on its way here, this Court's established practice is to reverse or vacate the judgment below and remand with a direction to dismiss." (quotation marks omitted)). This practice eliminates the unreviewed judgment which, if left on the books, might prejudice a party whose appeal was precluded due to the intervening mootness, thereby preserving "the rights of all the parties." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). The "equitable remedy of vacatur ensures 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) (quoting *Munsingwear*, 340 U.S. at 39). The vacatur rule 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 prevailed below," "ought not in fairness be forced to acquiesce in the judgment." *Bonner Mall*, 513 U.S. at 25. 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) (citation omitted).

That normal practice calls for vacatur here: this case became moot on appeal, and the Court should apply the "established practice" of "vacat[ing] the judgment below and remand[ing] with a direction to dismiss." *Garza*, 138 S. Ct. at 1793. Given the equitable nature of vacatur, the case for applying that established practice is especially strong here. Absent mootness, this Court likely would have reversed the district court's decision and ruled in the government's favor. In the related appeal, the Second Circuit issued a stay of the district court's judgment and an opinion concluding "the government made a strong showing that it was likely to succeed on the merits and that it would suffer irreparable harm absent a stay." Op. 25. As the government has explained, it similarly has very strong arguments on the merits and equities in this appeal. The administrative record establishes a sufficient justification for § 1226a detention, and the district court should not have ordered an evidentiary hearing. Emergency Motion for Stay Pending Appeal at 11-13. The district court also should have placed the burden of proof on Hassoun as the § 1226a habeas petitioner, *id.* at 14-16, and the court erred when it excluded critical evidence that supported the government's threat assessment of Hassoun, *id.* at 16. Finally, as the Second Circuit concluded, the equities favored granting a stay pending appeal, in part due to the threat Hassoun's release within the United States posed to the safety of the community or the national security. *Id.* at 17-21; Op. 23-25.

Moreover, the Supreme Court explained in *Munsingwear* that "a judgment, unreviewable because of mootness," should not be permitted to "spawn[] any legal consequences." 340 U.S. at 41; *see Camreta*, 563 U.S. at 713. Here, the district court made significant rulings regarding § 1226a, including the scope of review and the burden of proof, which could have significant legal consequences. That unreviewed judgment should not be left on the books. Not granting vacatur here would mean that the United States would be put in the inequitable position of having to delay petitioner's removal (and, in the absence of an appellate stay, release him into the United States) just to keep the case alive long enough to obtain appellate review. The United States would be placed in a position to choose between two unjust and inequitable scenarios. First, the United States would have to relinquish its right to seek appellate review of the district court's judgment by removing a terrorist alien in accordance with the mandatory directives of Congress. Second, alternatively, the United States would preserve its right to appellate review by keeping a terrorist alien with a final order of removal in the United States and potentially having to release him into the community, even though three Department and agency heads determined that he could not be safely released into the United States and despite the fact that it took years to secure a country that would accept him. *See Bonner Mall*, 513 U.S. at 25 (noting that "[a] party who seeks review of the merits of an adverse ruling" that is rendered moot "ought not in fairness be forced to acquiesce in the judgment.").

Finally, no exception to vacatur applies. There is an exception to vacatur when a party's own actions moot a controversy, but that exception does not apply

here. *E.g.*, *Bonner Mall*, 513 U.S. at 25. Although ICE stopped detaining Hassoun, it did so in compliance with the congressional mandate to remove him. *See* 8 U.S.C. § 1231(a)(1)(A) ("[W]hen an alien is ordered removed, the Attorney General *shall* remove the alien from the United States . . . .") (emphasis added), (a)(4)(A) ("Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal."). The government's obligation to remove Hassoun pre-dated the litigation and the timing of Hassoun's removal was dictated by the timing of the third country's sovereign decision to accept Hassoun. Given the removal regime enacted by Congress, the danger posed by Hassoun, and the sensitive area of foreign relations, *see, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407, 412 (1964), this Court should treat Hassoun's resettlement differently from other cases where an agency has "voluntarily ceased" its challenged conduct or has settled a controversy on appeal, both of which the Supreme Court found insufficient as a basis for requiring vacatur, *see Bonner Mall*, 513 U.S. at 26-30. This is not a case where ICE unilaterally released an alien into the United States to end litigation. Vacatur is appropriate here, to clear the pathway to future litigation on the statute at issue in this case. *See Arizonans for Official English*, 520 U.S. at 71.

For these reasons, *Munsingwear* vacatur is warranted in this case. Because the statute provided an independent basis for Hassoun's detention, the Court should vacate the district court's judgment and all rulings on or pertaining to 8 U.S.C. § 1226a, and remand with instructions to dismiss the entire habeas petition.

CONCLUSION

Because the case has become moot while on appeal, thus depriving the government of the opportunity to obtain review of the flawed decision below, the appropriate course is to vacate the district court's judgment and all rulings on or pertaining to 8 U.S.C. § 1226a and remand with instructions to dismiss the entire habeas petition.

Dated: August 5, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion 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 motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,187 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 5, 2020, I electronically filed the foregoing with the Clerk of the circuit court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ *Steven A. Platt*
STEVEN A. PLATT
Counsel for National Security