UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

Case No. 1:19-cv-370-EAW

v.

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

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF RESPONDENT'S MOTION FOR VACATUR

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
BACKGROUND 1
ARGUMENT 3
A. This Court Should Apply the *Munsingwear* Standard Incorporated by Rule 60(b)......... 3
B. The Court Should Reach the Same Conclusion as the Second Circuit, Which Concluded that the Record and the Equities Compel Vacatur. 6
CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

3M Co. v. Boulter,
290 F.R.D. 5 (D.D.C. 2013)....................5

Ackermann v. United States,
340 U.S. 193 (1950)....................11

Am. Bar Ass'n v. FTC,
636 F.3d 641 (D.C. Cir. 2011)....................7

Am. Games, Inc. v. Trade Prods., Inc.,
142 F.3d 1164 (9th Cir. 1998)....................5

Arevalo v. Ashcroft,
386 F.3d 19 (1st Cir. 2004)....................10

Azar v. Garza,
138 S. Ct. 1790 (2018)....................6

Bakula v. Dufaur Corp.,
1994 WL 18503 (S.D.N.Y. Jan. 18, 1994)....................12

Clarke v. United States,
915 F.2d 699 (D.C. Cir. 1990)....................6

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938)....................11

In re Facebook, Inc. IPO, Sec. & Derivative Litig.,
2015 WL 7587357 (S.D.N.Y. Nov. 24, 2015)....................5

In re Finle, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey,
160 B.R. 882 (Bankr. S.D.N.Y. 1993)....................4

Hall v. Louisiana,
884 F.3d 546 (5th Cir. 2018)....................5

Hassoun v. Searls,
469 F. Supp. 3d 69 (W.D.N.Y. 2020)....................8

Hassoun v. Searls,
No. 20-5191 (D.C. Cir. filed Aug. 5, 2020)....................2

Hassoun v. Searls,
2020 WL 7422066 (2d Cir. Nov. 25, 2020)....................2

Hassoun v. Searls,
976 F.3d 121 (2d Cir. 2020)....................2, 6, 8, 9, 10, 12

Hassoun v. Searls,
968 F.3d 190 (2d Cir. 2020)....................2

Lomas & Nettleton Co. v. Wiseley,
884 F.2d 965 (7th Cir. 1989)....................12

Nestle Co. v. Chester's Mkt., Inc.,
756 F.2d 280 (2d Cir. 1985)....................4

Nilssen v. Motorola, Inc.,
2002 WL 31369410 (N.D. Ill. Oct. 21, 2002)....................4

Redeemer Comm. of Highland Credit Strategies Funds v. Highland Capital Mgmt., L.P.,
253 F. Supp. 3d 722 (S.D.N.Y. 2017)....................4

Retained Realty, Inc. v. McCabe,
376 F. App'x 52 (2d Cir. 2010)....................12

Rubin v. Islamic Republic of Iran,
563 F. Supp. 2d 38 (D.D.C. 2008)....................3

Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet,
260 F.3d 114 (2d Cir. 2001)....................7, 8

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,
559 U.S. 393 (2010)....................12

U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship,
513 U.S. 18 (1994)....................2, 4, 5, 7, 8, 10, 11

United States v. Munsingwear, Inc.,
340 U.S. 36 (1950)....................1, 4, 10, 11

Valero Terrestrial Corp. v. Paige,
211 F.3d 112 (4th Cir. 2000)....................4

Statutes

8 U.S.C. § 1226a....................*passim*

8 U.S.C. § 1231(a)....................2, 7

Regulations

8 C.F.R. § 241.14(d)....................1

Rules

Fed. R. App. P. 27(a) 9

Fed. R. Civ. P. 60(b) 2, 3, 4, 5, 11, 12

The Court should vacate all its decisions on or pertaining to 8 U.S.C. § 1226a. Respondent sought appellate review of decisions on that statute but the D.C. Circuit never had the opportunity to review this Court's § 1226a rulings. That is because the appeal became moot when Petitioner was removed to a foreign country and so was no longer in Respondent's custody. That mootness flowed from the sovereign foreign country's agreement to accept Petitioner. As Respondent explained before the D.C. Circuit, Respondent's lack of unilateral control of this mootness, plus the undue consequences of leaving this Court's unreviewed § 1226a-based rulings intact, justifies vacating those rulings and preserving "the rights of all the parties." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). No exception to vacatur applies: the government did not voluntarily or unilaterally moot this case, and denying vacatur would be inequitable because such a denial would mean that the government would have had to either relinquish its right to appellate review by removing a terrorist alien or instead preserve its right to appellate review by potentially releasing him within the United States. Indeed, the Second Circuit has already ruled, in the companion appeal based on Petitioner's detention under 8 C.F.R. § 214.41(d), that this Court had to vacate all its regulation-based rulings for these same reasons. This Court should now likewise vacate the § 1226a-related rulings (Dkt. 295-1).

BACKGROUND

Respondent detained Petitioner under two authorities: 8 C.F.R. § 241.14(d) and 8 U.S.C. § 1226a. Following judgment in Petitioner's favor (Dkt. 264), Respondent appealed from this Court's rulings under the regulation to the Second Circuit and appealed from this Court's rulings under the statute to the D.C. Circuit. *See* 8 U.S.C. § 1226a(b)(3) (conferring jurisdiction on the D.C. Circuit only to hear challenges to § 1226a, necessitating separate vacatur motions); Dkts. 259, 260 (notices of appeal). While the appeals were pending, but after the Second Circuit ruled

that the government "made a strong showing that it is likely to succeed on the merits of its argument" on the regulation, *Hassoun v. Searls*, 968 F.3d 190, 191 (2d Cir. 2020), Petitioner ceased to be in Respondent'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. Both parties acknowledged that Petitioner's removal mooted the case. *See, e.g.*, Pet'r-Appellee's Opp'n to Resp't's Mot. to Vacate 10 (Dkt. 295-2) ("Petitioner does not oppose dismissal of the government's appeal as moot.").

Because the appeals became moot without merits rulings from the appellate courts, Respondent moved the Second Circuit to vacate this Court's regulation-based rulings and moved the D.C. Circuit to vacate this Court's statute-based rulings. Appellant's Mot. to Dismiss & to Vacate, *Hassoun v. Searls*, No. 20-2056 (2d Cir. filed Aug. 5, 2020) (C.A. Dkt. 82); Appellant's Mot. to Dismiss & to Vacate, *Hassoun v. Searls*, No. 20-5191 (D.C. Cir. filed Aug. 5, 2020) (reproduced at Dkt 295-1). The Second Circuit granted the regulation-based request in a unanimous published opinion, *Hassoun v. Searls*, 976 F.3d 121 (2d Cir. 2020), and declined Petitioner's request for panel rehearing or rehearing en banc, *Hassoun*, No. 20-2056, 2020 WL 7422066 (2d Cir. Nov. 25, 2020). On the statute-based request, the D.C. Circuit ordered, "on the court's own motion, that the case be remanded to the district court with instructions to consider [Respondent's] request for vacatur as a motion for relief from an order pursuant to Federal Rule of Civil Procedure 60(b). *See U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994)." Order (Dkt. 288).

This Court then asked the parties whether further briefing was needed for it to effectuate the D.C. Circuit's remand. Minute Order (Dkt. 293). Respondent responded that no briefing was necessary, given the parties' briefing in the D.C. Circuit (Dkt. 295); Petitioner maintained

that further briefing was necessary (Dkt. 294). On December 16, 2020, this Court indicated that it had "reviewed the parties' respective positions on the process for addressing the D.C. Circuit's instructions on remand," and invited the parties to "submit further briefing of not more than 25 pages in addition to the briefs that were filed with the D.C. Circuit in connection with the motion to vacate, as attached as exhibits to Respondent's filing at Dkt. 295." Minute Order (Dkt. 297).

ARGUMENT

Respondent respectfully requests that the Court vacate all its decisions on or pertaining to § 1226a for the reasons articulated in Respondent's prior briefing to the D.C. Circuit on the matter (Dkts. 295, 295-1, 295-3, 295-4). As Respondent previously argued to this Court (Dkt. 295), the D.C. Circuit briefing addresses the issues that bear on this Court's decision, and the Court need go no further than those briefs to grant Respondent's vacatur request. To aid the Court, however, Respondent addresses the below points bearing on and justifying vacatur under Rule 60(b).

A. This Court Should Apply the *Munsingwear* Standard Incorporated by Rule 60(b).

To start, in evaluating Respondent's vacatur motion, this Court should apply the case law developed under *Munsingwear* and its progeny; Rule 60(b) does not change that standard. *Contra* Pet'r's Letter 2 (Dkt. 294). In its remand order, the D.C. Circuit directed this Court to "consider [Respondent's] request for vacatur [Dkt. 295-1] as a motion . . . pursuant to Federal Rule of Civil Procedure 60(b)." Order (Dkt. 288). Under Rule 60(b), the Court may vacate a "final judgment, order, or proceeding" if "applying it prospectively is no longer equitable," Fed. R. Civ. P. 60(b)(5), or for "any . . . reason that justifies [such] relief," Fed. R. Civ. P. 60(b)(6). "Mootness provides such a reason, and '[w]hether any opinion should be vacated on the basis of mootness is an equitable question.'" *Rubin v. Islamic Republic of Iran*, 563 F. Supp. 2d 38, 40

(D.D.C. 2008) (quoting *St. Lawrence Seaway Pilots' Ass'n v. Collins*, No. 03-cv-1204, 2005 WL 1138916, at *1 (D.D.C. May 13, 2005)) (alteration in original); *accord In re Finle, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 160 B.R. 882, 898 (Bankr. S.D.N.Y. 1993) (stating that vacatur authority in this context rests in Rule 60(b)(5) and (6)); *Nestle Co. v. Chester's Mkt., Inc.*, 756 F.2d 280, 282, 284 (2d Cir. 1985) (reviewing the issue without specifying whether Rule 60(b)(5) or (6) was at issue), *abrogated on other grounds by U.S. Bancorp*, 513 U.S. at 27-29.

In fulfilling the D.C. Circuit's directive, the Court should apply the *Munsingwear* standard; Rule 60(b) does not alter or affect that standard. In the parties' D.C. Circuit briefing, both parties applied the traditional appellate vacatur standards derived from *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and *U.S. Bancorp*. Appellant's Mot. to Dismiss & to Vacate 14-18; Pet'r-Appellee's Opp'n to Resp't's Mot. to Vacate 12-16. As Respondent previously explained, those same vacatur standards apply here on a Rule 60(b) posture. *See, e.g.*, *Redeemer Comm. of Highland Credit Strategies Funds v. Highland Capital Mgmt., L.P.*, 253 F. Supp. 3d 722, 724 (S.D.N.Y. 2017) ("Although these [*Munsingwear* vacatur-related] rationales are set forth in appellate decisions, they apply fully to district court decisions as well."); *Nilssen v. Motorola, Inc.*, No. 93-cv-6333, 2002 WL 31369410, at *2 (N.D. Ill. Oct. 21, 2002) (explaining that "the *U.S. Bancorp* standard [applies] to a district court as well as the appellate courts," because, *inter alia*, "there are no considerations that would be relevant to the inquiry beyond those identified in *U.S. Bancorp*"); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 117-19 & n.3 (4th Cir. 2000) (noting that the "institutional differences" between district courts and appellate courts "do not provide reason to conclude that the standards governing appellate and district-court vacatur are or should be different"); *see generally* Resp't's Letter 1-2 (Dkt. 295).

This comports with the approach taken by other courts which have noted Rule 60(b), then analyzed the case under *Munsingwear* and *U.S. Bancorp* without applying any differing standards or requirements from Rule 60(b). *See, e.g.*, *In re Facebook, Inc. IPO, Sec. & Derivative Litig.*, No. 12-mdl-2389, 2015 WL 7587357, at *2 (S.D.N.Y. Nov. 24, 2015); *3M Co. v. Boulter*, 290 F.R.D. 5, 8 (D.D.C. 2013) ("[T]his Court will consider the [appellate] motion to vacate its prior order as if it were a motion made to this Court pursuant to Federal Rule of Civil Procedure 60(b) . . . .").

Petitioner contends that "a district court should enjoy greater equitable discretion when reviewing its own judgments [for possible vacatur] than do appellate courts operating at a distance." Pet'r's Letter 2 (quoting *Am. Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1170 (9th Cir. 1998); citing *Hall v. Louisiana*, 884 F.3d 546, 550 (5th Cir. 2018)). The cases cited by Petitioner suggest, however, that such discretion, if it is indeed greater, affords a district court the ability to *grant* vacatur even where the *Munsingwear* standard may not be satisfied. *See Hall*, 884 F.3d at 551 (agreeing with *Valero* that *U.S. Bancorp* will ordinarily control the vacatur analysis at the district court, and "also agree[ing] with the Fourth Circuit that 'vacatur *is available* as a remedy to the district court . . . even where the considerations of relative fault and the public interest would otherwise counsel against vacatur.'" (emphasis added, ellipses in original)); *Am. Games*, 142 F.3d at 1167-68, 1170 (in affirming a district court's grant of vacatur under Rule 60(b)(5), rejecting a challenge that the district court should have used the *U.S. Bancorp* "exceptional circumstance" test for settlement-induced mootness to *deny* vacatur, as "Ninth Circuit decisions after [*U.S. Bancorp*] support the reading . . . that a district court may vacate its own decision in the absence of extraordinary circumstances").

The ordinary standard from the *Munsingwear* line of cases applies here, and accordingly, as laid out in Respondent's briefs to the D.C. Circuit, this Court should vacate the rulings on or pertaining to § 1226a. *See* Appellant's Mot. to Dismiss & to Vacate 14-18; Appellant's Reply in Supp. of Mot. to Dismiss & to Vacate 1-6 (Dkt. 295-3).

B. The Court Should Reach the Same Conclusion as the Second Circuit, Which Concluded that the Record and the Equities Compel Vacatur.

Under the *Munsingwear* standard, this Court should apply the "established practice" in cases that become moot while on appeal: the Court should vacate rulings and judgment on or pertaining to 8 U.S.C. § 1226a. *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018); Appellant's Mot. to Dismiss & to Vacate 15. This case became moot only after a third country agreed to allow Petitioner to enter and remain within its borders and when the United States government in turn effectuated its mandatory statutory obligation to remove him. Just as the Second Circuit concluded regarding the regulation-based rulings, leaving the statute-based rulings on the books would continue to have preclusive effects on the parties to this action. Vacatur is thus warranted.

Appellate courts generally remand cases that become moot so that they may be dismissed: "when a case becomes moot on appeal, '[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.'" *Hassoun*, 976 F.3d at 120 (quotation marks omitted; alterations in original); *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*, 138 S. Ct. at 1793 ("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)). In particular, vacatur is warranted when a "party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of

circumstance" or the "unilateral action of the party who prevailed below," "ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp*, 513 U.S. at 25.

The criteria for vacatur are satisfied here. *First*, the established practice under *Munsingwear* is to vacate the district court's decisions, and the exception for a party whose own actions moot the case does not apply here. As the party against whom the Court entered many—although not all—of its rulings related to § 1226a, Respondent should not have to "acquiesce in" those rulings given that he lost his ability to challenge them on appeal. *U.S. Bancorp*, 513 U.S. at 25 ("The reference to 'happenstance' in *Munsingwear* must be understood as an allusion to this equitable tradition of vacatur."). The government's removal of Petitioner was independent of this lawsuit: the law imposed on the government a mandatory duty to remove Petitioner. Appellant's Reply in Supp. of Mot. to Dismiss & to Vacate 1-2 (citing 8 U.S.C. § 1231(a)(1)(A), (4)(A)); *Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet*, 260 F.3d 114, 121-22 (2d Cir. 2001) ("[N]ot all actions taken by an appellant that cause mootness necessarily bar vacatur of the district court's judgment."); *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 649 (D.C. Cir. 2011) (stating that vacatur is not categorically barred even where the appellant caused the mootness). Here, the government removed Hassoun in accordance with its statutory obligations—which shows that vacatur is appropriate.

The congressional imperative to remove Petitioner is alone enough to establish that the established practice of vacatur is warranted here. But even if Respondent's role in the precise timing of Petitioner's removal matters, as Petitioner has previously maintained, Pet'r-Appellee's Opp'n to Resp't's Mot. to Vacate 9, it would not undercut the case for vacatur: Mootness here was not the product of Respondent's unilateral action. Rather, mootness in this case was the work of several actors, including Petitioner, Respondent, and the country of removal.

Appellant's Mot. to Dismiss & to Vacate 17-18; Appellant's Reply in Supp. of Mot. to Dismiss & to Vacate 2-4. As the Second Circuit concluded, "the government's appeal was 'frustrated by the vagaries of circumstance,' and the removal of [Petitioner] to a third country was 'the natural and apparently long-anticipated result' of the government's immigration enforcement efforts." *Hassoun*, 976 F.3d. at 132 (quoting *U.S. Bancorp*, 513 U.S. at 25; *Russman*, 260 F.3d at 123). Petitioner's removal required coordination and agreement with a sovereign foreign nation. It was not exclusively within Respondent's control; the U.S. government's actions were *necessary* but not *sufficient* to effectuate removal. The Second Circuit recognized the government's multiple and "ongoing efforts" to remove Petitioner, both "throughout the district court proceedings" and "throughout this appeal." *Id.* (quoting this Court's stay order, 469 F. Supp. 3d 69, 75 (W.D.N.Y. 2020), Dkt. 246); *see* Appellant's Mot. to Dismiss & to Vacate 4-12 (recounting the pertinent litigation history of Petitioner's detention, including Petitioner's first habeas case before Chief Judge Geraci and the long and varied efforts by the government to remove Petitioner). It is true that the U.S. government is—obviously—involved in removal efforts. Although the government of course played a role in Petitioner's removal, "[t]he government's ongoing effort to comply with [the statutes requiring removal of a foreign national with an order of removal] was 'independent of the pending lawsuit' and does not indicate that the government acted 'in order to overturn an unfavorable precedent.'" *Id.* at 132-33. As the Second Circuit noted, Petitioner has "point[ed] to no evidence—beyond speculation—that the government acted for reasons other than its statutory obligation to effectuate a removal." *Id.* at 132. Petitioner's hollow assertion otherwise is baseless and makes no sense. Appellant's Reply in Supp. of Mot. to Dismiss & to Vacate 3-4 ("If the government could have at any time removed [Petitioner] in short order and with ease, as [Petitioner] seems to suggest, it would make no sense

for the government to have waited until an adverse final judgment (and multiple adverse district-court rulings, including the constitutional invalidation of a critical regulation), in an extraordinarily resource-intensive case that demanded massive effort by many government agencies."). The Second Circuit made that finding based on the same exact record as the one before the D.C. Circuit and, thus, this Court on remand. *See* Appellant's Mot. to Dismiss & to Vacate 4-12. This Court, faced with this precedent applying the same facts, should also find that Respondent did not unilaterally moot this case such that the Court should deviate from the established practice of vacatur.

Petitioner suggests that "additional submissions are . . . necessary to crystallize and resolve disputed factual issues about whether the government was responsible for the timing of [Petitioner's] removal." Pet'r's Letter 3. To the contrary, the existing record amply demonstrates that the government's obligation to remove Petitioner pre-dated both of his habeas cases, and that the timing of Petitioner's removal was dictated by the timing of the third country's sovereign decision to accept him. *See Hassoun*, 976 F.3d at 132-33 (discussing the history of the government's removal efforts and how Petitioner indicated "no evidence" to the contrary). Petitioner has suggested that at this late date, following appellate briefing and remand, he should be permitted to submit additional evidence, Pet'r's Letter 4, but he had a full and fair opportunity to submit evidence before either or both courts of appeals in conjunction with the vacatur motions, *see* Fed. R. App. P. 27(a)(3)(A), (a)(2)(B)(i) ("Any affidavit or other paper necessary to support a [response to a] motion must be served and filed with the [response.]"). Petitioner elected not to submit any relevant evidence to either court. Indeed, neither the D.C. Circuit nor the Second Circuit panel implied that the record before them was deficient and prevented them from adjudicating the issue.

Second, the Court should vacate all its § 1226a-related decisions to ensure they do not continue to have preclusive effects on the parties. A key purpose of *Munsingwear* vacatur is that "a judgment, unreviewable because of mootness," should not be permitted to "spawn[] any legal consequences." *Munsingwear*, 340 U.S. at 41; Appellant's Mot. to Dismiss & to Vacate 17; Appellant's Reply in Supp. of Mot. to Dismiss & to Vacate 4-6. Here, the Court's significant rulings regarding § 1226a, including the scope of review and the burden of proof, could have significant legal consequences. Indeed, the Second Circuit concluded that leaving intact the regulation-based rulings "could have a preclusive effect in future litigation between the parties over the lawfulness of [Petitioner's] detention," justifying vacatur. *Hassoun*, 976 F.3d at 133 & n.6 (collecting cases). So too could the statute-based rulings have preclusive effects on the rights of Petitioner and Respondent. *See id.*

Third, other equitable considerations warrant vacatur of all § 1226a-based rulings. Appellant's Mot. to Dismiss & to Vacate 16-17; Appellant's Reply in Supp. of Mot. to Dismiss & to Vacate 5-6. The government "vigorously pursued its appeal—in two courts of appeals, no less." *Hassoun*, 976 F.3d at 133. Declining vacatur here would endorse foisting an inequitable choice upon Respondent regarding those appeals: either relinquish his right to appellate review by removing Petitioner, or 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. *See U.S. Bancorp*, 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"). This unfair choice looms large over future cases given that ICE, Respondent's agency, is "a repeat player before the courts," giving it "an institutional interest in vacating adverse rulings of potential precedential value." *Hassoun*, 976 F.3d at 133 (quoting *Arevalo v.*

Ashcroft, 386 F.3d 19, 20-21 (1st Cir. 2004)). And as the Second Circuit concluded, Petitioner "will not suffer harm because he has been removed from the United States and is barred from re-entry." *Id.* at 133. Petitioner's D.C. Circuit briefing has not identified any undue prejudice he stands to suffer—indeed there is none—if the Court vacates its statute-based rulings. The foregoing reasoning reinforces the government's arguments here that this Court's decisions on § 1226a detention could have unjust preclusive effects. Appellant's Reply in Supp. of Mot. to Dismiss & to Vacate 4-6. Notably, the equitable reasons are weighty enough that they support vacatur even if the Court agrees with Petitioner that non-*Munsingwear*-vacatur case law is relevant here. *See* Pet'r's Letter 3 (stating that "extraordinary circumstances" are required to obtain relief under Rule 60(b)(6) but citing *Ackermann v. United States*, 340 U.S. 193, 199 (1950), a non-*Munsingwear*-vacatur case); *see also U.S. Bancorp*, 513 U.S. at 29 (also alluding to "extraordinary circumstances," but indicating it is the standard required in the unique context of a "settlement agreement provid[ing] for vacatur," which is not present here).

In sum, as explained above and in Respondent's briefs in the D.C. Circuit, under established vacatur principles, this Court should vacate all its decisions on or pertaining to 8 U.S.C. § 1226a.

One final note: Under 8 U.S.C. § 1226a(b)(4), "the rule of decision in habeas corpus proceedings" related to § 1226a "shall be" "[t]he law applied by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit." This Court previously held that the phrase "rule of decision" in that provision means that D.C. Circuit law applies *only* to "substantive" matters in this case, Order 6 n.2 (Dkt. 75), and "does not require the Court to apply D.C. Circuit procedural law," Order 11 (Dkt. 225). The Court has applied the progeny of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), to determine whether a rule is substantive or

procedural. Order 11 (Dkt. 225) (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (in an *Erie* case, "explaining that a rule is procedural if it 'governs only the manner and the means by which the litigants' rights are enforced' and is substantive if it affects 'the rules of decision by which the court will adjudicate those rights'")). Under that framework, a Rule 60(b) motion is procedural, not substantive. *See, e.g.*, *Retained Realty, Inc. v. McCabe*, 376 F. App'x 52, 55-56 & n.1 (2d Cir. 2010) (concluding that the related Rule 54(b), which permits the entry and revision of partial final judgments, is procedural, and noting that the Supreme Court has *never* found any Federal Rule of Civil Procedure to be substantive); *Bakula v. Dufaur Corp.*, No. 92-cv-5166, 1994 WL 18503, at *2 (S.D.N.Y. Jan. 18, 1994) ("Federal law governs the standards for applying Rule 60(b), even if the applicable substantive law of the underlying case would be state law."); *cf. Lomas & Nettleton Co. v. Wiseley*, 884 F.2d 965, 968 (7th Cir. 1989) (opining that a state rule of decision might apply "[i]n an unusual circumstance" where "a substantive right under state law" was affected, but not suggesting that state law could prohibit a forum federal court from vacating its rulings in circumstances where Rule 60(b) would permit it to do so). Under this Court's prior ruling, then, this Rule 60(b) request would be a procedural matter that is governed by Second Circuit law. The Second Circuit's most on-point precedent on the matter would be its decision in this very case: in that decision the Second Circuit ruled, based on the same record and the same arguments, that this Court had to vacate its regulation-based rulings. *Hassoun*, 976 F.3d at 133. Under that decision, this Court should vacate the statute-based rulings too. At all events, no matter what Circuit's law applies, under well-established *Munsingwear* principles that govern in both the Second and D.C. Circuits, the Court should vacate all decisions on or pertaining to 8 U.S.C. § 1226a. *See* Appellant's Mot. to Dismiss & to Vacate; *Hassoun*, 976 F.3d at 133.

CONCLUSION

For the above reasons and for the reasons expressed in Respondent's prior briefing (Dkts. 295, 295-1, 295-3, 295-4), the Court should vacate all decisions on or pertaining to 8 U.S.C. § 1226a, dismiss the entire habeas petition, and amend the judgment to reflect that the entire habeas petition was dismissed.

Dated: January 4, 2021

Respectfully Submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

KATHLEEN A. CONNOLLY
Senior Litigation Counsel

/s/ *Steven A. Platt*
STEVEN A. PLATT
Senior Counsel for National Security
District Court Section
Office of Immigration Litigation
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 532-4074
Email: steven.a.platt@usdoj.gov

JOHN J.W. INKELES
Trial Attorney

JAMES P. KENNEDY, JR
United States Attorney
Western District of New York

DANIEL B. MOAR
Assistant United States Attorney
138 Delaware Avenue
Buffalo, New York 14202
Telephone: (716) 843-5833
Email: daniel.moar@usdoj.gov

Attorneys for Respondent