UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

v.

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

Respondent.

Case No. 1:19-cv-00370-EAW

PETITIONER'S SUPPLEMENTAL BRIEF IN OPPOSITION TO RESPONDENT'S MOTION FOR VACATUR

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INTRODUCTION

The government seeks to wipe off the books this Court's rulings and judgment regarding 8 U.S.C. § 1226a. Those rulings stand for the proposition that political officials of the executive branch cannot make a unilateral decision to imprison a person indefinitely without presenting evidence to substantiate their allegations before a neutral decision maker as part of a fair process. As a result of the fair process ordered by this Court, the government's core allegations were exposed as lies or as patently unreliable hearsay that could not withstand meaningful scrutiny. The Court ultimately entered judgment in Petitioner's favor under 8 U.S.C. § 1226a not because of any sweeping legal ruling regarding the constitutionality of the law, but because the government conceded it could not meet any remotely plausible burden of proof.

The government now asks this Court to vacate those rulings and judgment because, it claims, it was "happenstance" that the government removed Petitioner while its appeal was pending, and because the rulings threaten to have preclusive effect on the parties in future litigation. That the government continues to offer these arguments is consistent with its willingness to stretch credulity to the breaking point throughout this litigation. As this Court knows well, nothing was coincidental about how and when this case became moot—indeed, after conceding its case and acquiescing in a judgment that resulted in an order of release from this Court, the government furiously attempted to complete Petitioner's removal during the narrow window of time provided by the appellate courts' administrative stays. Moreover, as the government has previously conceded, the idea that the government is prejudiced by the preclusive effect of the Court's rulings is utterly fanciful. Petitioner now resides half a globe away and is barred from ever returning to the United States. Even if the

Court's rulings would have preclusive effect against the government in a future proceeding asserting the same claims between these precise parties, that possibility is so utterly fantastical that to endorse it as a reason to grant vacatur would invite the very kind of bad-faith manipulation of the judicial process that *Munsingwear*'s focus on "equity" is intended to prohibit rather than enable.

Vacatur is an extraordinary remedy that is granted only where it would be inequitable to permit a ruling or judgment to stand. Here, it is the remedy that would be inequitable. The government spent eighteen months prosecuting a losing case based on false accusations that, at a minimum, it failed to properly vet. In that time, it accrued a number of adverse decisions. On the eve of the decisive hearing, the government admitted that it could not win; it then hastily arranged to moot the case, and now seeks vacatur of the adverse rulings spawned by its misguided litigation. Allowing the government to manipulate the legal process in this way would be unjust. Moreover, it would gravely disserve the public interest and the development of the law to erase from the books this Court's modest but crucially important rulings under § 1226a. Equity should not permit the government to obtain vacatur of the very rulings that were essential to expose the government's indifference to the truthfulness of its allegations in this case—a remarkable and truly shocking abuse of the sweeping detention powers entrusted to it. This Court should reject the motion.[1]

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[1] Petitioner's most recent accounts of the facts relevant to vacatur can be found in his petition for rehearing en banc to the Second Circuit and his opposition to the government's motion for vacatur in the D.C. Circuit. *See* Petition for Rehearing En Banc, *Hassoun v. Searls*, No. 20-2056 (2d Cir. Nov. 3, 2020), ECF 137; Petitioner's Opposition to Respondent's Motion to Vacate the District Court's Decisions and Order, *Hassoun v. Searls*, No. 20-5191 (D.C. Cir. Aug. 17, 2020), ECF 1856943.

ARGUMENT

I. This Court has broader discretion than an appellate court to determine that vacatur is not appropriate.

This Court, when considering a motion to vacate its own decisions as moot under Rule 60(b), has broader discretion to evaluate the equities of such relief than an appellate court. Petitioner agrees with the government that this Court may consider the ordinary standards for vacatur due to mootness that the appellate courts have developed in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994), and subsequent cases. Petitioner disagrees, however, that this Court is necessarily bound to follow only those analyses. This Court enjoys broader discretion to deny vacatur for two reasons: First, it can consider additional equitable factors beyond the traditional *Munsingwear* considerations. And second, it "has broader discretion to make the equitable determination whether to grant vacatur or not" because of its "greater familiarity with the facts and its other institutional advantages relative to an appellate court." *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 119 n.3 (4th Cir. 2000).

First, it appears that every appellate court to have considered the standards that govern motions for vacatur under Rule 60(b) has held that the district courts may consider additional factors beyond the traditional *Munsingwear*/*Bancorp* factors. *See Valero*, 211 F.3d at 121; *Am. Games, Inc. v. Trade Prod., Inc.*, 142 F.3d 1164, 1170 (9th Cir. 1998); *Hall v. Louisiana*, 884 F.3d 546, 551 (5th Cir. 2018); *Marseilles Hydro Power LLC v. Marseilles Land & Water Co.*, 481 F.3d 1002, 1003 (7th Cir. 2007); *see also In re Smalls*, 471 F.3d 186, 191 (D.C. Cir. 2006) (Rule 60(b) motions are reviewed on appeal for abuse of discretion); *In re Lawrence*, 293 F.3d 615, 623–24 (2d Cir. 2002) (same).

Respondent contends that this additional discretion is a one-way ratchet—that it expands the Court's discretion to *grant* vacatur, but not to deny it. ECF 299 at 5. This is mistaken. In two of these cases, the courts denied vacatur and appear to have relied on a broader consideration of the equities than an ordinary *Munsingwear* analysis would suggest. In *Marseilles Hydro Power LLC*, for example, the court concluded that vacatur would have no practical effect on the parties and was therefore unwarranted. 481 F.3d at 1004. In *Hall*, likewise, the majority concluded that vacatur was unwarranted because the decision in question would have no res judicata effect because of intervening legislation. 884 F.3d at 544. One judge in *Hall* wrote explicitly that in such cases of mootness-by-legislation the ordinary consideration of "fault" under *Munsingwear* was inappropriate and that "other equitable considerations should govern vacatur" and that those other consideration should result in *denial* of vacatur. *Id.* (Higginbotham, J., concurring).

In two other appellate cases that discuss the use of broader equitable authority, the courts affirmed district court vacatur of certain rulings. *See Valero*, 211 F.3d at 121; *Am. Games*, 142 F.3d at 1169–70. But nothing in those cases suggests that the additional latitude granted to district courts may only be employed to wipe away rulings rather than let them stand. The Ninth Circuit in *American Games* considered a situation that did not fall neatly within the confines of either "[*Bancorp v.*] *Bonner Mall* (mootness by settlement) and *Munsingwear* (mootness by happenstance)" and held that in such circumstances "a district court should enjoy greater equitable discretion when reviewing its own judgments than do appellate courts" because of "the fact-intensive nature of the inquiry required." 142 F.3d at 1170. There is no suggestion in *American Games* that the district court's discretion could only be used *in favor* of vacatur. Similarly, Fourth Circuit in *Valero* was careful to clarify that even

while the "*Bancorp* considerations . . . are . . . largely determinative of a district court's vacatur decision for mootness," those considerations "do not necessarily exhaust the permissible factors that may be considered by a district court in deciding a vacatur motion." 211 F.3d at 121.

Respondent emphasizes one sentence in *Hall* that appears to characterize *Valero* as creating additional discretion only to *grant* vacatur. ECF 299 at 5 (quoting *Hall*, 884 F.3d at 550). But *Hall* itself acknowledges that factors beyond the ordinary *Munsingwear*/*Bancorp* factors may inform the vacatur analysis, especially in "unusual circumstances." *Hall*, 884 F.3d at 551. Moreover, *Hall* emphasized that "*Bancorp* requires that we look at the equities of the individual case" and, in affirming a decision *not* to grant vacatur, the court looked to the quintessentially equitable consideration that "[j]udgments should stand . . . unless a court concludes that the public interest would be served by vacatur because [j]udicial precedents are presumptively correct and valuable to the legal community as a whole." *Id.* at 553 (internal quotations omitted). The government's suggestion that equity can only be exercised in one direction is inconsistent with *Hall* and, indeed, contradicts the notions of fairness that constitute "equity" itself.

In this case, this Court's broader exercise of equitable discretion to deny vacatur is particularly appropriate. The Court is intimately familiar with the government's conduct throughout a year and a half of litigation. And the resolution of the case was highly unusual, involving a surprise decision by the government to both *stop prosecuting its case* on the eve of trial—conceding it could not meet a legal standard the Court had imposed many months earlier (or even a lower one), *see Hassoun v. Searls*, 469 F. Supp. 3d 69, 79 (W.D.N.Y. 2020)—and then to *seek a stay pending appeal*, while it conducted removal negotiations with a

foreign country. In these circumstances, the equities at stake are manifold—they include the detention of a human being for eighteen months despite its ultimately unprovable legality, the public value of considered rulings of first impression about one of the most expansive defenses of executive power in the nation's history, the government's manipulation of appellate jurisdiction over a court order granting release under conditions that it invited, multiple instances of government misconduct and misrepresentations, and clear incentives for government conduct in future cases. To suggest that the Court should ignore these broader equities just because they counsel against the vacatur the government seeks is both nonsensical and self-serving.

Second, the peculiar circumstances that led this case to become moot also underscore that this Court has broader capacity than an appellate court to make factual determinations in support of a decision to vacate, or not vacate, its decisions. This is, of course, entirely sensible and consistent with hundreds of years of precedent that foreground the role of district courts in developing the factual record (and, in the regular course, appellate deference to those facts). "[B]ecause of a district court's greater familiarity with the facts and its other institutional advantages relative to an appellate court, district courts should have broader discretion to make the equitable determination whether to grant vacatur or not." *Valero*, 211 F.3d at 119 (citing *Am. Games*, 142 F.3d at 1170; *Krolikowski v. Volanti*, No. 95 C 1254, 1996 WL 451307, at *3 (N.D. Ill. Aug. 7, 1996)).

This Court is of course well aware of the facts and procedural history of this case, including the collapse of the government's case under scrutiny; its remarkable decision to concede defeat before the evidentiary hearing; its consequent decision to forego any opportunity to examine Petitioner under oath despite its hard-fought victory winning the

right to do so; and its abrupt pivot to begin confidential discussions regarding Petitioner's removal even while it was still briefing whether this Court should stay the impending order of release that its actions had made inevitable. *See* Stipulation to Amendment Protective Order to Include Confidential Information Regarding Removal (June 26, 2020), ECF 249; Reply in Support of Respondent's Motion to Stay (June 27, 2020), ECF 250; Decision and Order (June 29, 2020), ECF 256. As discussed below, these and other factual circumstances inform the equities here, which tip strongly against allowing the government to wipe off the books this Court's modest, careful, and almost entirely procedural rulings regarding the scope of habeas review of unilateral executive detention under 8 U.S.C. § 1226a.

II. The equities do not justify the extraordinary remedy of vacatur with respect to this Court's PATRIOT Act rulings.

The government urges the Court to vacate its PATRIOT Act rulings "because the appeal became moot when Petitioner was removed to a foreign country and so was no longer in Respondent's custody." ECF 299 at 1. The government's strategic use of the passive voice attempts to obscure the obvious. Petitioner "was" not simply removed; the *government* removed him. The government did so, moreover, knowing full well that doing so would moot its appeal. And, fatally to its position in the context of a weighing of equities, the government only began in earnest an attempt to remove Petitioner—including negotiating the terms of such removal—*after* this Court indicated it would order Petitioner's removal (which itself came after the government itself chose to forfeit the case by canceling a weeklong evidentiary hearing that had been planned amidst a pandemic for six months). Separately, there is no realistic concern that the Court's rulings will ever have a preclusive effect against the government.

To permit the government to wipe away district court rulings it disagrees with by manipulating the appellate stay process and its own unilateral control over the timing of an immigration detainee's removal is not remotely the kind of "equity" that *Munsingwear* vacatur is meant to serve. That a panel of the Second Circuit accepted this argument with respect to this Court's purely legal rulings invalidating 8 C.F.R. § 241.14(d) in December 2019, *see* Decision and Order ECF No. 55, is no reason for this Court to repeat that error with respect to its decisions and judgment under 8 U.S.C. § 1226a, which involved six months of intense factual development and evidentiary disputes.

The reasons the government offers for vacatur all fail. First, the government continues to portray its removal of Petitioner, which mooted the government's appeals, as mere "happenstance." ECF 299 at 7. Petitioner has repeatedly explained why this is not so—and why the government bears responsibility for the mootness, and why Petitioner does not. *See* Petitioner–Appellee's Opp. to Respondent's Mot. to Vacate the District Court's Decisions and Order Granting Judgment to Appellee at 8–12, *Hassoun v. Searls*, No. 20-5191 (D.C. Cir. Aug. 17, 2020), ECF 1856943; *see also* Petitioner–Appellee's Mot. to Vacate Motions Panel's Opinion Granting the Government's Mot. for a Stay as an Improvidently Issued Advisory Opinion & Under *United States v. Munsingwear* at 16–18, *Hassoun v. Searls*, No. 20-2056 (2d Cir. Aug. 17, 2020), ECF 87.

Even if the Court finds that the government did not *unilaterally* moot the case, the government now concedes that it played an integral role: "[M]ootness in this case was the work of several actors, including Petitioner, Respondent, and the country of removal." ECF 299 at 7. But as the Supreme Court has explained, such an agreement among multiple

parties is not the straightforward kind of "happenstance" highlighted in *Munsingwear*. It is, if anything, more akin to a negotiated settlement among the parties.

In *Bancorp*, the Supreme Court held that where a case becomes moot by settlement, the "established practice" so heavily invoked by the government, *see, e.g.*, ECF 299 at 7, is, in fact, flipped on its head: Vacatur requested by the losing, settling party will ordinarily *not* be granted, unless there are exceptional circumstances justifying it. *Bancorp*, 513 U.S. at 392–93 ("Where mootness results from settlement . . . the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur." (quotation marks omitted)). And, of course, whether exceptional circumstances exist is a matter of judgment that must consider the public interest and other equities and which, on a Rule 60(b) motion, is reserved to the sound discretion of the district court. *See, e.g., Am. Games*, 142 F.3d at 1170; *Krolikowski*, 1996 WL 451307, at *4.

In order to apply these principles to this case, it is important for the Court to understand that [redacted]

[redacted]

In these circumstances, mootness was not mere happenstance, but—at a minimum—[redacted]. It is in these sorts of mixed cases that district courts appropriately exercise broader discretion to control the extraordinary remedy of vacatur. *See Am. Games*, 142 F.3d at 1166 (approving the use of an "equitable balancing of the hardships and the public interests at stake" where the district court found that the case fell "somewhere between *[Bancorp]* (mootness by settlement) and *Munsingwear* (mootness by happenstance); *see also Bancorp*, 513 U.S. at 26 ("Respondent won below. It is petitioner's burden, as the party seeking relief from the status quo . . . to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur.").[3]

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[2] The government's motions for vacatur have all avoided any discussion of how or why the prospect of Petitioner's removal to the receiving country suddenly materialized only after Petitioner's court-ordered release under supervision became imminent. It beggars belief that the U.S. government did not play an active role to influence the timing or substance of the decision of the receiving nation—a country with which Petitioner had no previous connection whatsoever—to accept him.

The Court could, if it deemed it relevant, require the government to explain in more detail the timing and substance of its efforts to find a receiving country. It bears noting that at other stages of Petitioner's detention the government was not nearly so reticent about describing to the Court the nature and timing of its diplomatic outreach to other countries. *See Hassoun v. Sessions*, No. 18-cv-586, 2019 WL 78984, at *1–2 (W.D.N.Y. Jan. 2, 2019) (describing in some detail the government's diplomatic outreach to nine named nations and three other, unnamed nations).

[3] The government argues that its statutory duty to remove individuals like Petitioner means that the Court should ignore the rest of its conduct in evaluating the equities here. *See* ECF 299 at 7 ("The congressional imperative to remove Petitioner is alone enough to establish

In addition, the government raises the specter that "[d]eclining vacatur here would endorse foisting an inequitable choice upon" it by forcing it to either forfeit its right to appeal an adverse ruling or delay a detainee's removal in order to permit an appeal to go forward. *See* ECF 299 at 10. For support, it asserts that this would be unfair because the government "vigorously pursued its appeal—in two courts of appeal, no less." *Id.* (quotation marks omitted). While it may look that way to an outside observer, the government did not pursue its case, or its appeals, with vigor at all. Instead, it *forfeited* its case (and elected to scrap a long-planned evidentiary hearing that had required innumerable resources and sacrifices from the Court, its personnel, and counsel); used the appellate stay process to obtain a near-automatic administrative stay *with Petitioner's consent*; and, at the same time, accelerated and concluded negotiations to effectuate Petitioner's removal while *again* obtaining Petitioner's consent to postpone briefing on its pending stay applications (thereby agreeing to extend his own detention pending removal, which this Court had declared unlawful). In these unique circumstances—where the government engineered Petitioner's snap removal at the earliest stages of a precipitous appeal—the case arguably "stands no differently than it would if jurisdiction were lacking because the losing party failed to appeal at all." *Bancorp*, 513 U.S. at 25.

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that the established practice of vacatur is warranted here."). But that argument obscures reality: mandatory or not, the government's implementation of its duty to remove people involves many acts of discretion, choice, and timing. No case could more aptly demonstrate that profound measure of government control than this one. It would be particularly inequitable to reward the government with vacatur if the timing of its precipitous efforts to effectuate removal were motivated by the prospect of adverse judicial rulings.

Moreover, the choice the government presents is a false one. The government seeks to use *this* case as a stand-in for future cases in which different equities might suggest a different outcome. If the government's point is that a denial of vacatur here would mean it could not repeat its same exact conduct without risking that a decision against it remain on the books, under *Munsingwear* and *Bancorp*, that is simply the proper consequence of balancing the equities in these circumstances. But if the government's point is that a denial of vacatur here would mean it would not be able to wipe clean an adverse decision when the circumstances present here were absent—when, as in what one hopes is the mine run of cases, the government and its lawyers execute their duties in good faith—that point is irrational and irrelevant, because the equities present there would be starkly different.

Second, the government's claim that "the Court should vacate all its § 1226a-related decisions to ensure they do not continue to have preclusive effects on the parties" is, again, fanciful—and the government knows it. While the government here warns that those rulings "could have significant legal consequences," ECF 299 at 9, it does not explain *how*—and it has never done so, despite multiple opportunities to brief the vacatur question in connection with this litigation. In fact, the government has already conceded that "[t]here is no realistic probability that [Petitioner] could in the future be in a position to allege that he had been injured by the statute[.]" Appellant's Motion to Dismiss and to Vacate the District Court's Decisions and Order Granting Judgment to Appellee at 13, *Hassoun v. Searls*, No. 20-5191 (D.C. Cir. Aug. 5, 2020), ECF 1855258. That, of course, is because Petitioner is now in a foreign country and is forever barred from entry into the United States. And even disregarding the fact that these parties will never litigate these same claims, there is no need for vacatur to prevent the district court's decisions from exerting a precedential effect on

other future § 1226a litigation involving the government. This Court's decisions regarding § 1226a do not bind any court—even this one. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quoting 18 J. Moore et al., *Moore's Federal Practice* § 134.02[1] [d], p. 134–26 (3d ed. 2011))).[4]

Third, the fact that the Second Circuit did grant vacatur of this Court's rulings under 8 C.F.R. § 241.14(d) does not determine whether vacatur is appropriate here. The Second Circuit was only considering this Court's purely legal ruling "that 8 C.F.R. § 241.14(d) is not a permissible reading of [8 U.S.C.] § 1231(a)(6), and that it is accordingly a legal nullity that cannot authorize the ongoing, potentially indefinite detention of Petitioner." *Hassoun v. Searls*, 427 F. Supp. 3d 357 (W.D.N.Y. 2019). That ruling, issued in December 2019, was decided before there had been any factual development in this case. The record before the Second Circuit was thus much thinner than the one subsequently developed in § 1226a proceedings. Indeed, the fact that the Second Circuit's opinions completely ignored the government's concession that it could not prove its care—or that the government's core allegations crumbled under modest scrutiny—strongly suggests that the Second Circuit simply declined to weigh any equities that depend on the evidentiary proceedings that followed the December 2019 ruling on the regulation. *See Hassoun v. Searls*, 968 F.3d 190 (2d

[4] Of course, the reasoning of this Court's opinions might be persuasive to future courts faced with cases involving the same statute or regulation. Presumably, that is what the government fears. But that is not a basis for vacatur.

Cir. 2020); *Hassoun v. Searls*, 976 F.3d 121 (2d Cir. 2020). By contrast, the Court's decisions and final disposition under 8 U.S.C. § 1226a arise out of the Court's close supervision of targeted discovery, various evidentiary disputes, and detailed pre-hearing submissions before the frustrated evidentiary hearing. Indeed, the Court's disposition under § 1226a ultimately depended on a failure of proof when the government conceded it could not meet its burden and chose to forego its opportunity to examine Petitioner regarding its allegations. *Hassoun*, 469 F. Supp. 3d at 78–79.

Despite these legal and factual differences between the regulatory and statutory claims, the government insinuates that the Second Circuit's ruling is effectively binding on this Court because this Court must apply Second Circuit law to a motion for vacatur under Rule 60(b). *See* ECF 299 at 11–12. This argument fails at every step. The government is incorrect that Second Circuit law applies. As a textual matter, § 1226a(b)(3) makes clear that the "final order" is subject to review only in the D.C. Circuit. Because a motion for vacatur seeks to affect that final order—indeed, to eliminate it—review of such a motion is committed to the D.C. Circuit. The government contends that this motion is nevertheless governed by Second Circuit law because it is merely "procedural" and does not implicate a substantive "rule of decision" for which § 1226a(b)(4) prescribes that D.C. Circuit law must apply. ECF No. 299 at 11–12. The government makes an analogy to this Court's prior decision holding that the procedures for invoking evidentiary privileges are governed by Second Circuit law even while the substance of the privilege is supplied by the D.C. Circuit. *Id.* But that analogy fails here because the relief the government seeks here is quintessentially substantive: to eliminate the final judgment on the merits. A motion to overturn substantive decisions and orders—and thereby finally determine the rights of the

parties—is no more "procedural" than a motion to obtain those decisions and orders in the first place.[5] In other contexts, courts recognize this point by, for example, holding that state law governs the preclusive effect of state judgments in diversity cases because such questions are not merely procedural matters to which federal law can apply under the *Erie* doctrine. *See Conopco, Inc. v. Roll Int'l*, 231 F.3d 82, 87 (2d Cir. 2000) ("To determine the effect of a state court judgment, federal courts, including those sitting in diversity, are required to apply the preclusion law of the rendering state."). Similarly, federal district courts apply the law of the Federal Circuit to determine the preclusive effect of a judgment that involves "substantive issues of patent law" subject to that circuit's appellate jurisdiction. *See, e.g.*, *Speedfit LLC v. Chapco Inc.*, No. 15-cv-13232020 WL 5633101, at *7 (E.D.N.Y. Sept. 21, 2020); *Arunachalam v. Presidio Bank*, 801 F. App'x 750, 752 (Fed. Cir. 2020). In a closely analogous context, the Federal Circuit has held that on a "district court's denial of a motion to vacate its judgment" under Rule 60(b), any "aspects of the motion that are unique to patent law are reviewed in accordance with Federal Circuit law" rather than the law of the regional circuit. *Cardpool, Inc. v. Plastic Jungle, Inc.*, 817 F.3d 1316, 1321 (Fed. Cir. 2016). Because the motion here seeks relief that is "unique to" the government's detention powers under § 1226a it should be governed by D.C. Circuit law, not that of the Second Circuit.

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[5] If there were some difference between the D.C. Circuit and Second Circuit with respect to the *procedures* by which a motion for vacatur must be presented, perhaps there would be an argument that those procedures are supplied by Second Circuit law. But that is not what the government seeks here; it asks the Court to apply the *substantive* standards of the Second Circuit—and to give its decision under 8 C.F.R. § 241.14(d) effectively preclusive force—to adjudicate the *merits* of its request to eliminate the decisions, orders, and judgment under § 1226a.

In any event, the government points to no relevant distinction in the standards that govern a motion to vacate under Rule 60(b) between the D.C. Circuit and Second Circuit. The only reason the government now, belatedly, argues that Second Circuit law applies is to attempt to give preclusive effect to the favorable decision it obtained from that court. But this is transparently opportunistic. Indeed, when the government originally moved for vacatur in the D.C. Circuit, it cited D.C. Circuit law and never suggested that the court's disposition was governed by its sister circuit's law (as it would have been if the arguments it is making here are correct). *See* Appellant's Motion to Dismiss and to Vacate the District Court's Decisions and Order Granting Judgment to Appellee, *Hassoun v. Searls*, No. 20-5191 (D.C. Cir. Aug. 5, 2020), ECF 1855258.

Moreover, even if Second Circuit law did apply to this motion, the equities would not come out the same way. This Court is in a far different position with respect to the government's motion to vacate its PATRIOT Act rulings than the Second Circuit was with respect to the Court's rulings under the regulation. Unlike Petitioner's claims under 8 C.F.R. § 241.14(d), the factual record under § 1226a was extensively developed and presented to the Court, and the Court issued numerous rulings and factual determinations on that record. The judgment under § 1226a was fundamentally premised on the factual insufficiency of the government's case under any plausible standard of proof.

As described above, the Court's close familiarity with the progress of this case, the government's representations to the court regarding the facts and allegations supporting its determination under § 1226a, and its litigating positions throughout the pre-hearing proceedings necessarily inform the Court's exercise of discretion over vacatur. This Court also has special insight on whether the timing of Mr. Hassoun's mootness can be described

as mere "happenstance," following as it did immediately on the heels of the government's remarkable turnabout in this Court. This Court is also able to inquire further into the circumstances that led to Petitioner's removal, should it choose do to so, in a way that an appellate court is not well equipped to do. This Court's observations in that regard—including any further findings of fact—will be critical to any future D.C. Circuit review of this Court's vacatur decision. Far from being compelled to reach the same conclusion as the Second Circuit, this Court should take the opportunity to properly assess the equities of the government's request and why those equities counsel strongly against vacating the core of this litigation, which was conducted under § 1226a.

CONCLUSION

For these reasons, the Court should deny Respondent's motion for vacatur.

Respectfully Submitted,

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