UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-2056

Caption [use short title]: Hassoun v. Searls

Motion for: Dismissal, and to Vacate the District Court's Decisions and Order Granting Judgment to Appellee

Set forth below precise, complete statement of relief sought:

Appellant seeks: (1) dismissal of this appeal as moot; and (2) vacatur of the district court's decisions related to the basis of this appeal and of the district court's order granting judgment to Appellee.

MOVING PARTY: Jeffrey A. Searls

☐ Plaintiff ☐ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Adham A. Hassoun

MOVING ATTORNEY: Steven Platt

OPPOSING ATTORNEY: A. Nicole Hallett

[name of attorney, with firm, address, phone number and e-mail]

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Court-Judge/Agency appealed from: W.D.N.Y., Judge Wolford

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain): ______

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency: ______

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date: ______

Signature of Moving Attorney: s/ Steven A. Platt **Date:** 8/5/2020 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

No. 20-2056

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND 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.

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

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. Indeed, in granting a stay pending appeal, this Court ruled 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." *Hassoun v. Searls*, No. 20-2056, — F.3d —, 2020 WL 4355275, slip op. 25 (2d Cir. July 30, 2020) (C.A. Dkt. 76). Given the importance of the regulation at issue here and the flaws in the district court's ruling, 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 C.F.R. § 241.14(d).

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]

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[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*;

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 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.").

Consistent with those authorities, a regulation, 8 C.F.R. § 241.14(d), permits the detention of an alien when: (1) the alien is described in 8 U.S.C. § 1182(a)(3)(B), which describes aliens who conduct terrorism-related inadmissibility activities or who have engaged in any activity "that endangers the national security"; (2) the alien's "release presents a significant threat to the national security or a significant risk of terrorism"; and (3) "[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). To invoke this authority, ICE must notify the alien that it intends to detain him under § 241.14(d), describe to the alien the factual basis for that detention, and afford the alien a reasonable opportunity to examine the evidence,

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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)."

to submit a written statement, and to present evidence on his behalf. *Id.* § 241.14(d)(2)(i)-(ii). In certain cases, the government must conduct a sworn interview of the alien if possible—an option offered to the petitioner in this case—and, if requested, allow for an interpreter and the presence of the alien's attorney. *Id.* § 241.14(d)(3)(i)-(ii). The ICE Director then assembles a record and makes a recommendation to the Secretary of Homeland Security on whether to detain the alien under this regulation. *Id.* § 241.14(d)(4)-(5). The FBI Director also submits a recommendation. *Id.* § 241.14(d)(6).

Based on this record, the Secretary then may certify that an alien should continue to be detained on security or terrorism grounds. *Id*. Before the Secretary makes a certification, the regulation provides that the Secretary "shall order any further procedures or reviews as may be necessary under the circumstances to ensure the development of a complete record, consistent with the obligations to protect national-security and classified information and to comply with the requirements of due process." *Id.* A certification by the Secretary is subject to ongoing review every six months and continued detention requires re-certification by the Secretary or Deputy Secretary of Homeland Security. *Id.* § 241.14(d)(7).

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

[2] References to the district court docket are marked as "Dkt." References to the docket in this appeal are marked as "C.A. Dkt."

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 (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. 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), the regulation at issue here. *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 was not lawfully authorized by 8 C.F.R. § 241.14(d), and (2) an evidentiary hearing would be necessary to determine whether Hassoun's continued detention was lawfully authorized by 8 U.S.C. § 1226a(a)(6). Dec. 13, 2019 Order 1-2 (Dkt. 55). The court held that 8 C.F.R. § 241.14(d) is inconsistent with the Supreme Court's interpretation of the statute invoked to authorize the regulation, 8 U.S.C. § 1231(a)(6). *Id.* at 12. The court reasoned that permitting detention under the regulation raised procedural-due-process concerns, that the regulation was not entitled to the court's deference, and that the regulation was inconsistent with § 1231(a)(6), because it permitted indefinite detention without adequate procedures. *Id.* at 25. With regard to 8 U.S.C. § 1226a(a)(6), the court concluded that the administrative record did not demonstrate the lawfulness of Hassoun's detention and ordered an evidentiary hearing to consider that issue. *Id.* at 27.

On June 18, 2020, 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 Court and to the D.C. Circuit, *Hassoun v. Searls*, No. 20-5191 (D.C. Cir.). (The jurisdictional scheme channels rulings on § 1226a to the D.C. 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. C.A. Dkt. 9-1. Both courts issued administrative stays, on the agreement of the parties. On July 16, 2020, this Court stayed the district court's judgment pending appeal, noting that it would issue an opinion on its decision in due course. C.A. Dkt. 60.

On July 21, 2020, ICE removed Hassoun to a foreign country. C.A. Dkt. 72. Hassoun is no longer in U.S. government custody. *Id.* The government notified this Court, the D.C. Circuit, and the district court of Hassoun's removal on July 22, 2020, and told this Court and the D.C. 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). The D.C. Circuit has ordered the government to file a motion addressing how to proceed by August 5, 2020.

On July 30, the Court 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) (C.A. Dkt. 76) (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 § 241.14(d) is a "permissible" reading of its enabling statute, 8 U.S.C. § 1231(a)(6), rejecting the district court's conclusion that *Zadvydas v. Davis*, 533 U.S. 678 (2002), and *Clark v. Martinez*, 543 U.S. 371 (2005), had "interpret[ed] section 1231(a)(6) for all time and all purposes." Op. 14-15 (quoting *Tuan Thai v. Ashcroft*, 389 F.3d 967, 969-70 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc)). Rather, the regulation at issue here was crafted to "avoid[] the serious constitutional questions identified in *Zadvydas* by focusing narrowly on those 'specially dangerous individuals' implicated in 'terrorism or other special circumstances.'" Op. 15; *see also* Op. 17-18 ("[T]he Court never suggested that § 1231(a)(6) *unambiguously* precludes the interpretation the government now urges . . . ."). 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 held "there is substantial reason to doubt the district court's conclusion that the regulation is invalid because it does not explicitly incorporate the clear-and-convincing evidence standard," and that the

government was "likely to prevail" on its argument that the correct standard was a preponderance of the evidence. Op. 21-22.

The Court 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 invalidates a lawful regulation 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 C.F.R. § 241.14(d) and remand with instructions to dismiss the habeas petition as moot. All relevant considerations strongly support vacatur.[3]

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[3] The government is today moving the D.C. Circuit to vacate the district court's judgment and rulings on or pertaining to 8 U.S.C. § 1226a. *See Hassoun v. Searls*, No. 20-5191 (D.C. Cir.).

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." *Knaust v. City of Kingston*, 157 F.3d 86, 88 (2d Cir. 1998) (citations omitted); *see also British Int'l Ins. Co. v. Seguros La Republica, S.A.*, 354 F.3d 120, 122-23 (2d Cir. 2003). A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," *Catanzano v. Wing*, 277 F.3d 99, 107 (2d Cir. 2001) (quotation marks omitted), and the court can no longer provide any relief that could effectively redress the parties' claimed injuries, *In re Kurtzman*, 194 F.3d 54, 58 (2d Cir. 1999).

This case became 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. *Catanzano*, 277 F.3d at 107.

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." *Lillbask ex rel. Mauclaire v.*

State of Conn. Dep't of Educ., 397 F.3d 77, 85 (2d Cir. 2005). There is no realistic probability that Hassoun could in the future be in a position to allege that he had been injured by the regulation, because any future invocation of the regulation against him would require him to return to the United States, meet the criteria for detention under the regulation, and have the Secretary certify him for detention under the regulation. That chain of events does not establish "capable of repetition" because repetition is, at most, a "theoretical[ ] possib[ility]." *Russman v. Bd. of Educ.*, 260 F.3d 114, 120 (2d Cir. 2001).

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. C.A. Dkt. 72. There is no "reasonable expectation that the same complaining party"

(Hassoun) will again become detained under the regulation and seek his release from U.S. government custody. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted); *see also, e.g.*, *N.Y. Public Interest Research Grp. v. Whitman*, 321 F.3d 316, 327 (2d Cir. 2003) (noting that even where compliance is voluntary, it "moots a case . . . where it is clear the allegedly wrongful behavior could not reasonably be expected to recur").

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 C.F.R. § 241.14(d)—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 an appellate court to vacate the unreviewed judgment granted in the court below and remand the case to that court with directions to dismiss it." *Bragger v. Trinity Capital Enter. Corp.*, 30 F.3d 14, 17 (2d Cir. 1994); *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 undisturbed, might prejudice a party whose appeal as of right was precluded due to the intervening mootness," thereby preserving the rights of all the parties. *Bragger*, 30 F.3d at 17 (citing *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. This Court 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.

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 held, in the first judicial opinion to address 8 C.F.R. § 241.14(d), that the

regulation was facially void. That unreviewed judgment, the correctness of which this Court has called into serious doubt, 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; *Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet*, 260 F.3d 114, 123 (2d Cir. 2001) (exception inapplicable where action was a "natural and apparently long-anticipated result"). 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 removal 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 regulation 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 regulation provided an independent basis for Hassoun's detention, the Court should vacate the district court's judgment and all decisions on or pertaining to 8 C.F.R. § 241.14(d) 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 decisions on or pertaining to 8 C.F.R. § 241.14(d) and remand with instructions to dismiss the entire habeas petition.

Dated: August 5, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

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 4,934 words according to the count of Microsoft Word, excluding the materials permitted to be excluded by Rule 32(f).

/s/ Steven A. Platt

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2020, I filed this motion through the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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