No. 20-2056

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ADHAM AMIN HASSOUN,

Petitioner–Appellee,

v.

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

Respondent–Appellant.

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

PETITIONER–APPELLEE'S OPPOSITION TO RESPONDENT'S MOTION TO VACATE THE DISTRICT COURT'S DECISIONS AND ORDER GRANTING JUDGMENT TO APPELLEE

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INTRODUCTION

Petitioner-Appellee Adham Amin Hassoun spent years in an immigration detention facility while the government made no progress in removing him. For the final eighteen months of Petitioner's detention, the government claimed the power to hold him indefinitely. It grounded that extraordinary claim in two authorities: a rarely-used regulation, 8 C.F.R. § 241.14(d), and a never-before-used provision of the USA PATRIOT Act, 8 U.S.C. § 1226a. Both authorities, according to the executive branch, permitted Petitioner's indefinite detention because the executive branch had deemed him a danger to national security. And according to the executive branch, the executive branch's decision was not subject to judicial review.

Petitioner filed a habeas petition challenging the validity of both authorities, and he prevailed. Following one-and-half years of litigation, including months of discovery and a series of exhaustive, carefully reasoned interlocutory rulings that sharply curbed the executive's arrogation of unreviewable power, the government effectively chose to terminate the district court litigation. It conceded that, in light of the district court's prior rulings, it could not prove that Petitioner was a danger to national security—not even by a preponderance of the evidence. WDNY-ECF 226 at 3–4; WDNY-ECF 256 at 30. The district court then ordered Petitioner's release. WDNY-ECF 256 at 42.

The government appealed both to this Circuit and to the D.C. Circuit, and sought stays of the district court's judgment in both courts of appeals. Suddenly, however, the executive branch discovered that it was indeed able to remove Petitioner, and mere weeks later, it did so.

Having mooted its own appeal, the government now asks this Court to vacate the district court's rulings on the regulation. To justify this "extraordinary relief," the government relies on the federal courts' general practice of vacating judgments that are rendered unreviewable by "happenstance." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994). But as explained below, the notion that this case was mooted by happenstance is risible.

It would be ironic indeed if the executive branch could use its extensive, unchecked power over the timing and circumstances of removal to moot a case and obtain vacatur of a series of district court rulings on—what else?—the danger of unchecked executive power. The Court should deny the government's request.

BACKGROUND[1]

Petitioner, a stateless Palestinian, completed his criminal sentence in October 2017 following his conviction for conspiracy and material support for terrorism predicated on—in the words of the sentencing court—"provid[ing]

[1] The procedural and substantive history of this case is more fully described in Petitioner's opposition to the government's stay motion. *See* ECF 37-1 at 3–9.

support to people sited in various conflicts involving Muslims around Eastern Europe, the Middle East and Northern Africa," where there was "no evidence that these defendants personally maimed, killed or kidnapped anyone in the United States or elsewhere," where "the government . . . pointed to no identifiable victims," and which was "limited to issues abroad and not in the United States." WDNY-ECF 248-16 at 6, 14. The sentencing court found Petitioner's "motivation to violate the statutes in this case" was his empathy for people who "live[d] through armed conflict and religious persecution." *Id.* at 7. The court rejected "the government's argument that Petitioner poses such a danger to the community that he needs to be imprisoned for the rest of his life" and imposed a 188-month sentence—nearly fifteen years *below* the guideline range of thirty years to life. *Id.* at 8, 16–17.

After completing his sentence, Petitioner was immediately placed in immigration detention in Batavia, New York, pending removal. In February 2019, after Petitioner won his first habeas petition because his removal was not reasonably foreseeable, *Hassoun v. Sessions*, Case No. 18-CV-586-FPG, 2019 WL 78984, at *6 (W.D.N.Y. Jan. 2, 2019) (applying *Zadvydas v. Davis*, 503 U.S. 678 (2001)), the government moved to certify him for indefinite detention as a danger to national security. WDNY-ECF 256 at 3–4. The government initially indicated it would rely upon a regulation, 8 C.F.R. § 241.14(d), and then (months later)

formally certified him under that regulation as well as a provision of the PATRIOT Act, 8 U.S.C. § 1226a. Petitioner filed a habeas petition challenging his detention under both authorities.

In December 2019, the district court invalidated 8 C.F.R. § 241.14(d) as *ultra vires* because the Supreme Court has held that the regulation's authorizing statute, 8 U.S.C. § 1231(a)(6), does "not allow for indefinite detention of any class of aliens that it covers," and because the regulation lacks fundamental due process safeguards, such as a neutral decisionmaker and a clear burden and standard of proof. WDNY-ECF 55 at 25. Though that decision ended all proceedings that were even arguably under this Court's jurisdiction, the government did not appeal until more than six months later, on June 29, 2020.[2]

With respect to the PATRIOT Act detention authority, the court reserved decision on Petitioner's constitutional challenges, ordered an evidentiary hearing, WDNY-ECF 55 at 26–27, and permitted limited discovery. WDNY-ECF 58. Over the next six months, the government's case unraveled. As the district court later explained, the factual basis for Petitioner's detention under the regulation and the

[2] As explained in his opposition to the government's motion to stay the district court's order of Petitioner's release, Petitioner's position is that this Court lacks jurisdiction over the government's appeal. ECF 31-1 at 11–13. Because the appeal is moot, *see infra* § I, it is unlikely that Petitioner can seek review of the stay panel's jurisdictional holding.

statute rested solely on an "administrative record" that includes *nothing* postdating Petitioner's criminal conviction except an FBI "letterhead memorandum . . . summarizing allegations that various other detainees at the BFDF had made against Petitioner." WDNY-ECF 256 at 19 (discussing Admin. R., WDNY-ECF 17-2, Ex. A, Attachment 1). The district court found that these allegations were "an amalgamation of unsworn, uninvestigated, and now largely discredited statements by jailhouse informants, presented as fact," *id.* at 24, that "cannot bear meaningful scrutiny," *id.* at 20.

On June 18, six days before the scheduled evidentiary hearing, the government moved to cancel it, and asked the court to enter judgment in Petitioner's favor. WDNY-ECF 226. In so doing, the government abandoned its opportunity to examine Petitioner under oath. WDNY-ECF 225 at 13. The government conceded on the record that it could not have proved its case by clear and convincing evidence, WDNY-ECF 241 at 6:6–7, or even by a preponderance of the evidence, WDNY-ECF 244 at 9:19–21. *See* WDNY-ECF 256 at 30 & n.11. Petitioner subsequently agreed to all of the extraordinarily strict conditions the government proposed in the event of his release from custody. WDNY-ECF 240. Before the district court acted, on June 24, the government moved to stay Petitioner's release pending its forthcoming appeal. WDNY-ECF 242.

On June 26, while its motion to stay was pending, the government publicly filed a joint stipulation of the parties that, for the first time in the litigation, extended the parties' protective order to cover "information regarding the U.S. government's efforts to remove Petitioner from the United States, including information such as the country of removal [and] terms of removal." WDNY-ECF 249 at 2.

On June 29, the district court denied the government's motion to stay, ordered Petitioner's release upon the agreed-upon conditions, and entered final judgment. WDNY-ECF 256; WDNY-ECF 264. The government appealed the district court's ruling on the regulation in this Court and simultaneously appealed the relevant PATRIOT Act rulings in the D.C. Circuit. WDNY-ECF 259, 260. The government then moved to stay Petitioner's release in both courts, and the parties consented to both a briefing schedule and the imposition of an administrative stay. ECF 9-1 at 1, 5.

On July 13, the government notified both courts that it had made "material progress in achieving Petitioner–Appellee's removal from the United States." ECF 43-1 at 1. Based on a sworn agency declaration, the government represented that Petitioner's removal would occur by July 27 "[a]bsent an extraordinary or unforeseen circumstance." *Id.*

On Monday, July 20, the government informed both circuits that it would remove Petitioner from the United States within the week. ECF 67 at 1. That notice was supported by an agency declaration in which the Assistant Director for Removal in Immigrations and Customs Enforcement's Enforcement and Removal Operations' Removal Division swore that the government "is now in the process of finalizing the logistical arrangements required to effectuate [Petitioner's] removal," and "there are no known obstacles that would prevent Petitioner's removal as scheduled." Decl. of Marlen Piñeiro ¶ 6, ECF 67 at 3.

Two days later, on July 22, the government removed Petitioner to a foreign country and promptly notified both circuits. ECF 72. On August 5, the government moved to dismiss its appeal to this Court as moot. Simultaneously, the government moved to vacate the district court's rulings "pertaining to" 8 C.F.R. § 241.14(d). ECF 72 at 2. Petitioner does not oppose dismissal of the government's appeal as moot.[3] For the following reasons, however, Petitioner opposes vacatur of the district court's rulings.

ARGUMENT

Invoking *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the

[3] Petitioner notes that the government's appeal became practically moot as of July 13, 2020. *See* Pet'r–Appellee's Mot. to Vacate Mots. Panel's Op. Granting the Government's Mot. for Stay, Case No. 20-2056 (2d. Cir., Aug. 17, 2020).

government seeks vacatur of both the district court's final judgment and any of its decisions or rulings "pertaining to" 8 C.F.R. § 241.14(d). ECF 82 at 2. But the government has not met its burden of establishing "equitable entitlement to the extraordinary remedy of vacatur." *Bancorp*, 513 U.S. at 26; *Doe v. Gonzales*, 449 F.3d 415, 420 (2d Cir. 2006). As explained below, vacatur is inappropriate here because the mootness of this case is not attributable to "happenstance," *Bancorp*, 513 U.S. at 25, but to the government's own concerted effort to remove Petitioner immediately following the district court's order of release, thereby forestalling any appeal. It is also inappropriate because it is unnecessary: leaving the district court's decisions on the statute intact will not produce unjust legal consequences and will serve the public interest.

I. The government's active role in mooting this case makes vacatur unwarranted.

Generally, there are two circumstances in which vacatur under *Munsingwear* may be appropriate. First, "when mootness occurs through happenstance," and second, when mootness results from "the unilateral action of the party who prevailed in the lower court." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71–72 (1997). The second of these is inapplicable: Petitioner did not moot this case by unilaterally removing himself from the United States.

To prevail, then, the government must establish that this case was mooted by happenstance. It cannot.

Although the word "happenstance" appears nowhere in the government's motion, it is key to *Munsingwear* jurisprudence. *See, e.g.*, *Bancorp*, 513 U.S. at 22–23. "Happenstance" refers to "circumstances not attributable to the parties," *Arizonans for Official English*, 520 U.S. at 71, or "the vagaries of circumstance," *Bancorp*, 513 U.S. at 25. But Petitioner's removal—the circumstance that mooted this case—is directly attributable to the government's intentional conduct. Indeed, there are few areas in which the government has *more* power than when, and how, a non-citizen is removed from the United States. Far from being outside the government's control, Petitioner's removal was exclusively within it.

To avoid this conclusion, the government insists that Petitioner's removal was not attributable to the United States *per se*, but to "a foreign country's sovereign decision to accept him." ECF 82 at 13. On its face, that position strains credulity. The foreign country's decision to accept Petitioner, "sovereign" though it was, cannot reasonably be divorced from the government's own conduct. That is, the foreign country that accepted Petitioner for resettlement did not unforeseeably and uncontrollably decide to pluck him from U.S. custody just as two circuit courts were poised to rule on the government's motions for a stay. Rather, as always, the foreign country's agreement to accept Petitioner for resettlement was the product of negotiations with the U.S. government. *See* ECF 82 at 6. Those negotiations were specifically and knowingly aimed at achieving the very thing that mooted this

case: Petitioner's removal. *See Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet*, 260 F.3d 114, 122 (2d Cir. 2001) (appellant forfeits the "benefit of vacatur" when it "knew or should have known that [its] conduct was substantially likely to moot the appeal").

As the government itself has laid out, it approached Petitioner's counsel on June 26—while its motion to stay Petitioner's release was pending in the district court—to amend the parties' protective order to cover information about Petitioner's removal, including the country of removal. WDNY-ECF 277-1 ¶ 2. Over the next nineteen days, the parties spoke again and again. WDNY-ECF 277-1 ¶ 5. This flurry of activity immediately followed the government's surprising decision to cancel the evidentiary hearing, abandon its hard-won opportunity to finally examine Petitioner under oath, and concede its factual case. For the government to suggest that this sudden burst of action on the removal front was coincidental, and entirely attributable to the foreign government that ultimately accepted Petitioner, has no basis of support in the record and is not credible. To the contrary, the sequence of events bespeaks a deliberate strategy carefully orchestrated by the government to end this case by effectuating Petitioner's removal, rather than risk his release under supervision.

To be sure, this Court has held that vacatur may be warranted under *Munsingwear* when an appellant moots a case through "voluntary" or "non-

accidental" conduct that is "entirely unrelated to the lawsuit." *Russman*, 260 F.3d at 122. In that vein, the government argues that because it had a "mandatory" obligation to remove Petitioner upon the foreign country's agreement to accept him, it cannot fairly be held responsible for mooting the case. ECF 82 at 2; *see also id.* at 16–17. But it is not enough for the government to say that it had a duty to remove Petitioner once it had obtained the agreement of a foreign country. Mootness is a matter of *timing*, and to establish that this case was mooted by happenstance—and that the government is, therefore, equitably entitled to the "extraordinary remedy of vacatur," *Bancorp*, 513 U.S. at 26—the government must demonstrate that its role in the timing of Petitioner's removal was neither related to the case nor driven by an interest in taking advantage of the *Munsingwear* doctrine.

Given the facts above, the government cannot do so. Tellingly, it does not even try. It sets forth no facts which might support the conclusion that its abrupt effectuation of Petitioner's removal—which, despite years of little or no progress, occurred with startling rapidity immediately after the district court's order of release—was unrelated to the proceedings in the district court. It does not say when its negotiations with the foreign country began. It does not say which country initiated the negotiations, or why. It does not say whether it apprised the foreign country of the developments in or outcome of Petitioner's case. It does not say

whether it stepped up its negotiations with the foreign country when it realized that it was unlikely to achieve a favorable outcome in the district court. It does not say whether it offered additional incentives or applied additional pressure to the foreign country to accept Petitioner, and if so, whether those efforts were driven by the government's desire to avoid having to release Petitioner into the United States.

In light of the government's conspicuous silence on these matters, to ask the Court to accept that the timing of Petitioner's removal is attributable to happenstance is simply too much.

Notably, even if it were somehow true that the government was forced to remove Petitioner involuntarily because of the independent and fortuitously-timed decisions of a foreign country—or even if Petitioner's removal were somehow entirely unrelated to the litigation—the government would still be at fault for its inability to obtain appellate review because it could have taken an appeal long before Petitioner's eventual removal. *See Bancorp*, 513 U.S. at 24–25 (citing cases in which parties were entitled to vacatur when they were "without fault" for the case's mootness); *Dennin v. Conn. Interscholastic Athletic Conference, Inc.*, 94 F.3d 96, 101 (2d Cir. 1996) (granting vacatur when party was "without fault" for mootness). The district court's principal decision on the regulation, in which it concluded that the regulation was a "legal nullity" and did not authorize Petitioner's ongoing detention, issued in December 2019. WDNY-ECF 55 at 25.

The government could have sought an interlocutory appeal from that decision, which finally and conclusively resolved all district court proceedings under 8 C.F.R. § 241.14(d). As the district court observed,

> [I]f the government believed that it was likely to succeed on appeal with respect to [the regulation], and that irreparable harm would result if [Petitioner] was not continued in detention under the regulation, it could have sought to pursue an interlocutory appeal some six months ago.

WDNY-ECF 256 at 40. It did not. In this way, too, the government's inability to obtain appellate review is a problem of its own making.

The government has not established, as it must, that the mootness of this case is attributable to circumstances beyond its control. *See Arizonans for Official English*, 520 U.S. at 71. Rather, this case was mooted by the government's own, intense efforts to effectuate Petitioner's removal as a result of its losses in the district court and, especially, that court's order of release. The government's efforts to effectuate removal were plainly orchestrated to avoid the risk that Petitioner would ever be set free on U.S. soil by court order; they were not mere happenstance. Accordingly, the government is not entitled to vacatur of the district court's judgment or other decisions on the regulation.

II. The district court's decisions will not exert unjust legal consequences if left undisturbed.

Courts grant vacatur under *Munsingwear* "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences."

Munsingwear, 340 U.S. at 41; *see* ECF 82 at 15. Yet the government fails to identify what legal consequences—if any—might flow from the decisions it seeks to vacate. Much less does it explain how Respondent might be harmed by those decisions if they were left undisturbed. *See Camreta v. Greene*, 563 U.S. 692, 713 (2011) (the "point of vacatur" under *Munsingwear* is to ensure that "no party is harmed by" a decision not subject to review). Indeed, the government does not so much as identify—by date, docket number, or even title—precisely which of the district court's rulings or decisions "pertain[] to" the regulation and are encompassed in its request for relief.

In the realm of legal consequences, the most salient under *Munsingwear* is the possibility that an unreviewable decision will exert an unfair preclusive effect on the losing party. *See Munsingwear*, 340 U.S. at 40 (explaining that vacatur "clears the path for future relitigation of the issues between the parties"). The government, however, does not argue that vacatur is necessary to prevent the district court's decisions from exerting a preclusive effect on any future litigation. On the contrary, the government *concedes* 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 regulation[.]" ECF 82 at 13. That, of course, is because he is in a foreign country and is forever barred from entry into the United States. Relatedly, there is no need for vacatur to prevent the district court's decisions from exerting a

precedential effect on future litigation involving the government, or anyone else. The district court's interlocutory decisions on the regulation do not bind any court—even the court that issued them. *See Camreta*, 563 U.S. at 709 n.7 ("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))). Thus, contrary to the government's assertion, there is no need whatsoever for vacatur "to clear the pathway to future litigation on the regulation at issue in this case." ECF 82 at 17. The pathway is not obstructed.[4]

Rather than identify legal consequences justifying its requested relief, the government suggests that vacatur is appropriate here because "[a]bsent mootness, this Court likely would have reversed the district court's decision and ruled in the government's favor." ECF 82 at 15. But the Supreme Court has explicitly rejected that as a valid ground for vacatur under *Munsingwear*. *See Bancorp*, 513 U.S. at 27 (it is "inappropriate . . . to vacate mooted cases, in which [the Court has] no constitutional power to decide the merits, on the basis of assumptions about the merits."). Thus, whether the government's appeal might have been successful is of

[4] Of course, the reasoning of the district 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.

no moment.

Additionally, the government asserts that vacatur is justified here because leaving the district court's decisions on the books would place the government "in a position to choose between two unjust and inequitable scenarios": effect removal and "relinquish" its ability to seek appellate review, or delay removal "just to keep the case alive long enough to obtain appellate review." ECF 82 at 16. That assertion is flatly wrong.

Denying vacatur in this case will not prevent the government from seeking—and, if appropriate, obtaining—vacatur in a similar case in the future. Petitioner does not maintain, and this Court need not hold, that a case mooted by the government's removal of a non-citizen can never qualify for vacatur under *Munsingwear*. *This* case does not qualify because the government has failed to establish, as it must, that Petitioner's removal was attributable to happenstance. *See supra* Part I. But if it can meet its burden in a future case, then it may well be entitled to vacatur under *Munsingwear*, and the Court's denial of its motion here will present no barrier to relief.

Nor is it necessarily "inequitable" for the government to relinquish its right to appellate review in the interest of complying with statutory and constitutional directives. The government is not a private litigant, and its interests—including its interest in preventing any person's detention from lasting longer than necessary—

are broader than seeking "victory" in any particular case. Thus, even if it were true that denying the government's motion to vacate here would prevent the government from obtaining vacatur in other, future cases, that result would not be inequitable; on the contrary, it would simply be a byproduct of the government's special position as a litigant.

Finally, the government identifies no public interest that would be served by vacatur of the district court's rulings. *See Bancorp*, 513 U.S. at 26 ("As always when federal courts contemplate equitable relief, our holding must also take account of the public interest."); *id.* at 28 (rejecting the notion that vacatur should be more freely granted with respect to district court rulings than appellate opinions). And there is none. On the contrary, the public interest is best served by leaving undisturbed the district court's careful, thorough explication and analysis of the government's own theories of its power to indefinitely detain.

CONCLUSION

For the foregoing reasons, the Court should deny the government's request for vacatur.

Dated: August 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2020, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. No party is unrepresented in the appellate CM/ECF system.

Date: August 17, 2020

/s/ *Jonathan Hafetz*
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 3,944 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Date: August 17, 2020

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