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: Vacatur of Motions Panel's Opinion Granting Respondent-Appellant's Motion for a Stay

Set forth below precise, complete statement of relief sought:

Vacatur of the panel's opinion, ECF No. 76, regarding Respondent-Appellant's motion for a stay

MOVING PARTY: Adham A. Hassoun
- ☐ Plaintiff ☐ Defendant
- ☐ Appellant/Petitioner ☑ Appellee/Respondent

OPPOSING PARTY: Jeffrey A. Searls

MOVING ATTORNEY: Jonathan Hafetz

OPPOSING ATTORNEY: Steven Platt

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

American Civil Liberties Union
125 Broad St., 18th Floor, New York, NY 10004
(212) 549-2500, jhafetz@aclu.org

U.S. Department of Justice
P.O. Box 868, Washington, DC 20044
(202) 532-4074, steven.a.platt@usdoj.gov

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/Jonathan Hafetz **Date:** 8/17/2020 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

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 MOTION TO VACATE MOTIONS PANEL'S OPINION GRANTING THE GOVERNMENT'S MOTION FOR A STAY AS AN IMPROVIDENTALY ISSUED ADVISORY OPINION & UNDER *UNITED STATES V. MUNSINGWEAR*

A. Nicole Hallett
Mandel Legal Aid Clinic
University of Chicago Law School
6020 S. University Avenue
Chicago, IL 60637
773.702.9611
nhallett@uchicago.edu

(Counsel continued on next page)

Jonathan Hafetz
Brett Max Kaufman
Charles Hogle
Judy Rabinovitz
Celso Perez
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
212.549.2500

Jonathan Manes
Roderick & Solange MacArthur Justice Center
160 E. Grand Ave., 6th Floor
Chicago, IL 60611
312.503.0012
jonathan.manes@law.northwestern.edu

jhafetz@aclu.org

Counsel for Petitioner–Appellee

INTRODUCTION

Petitioner seeks to vacate a twenty-five page appellate decision deciding the government's motion to stay his release pending appeal. The opinion reached significant jurisdictional and constitutional issues of first impression that neither party expected, or needed, this Court to decide. The motions panel did not publish its opinion until eight days *after* the government released Petitioner into a foreign country as a free man. The panel said the timing of its opinion was meant to "explain" the one-line order it had issued two weeks earlier granting the government's motion to stay Petitioner's release into the United States. ECF 76 at 4. But even at that earlier date, the Court knew the parties were in alignment, Petitioner's removal was imminent, and the case was practically moot.

By then, the parties had agreed to postpone briefing on the motion because, as the government notified both Petitioner (in obtaining his consent) and the Court (in filing for an extension), "[a]bsent an extraordinary or unforeseen circumstance" the government would imminently remove Petitioner from the country. ECF 41 at 1. What's more, at the time the Court issued its order—with opinion "forthcoming," ECF 60—not only this Court, but the D.C. Circuit, had issued indefinite administrative stays preventing Petitioner's release into the United States.

The panel's opinion is purely advisory, and the Court should vacate it for that reason alone. The Court should also vacate the opinion under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). That is principally because Petitioner was prevented from seeking further review of the opinion—including whether the panel, rejecting Petitioner's argument, even had jurisdiction over the appeal—by mootness that he did not cause.[1]

BACKGROUND[2]

Petitioner, a stateless Palestinian, completed a criminal sentence in October 2017 following his conviction for conspiracy and material support for terrorism predicated on, in the sentencing court's words, "provid[ing] support to people sited in various conflicts involving Muslims" abroad that had "no identifiable victims." WDNY-ECF 248-16 at 6, 14. The court rejected "the government's argument that Mr. Hassoun poses such a danger to the community that he need[ed] to be imprisoned for the rest of his life" and imposed a 188-month sentence—nearly fifteen years below the guideline range. *Id.* at 8, 16–17.

After completing his sentence, Petitioner was placed in immigration detention in Buffalo, New York, pending removal. In February 2019, after

[1] Appellant–Respondent opposes vacatur of the Second Circuit's stay opinion, and reserves the right to respond.

[2] 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.

Petitioner won his first habeas petition because his removal was not reasonably foreseeable, *Hassoun v. Sessions*, 2019 WL 78984, at *6 (W.D.N.Y. Jan. 2, 2019) (applying *Zadvydas v. Davis*, 533 U.S. 678 (2001)), the government moved to certify him for indefinite detention as dangerous 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 USA PATRIOT Act, 8 U.S.C. § 1226a. Petitioner's amended habeas petition challenges his detention under both authorities.

In December 2019, the district court invalidated 8 C.F.R. § 241.14(d) as *ultra vires* because (1) the Supreme Court interpreted the authorizing statute, 8 U.S.C. § 1231(a)(6), "not [to] allow for indefinite detention of any class of aliens that it covers," and (2) it lacked 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 even arguably under this Court's jurisdiction, the government did not appeal it until more than six months later, on June 29, 2020.[3]

[3] As previously explained, Petitioner's position is that this Court lacks jurisdiction over the government's appeal. ECF 37-1 at 11–13. Because the appeal is moot, *see infra* § I, Petitioner would likely be unable to seek review of the stay panel's opinion determining that the Court does have jurisdiction.

As to 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 completely unraveled. As the district court later explained, the factual basis for Petitioner's detention 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. Record, 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.[4]

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

[4] The stay panel's opinion omitted any discussion of the fact the government's allegations justifying Petitioner's detention were primarily based on discredited allegations that the government abandoned as unprovable before conceding defeat in the district court, *not* (as the panel represented, ECF 76 at 6–7) his past criminal convictions.

opportunity to examine Mr. Hassoun 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.12. 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 stay motion was pending, the government publicly filed a joint stipulation that, for the first time, extended the parties' protective order to cover "information regarding the U.S. government's efforts to remove Petitioner from the United States." 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 to the D.C. Circuit. WDNY-ECF 259 & 260.

On June 30, the government moved in this Court and the D.C. Circuit to stay the district court's release order. *See* ECF 9-1; DC-ECF 1849825.[5]

What happened next is described below.

ARGUMENT

I. Although this appeal became formally moot upon Petitioner's July 22 removal from the United States, it became practically moot upon the government's July 13 notice that Petitioner's removal would take place "[a]bsent an extraordinary or unforeseen circumstance" by July 27, with two indefinite administrative stays in place in two circuit courts.

The parties agree that this appeal is now moot. *See* ECF 82 (government's motion to vacate district court decisions and orders). But the appeal, and the motion that produced the panel's eventual opinion after Petitioner's release, were moot long before the government contends.

After the district court denied the government's request for a stay of Petitioner's release pending appeal, the government moved for a stay in this Court, and the parties consented to a briefing schedule and the imposition of an administrative stay. ECF 9-1 at 1, 5. The parties' agreement—and the Court's quick endorsement of it, ECF 16—ensured Petitioner would remain in government custody until and unless the government's entitlement to a stay was ultimately decided in Petitioner's favor, whether by the motions panel, the *en banc* Court, or

[5] The government's D.C. Circuit appeal is Case No. 5191.

the Supreme Court. Indeed, because the government filed twin appeals (and twin stay motions) in this Court and the D.C. Circuit, Petitioner would remain in government custody until *both* of the government's motions to stay were finally adjudicated—unless the government itself chose another course, as it ultimately did.

Initially, this Court's administrative stay extended only through July 15, the day after the government's motion was scheduled for resolution on the Court's motions calendar. ECF 16; *see* ECF 24. But on July 13, the motions panel extended it indefinitely, "until further order of this Court." ECF 41. That action matched the action of the D.C. Circuit's motions panel on July 1. DC-ECF 1849887; *see* ECF 25 (government's transmittal of D.C. Circuit's order).

The same day this Court's administrative stay became indefinite, the government moved—again, with Petitioner's consent—in both courts to postpone briefing on its motion to stay, "based on material progress in achieving Petitioner–Appellee's removal from the United States." ECF 43-1 at 1. That removal would, the government represented based on a sworn agency declaration, happen by July 27 "[a]bsent an extraordinary or unforeseen circumstance." *Id.* The D.C. Circuit promptly granted the government's motion. DC-ECF 1851462. This Court, however, took no action—indeed, that motion remains pending.

Because of the motions panel's inaction, the government was faced with an unchanged briefing deadline in this Court, and it filed its reply. ECF 49. Even so, on July 14, the government notified the Court that the D.C. Circuit had, the day before, granted its identical consent motion in that court, postponing any reply brief and ultimate decision until at least July 28, and reiterating that the D.C. Circuit's administrative stay remained in effect indefinitely until further order of the court. ECF 56-1.

At that point—the end of the day on July 14—in any realistic and practical sense, both the government's appeal and its motion to stay were moot. The government had represented to two appellate courts that Petitioner's removal was imminent and as close to guaranteed as possible. Two administrative stays of indefinite duration were in place, both of which would have to be actively dissolved by their respective motions panels and upheld through multiple layers of additional review before Petitioner's release could be effectuated. And Petitioner—who had weeks earlier won his release after eighteen months of litigation—had consented to all of this upon the same government representations about imminent release it had made to multiple courts. Those representations were made by government counsel to Petitioner's counsel during "at least eight" phone calls between June 26 and July 15. WDNY-ECF 277-1 ¶ 5 (government counsel's declaration). Petitioner was leaving the country, and the government had

effectively—with the protection of two consented-to administrative stays—abandoned its request for emergency relief pending his removal, which was a foregone conclusion.

This Court's motions panel, however, acted otherwise. On July 16, the panel granted the government's motion for a stay pending appeal in a one-line order, noting only that an opinion would be "forthcoming." ECF 60.

On July 20, the government again filed a notice in this Court that Petitioner's removal would happen that week. ECF 67. That notice was supported by an agency declaration swearing 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 Mr. Hassoun'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 this Court. ECF 72.

At that point, the appeal was unquestionably moot as a formal matter. Yet on July 30, more than a week after Petitioner had been resettled, the panel issued an opinion preliminarily deciding important jurisdictional and merits issues of first impression that would never conceivably be subject to a merits panel's review. ECF 76. The panel also indicated that "[i]n the interest of judicial economy, any future proceedings on appeal shall be assigned to this panel." *Id.* at 25.

II. The Court should vacate the panel's stay opinion as an improvidently issued advisory opinion.

As the Supreme Court explained more than a half century ago, "it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, *Federal Courts* 34 (1963)). That rule "was established as early at 1793," and "has been adhered to without deviation." *Id.* at 96 n.14. And this Court has recently recognized that "it is well settled that this Court cannot offer advisory opinions on moot questions or abstract principles." *Baron v. Vullo*, 699 F. App'x 102, 103 (2d Cir. 2017) (citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)). Nor does a federal court have authority "to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895).

This principle is based in Article III's requirement that a court's jurisdiction is limited to "live cases and controversies." *In re Burger Boys, Inc.*, 94 F.3d 755, 759 (2d Cir. 1996). And this constitutional rule restrains the courts from deciding legal questions, or issuing judicial opinions, absent "'flesh-and-blood' legal problems" before them. *New York v. Ferber*, 458 U.S. 747, 768 (1982) (quoting Alexander Bickel, *The Least Dangerous Branch* 115–16 (1962)). That principle extends to "issues which are . . . , as a *practical* matter, moot," *U. S. ex rel. Ellington v. Conboy*, 459 F.2d 76, 79 (2d Cir. 1972) (emphasis added). As a result,

no court can—and this Court will not—address issues in written opinions that are "moot for all practical purposes." *Sloan v. N.Y Stock Exch., Inc.*, 489 F.2d 1, 4 (2d Cir. 1973).[6] That is sensible, because where events and circumstances "make[] it impossible" to grant "effectual relief," the federal courts are powerless to act. *Church of Scientology of Cal.*, 506 U.S. at 12 (quotation marks omitted).

As a purely formal matter, the government's appeal was not moot until the government relinquished custody of him by freeing him in another country on July 22. But mootness is not an entirely formal exercise. It is a concept of built "of uncertain and shifting contours," and has "become a blend of constitutional requirements and policy considerations." *Flast*, 392 U.S. at 97. For example, in the context of declaratory judgments, the Supreme Court, "noting the difficulty in fashioning a precise test of universal application for determining" the mootness of such actions, has "held that, basically," the question is whether the facts and circumstances present a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance" of a judgment or opinion. *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975) (emphasis and quotation marks omitted).

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[6] *See, e.g.*, *In re Feit & Drexler, Inc.*, 760 F.2d 406, 413 (2d Cir. 1985) (describing multiple cases where the Supreme Court refused to hear appeals of criminals' convictions because their fugitive statuses meant "their challenges to their convictions might very well be moot as a practical matter")

When the government's two appeals and motions to stay Petitioner's release were filed, there was plainly a controversy—a vigorously disputed one—between the parties. Petitioner had won his freedom below, and the government sought to continue his confinement pending its appeals. But once the parties jointly agreed, on July 13, to postpone the government's reply deadline in both circuits—with two indefinite administrative stays in place, and upon the government's representations to Petitioner and two circuit courts that this litigation would come to a close "[a]bsent an extraordinary or unforeseen circumstance," ECF 43-1 at 1—that was no longer true.

"Moot questions require no answer." *Mo., Kan. & Tex. Ry. Co. v. Ferris*, 179 U.S. 602, 606 (1900). And according to both parties, as of July 13, the questions presented by the government's motions to stay Petitioner's release presented no questions requiring any answer from any court. The proceedings here and in the D.C. Circuit had shifted from being "an honest and actual antagonistic assertion of rights," and a "real, earnest, and vital controversy." *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892). They no longer involved "conflicting and demanding interests" presenting a question "necessary for decision from a clash of adversary argument." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). Instead, at that point, the parties' interests were *aligned*. They had spoken numerous times about Petitioner's impending removal before agreeing to

postpone briefing. WDNY-ECF 277-1 ¶ 5. Petitioner was about to receive his long-sought freedom, and the government was about to effectuate its long-sought removal.

This alignment makes this Court's issuance of a substantive judicial opinion eight days *after* Petitioner was actually released entirely unwarranted, and likely unprecedented. As the D.C. Circuit's staying of its hand makes clear, there was no reason to even *grant* the government's motion for a stay in the first place, because Petitioner's removal was imminent, his continued detention past July 27 "unforesee[able]," ECF 43-1 at 1, and this Court's (and the D.C. Circuit's) indefinite administrative stays had effectively paused the litigation and permitted Petitioner's continued detention pending removal (again, with his consent). There was even less reason to *issue an opinion* explaining the order following Petitioner's removal.

To be sure, the motions panel indicated its late-issued opinion sought to "explain the reasons for [its July 16] ruling" granting the government's motion for a stay. ECF 76 at 4. But there was nothing necessary about either the order or the explanation, as there was no longer a live dispute between the parties. And neither the order or opinion had any "tangible, demonstrable consequence." *Chathas v. Local 134 IBEW*, 233 F.3d 508, 512 (7th Cir. 2000); *cf. Coal. to End Permanent Cong. v. Runyon*, 979 F.2d 219, 219–20 (D.C. Cir. 1992) (explaining it is

"imprudent" to issue an opinion explaining a past order after a case becomes moot because "several of the reasons behind the mootness doctrine and the bar against rendering advisory opinions . . . counsel strongly in favor of restraint" (emphasis removed)).

The panel reached out, entirely needlessly, to decide novel, difficult, and consequential issues. And unusually, it did so first by issuing a one-line order, and only much later—after the parties had gone their separate ways—by explaining that order in a written decision. It is irrelevant whether the panel employed this highly unusual procedure to intentionally avoid the formal mootness that was certainly impending on the appeal. *See, e.g.*, 13B Fed. Prac. & Proc. Juris. § 3533.1 (3d ed.) ("[P]reliminary injunctive relief should not be given merely to forestall possibly mooting events."). The bottom line is that its opinion was purely advisory.

Indeed, the improvidence of the motions panel's order, as well as the advisory nature of its opinion, are compounded by the fact that Petitioner, in his opposition to the government's motion, contested this Court's jurisdiction over the appeal in the first place. *See* ECF 11–13. At the very least, the Court's jurisdiction was not a straightforward question. *See* ECF 76 at 8–14. Not only, then, did the motions panel answer questions requiring no answer from either party, *Ferris*, 179 U.S. at 606, but it did so with the Court's very jurisdiction over the appeal in

significant doubt. And now, after Petitioner's release, that important jurisdictional question is likely unreviewable through further proceedings.

Axiomatic principles of judicial restraint are so commonly observed throughout the judiciary that vacatur of an opinion as improvidently issued based on practical, if not formal, mootness is rare. But this is the special case. The Court should vacate the motions panel's stay opinion as an improvidently issued advisory opinion.

III. The Court should vacate the panel's stay opinion under *Munsingwear*.

Independently, the Court should vacate the panel's stay opinion under *Munsingwear*. When an appeal becomes moot "while on its way" to further appellate review, the "established practice" is to "vacate the judgment below." 340 U.S. at 39. That practice should apply here, where the government's removal of Petitioner from the country formally mooted its own appeal before the panel's stay opinion even issued, let alone became subject to further review.

Munsingwear vacatur 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." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). 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) (quotation marks omitted). The case for vacatur is especially strong here for four reasons.

First, by removing Petitioner from the country, the government—the prevailing party on the stay—took action that mooted its own appeal, frustrating further review of the motions panel's stay ruling by the *en banc* Court or the Supreme Court. Vacatur under *Munsingwear* "must be granted" whenever "mootness results from the unilateral action of the party who prevailed." *Bonner Mall*, 513 U.S. at 23. As the Supreme Court has remarked, "[i]t would certainly be a strange doctrine that would permit a [party] to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (quoting *Arizonans for Official English*, 520 U.S. at 75).

In its own motion to vacate the *district court* rulings in this case under *Munsingwear*, the government has argued that the timing of the government's removal of Petitioner is attributable not to it but instead to "the third country's sovereign decision to accept Hassoun." ECF 82 at 17. That argument beggars belief. The foreign country's decision to accept Petitioner for resettlement, "sovereign" though it was, cannot reasonably be divorced from the government's own conduct. That country did not unforeseeably and uncontrollably decide to

accept him from U.S. custody just as two circuit courts were poised to rule on the government's stay motions. Rather, the country's agreement to accept Petitioner was the product of negotiations with—and a conscious choice by—the U.S. government. ECF 82 at 6. Those negotiations were specifically and knowingly aimed at achieving the very thing that mooted this case: Petitioner's removal.

Indeed, as the government itself has laid out, it only approached Petitioner's counsel on *June 26* to amend the parties' protective order to cover information about Petitioner's removal—while its emergency motion to stay Petitioner's release was pending in the district court. WDNY-ECF 277-1 ¶ 2. And over the next nineteen days, the parties spoke again and again. WDNY-ECF 277-1 ¶ 5. Moreover, this flurry of activity immediately followed the government's surprising decision to cancel the evidentiary hearing, abandon its opportunity to examine Mr. Hassoun under oath, concede its factual case, and accept that the district court would order Mr. Hassoun's release forthwith. For the government to suggest that this sudden removal-related action was coincidental, and entirely attributable to the foreign government that ultimately accepted Petitioner, is not credible.

Moreover, the government further bears responsibility for the timing of the appeal's mootness because it alone decided that the litigation in this Court would be conducted in emergency fashion this July, rather than months earlier. The government's June 30 appeal in this Court sought review of a decision striking

down the regulation that was issued by the district court on *December 13, 2019*. WDNY-ECF 55. That decision finally resolved all issues relating to 8 C.F.R. § 241.14(d) and therefore ended any litigation even arguably subject to appeal in this Court. Yet the government did not seek (plainly appropriate) interlocutory review in this Court at that time. Had it done so on an (also appropriate) expedited basis, this Court could have issued an opinion long ago, and the dispute over the regulation would almost certainly have concluded by now. Instead, the government spent more than six months litigating Petitioner's PATRIOT Act challenge (which this Court indisputably lacks jurisdiction to review), keeping Petitioner detained on that basis. It only then sought "emergency" relief from this Court solely on the matter that had been conclusively resolved last December.

Second, even accepting the implausible argument that the mootness of this appeal was "happenstance," *Munsingwear*, 340 U.S. at 40, vacatur of the motions panel's stay opinion is appropriate as a matter of equity. *Munsingwear* vacatur is grounded in equitable principles. *Bonner Mall*, 513 U.S. at 25. Here, of course, Petitioner bears no fault for the mootness. *See id.* at 24–25 (explaining that the "principal condition" relevant to *Munsingwear* vacatur is whether the party seeking vacatur "caused the mootness by voluntary action"). His removal came days after the motions panel granted the government's motion to stay, without even issuing an opinion from which Petitioner could have sought immediate review. And when

the panel granted the stay, Petitioner's removal was both imminent and practically assured—indeed, Petitioner had consented to a delay of this Court's and the D.C. Circuit's stay proceedings to facilitate that removal.

Third, 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. Vacatur in such circumstances ensures "that no party is harmed by . . . a preliminary adjudication." *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (quotation marks omitted). Here, the stay panel's opinion on Petitioner's now-moot habeas claims could have significant legal ramifications.

Most critically, while the opinion only preliminarily resolves the question of whether 8 C.F.R. § 241.14(d) is a valid regulation, it purports to finally decide an important and novel jurisdictional question that may in fact supply the law of the case in future proceedings. In its opinion, the motions panel approved of the government's strategy of taking bifurcated appeals of the district court's single judgment. *Id.* at 8–13.[7] And notably, in reaching its conclusion, the panel adopted arguments concerning numerous federal statutes and cases that neither party discussed in their stay briefing. *See* ECF 76 at 12–13. Yet the panel's opinion may

[7] That strategy means that—had the district court not invalidated the regulation—two different appellate courts would have been asked to review the same evidentiary rulings, findings of fact, and conclusions of law simultaneously. *See* ECF 37-1 at 11–13.

be read to control the question in future cases because, as the panel put it, "we have an obligation to assure ourselves of jurisdiction under Article III," even in a preliminary posture. ECF 76 at 8 (quotation marks omitted).

Moreover, in the course of its likelihood-of-success analysis, the panel reached novel constitutional issues with far-reaching consequences in the government's favor on the basis of arguments the government did not even make—including one it affirmatively waived below. For example, the panel rejected the district court's conclusion that the regulation was *ultra vires* in part based on a reading of *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44, 843 n.11 (1984)). *See* ECF 76 at 16, 18. But the government did not argue that the subsection of the regulation at issue in this appeal was entitled to *Chevron* deference, and it waived that argument by not making it below. *See* WDNY-ECF 56 at 48–49.

The government may suggest that opinions from motions panels are not precedential or binding on future merits panels, *see E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1265 (9th Cir. 2020) ("treat[ing a] motions panel's decision as persuasive, but not binding"); *accord Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 795 n.2 (11th Cir. 2020); *FTC v.*

Food Town Stores, Inc., 547 F.2d 247, 249 (4th Cir. 1977),[8] and therefore are ineligible for *Munsingwear* vacatur. As discussed above, that very well may not be true of the panel's jurisdictional pronouncement in this case. *See Democratic Exec. Comm. of Fla.*, 950 F.3d at n.2 (explaining "in a rare case where a party could identify any ruling within a stay-panel opinion that *would* have precedential effect beyond the preliminary decision on the stay, then vacatur may be warranted if the case were to become moot"). But even if it is, just a few years ago, the Solicitor General (successfully) argued in favor of the *Munsingwear* vacatur of an *en banc* D.C. Circuit order denying the government's motion for a stay pending appeal of a district court's grant of a temporary restraining order. *See* Pet. for Writ of Cert., *Hargan v. Garza*, Case No. 17-654, 2017 WL 5127296 (U.S. Nov. 3, 2017); *see also Garza*, 138 S. Ct. 1790 (granting government's request). There is no rule that stay opinions are immune from *Munsingwear* vacatur; when the equities require it, it can and should be done.

Finally, given the government's motions in two appellate courts to vacate the district court's opinions addressing all of the substantive legal issues below, it

[8] In *East Bay Sanctuary Covenant*, the Ninth Circuit adopted the government's argument that "stay decisions are preliminary decisions, based on compressed briefing, to determine the interim state of affairs pending full appeal, rather than to resolve the ultimate appeal." Reply Br. in Supp. of Br. for Appellants, *E. Bay Sanctuary Covenant*, 2019 WL 2551812 at *4 (Jun. 12, 2019).

would be highly inequitable if the result in this case, after eighteen months of litigation, is that the *only* judicial analysis that remains on the books is the panel's stay opinion. That opinion explained the Court's earlier one-line order— and both came after the parties' actual dispute had realistically ended. *See supra* §§ I–II. And although the opinion was issued after curtailed briefing in an emergency posture, it reaches far to decide questions of jurisdiction and constitutional law on the basis of arguments not even presented to it by the parties. In recognition of the principle of judicial restraint, the D.C. Circuit—which indisputably had jurisdiction over a central portion of the government's appeal (if not its entirety)—held back from deciding critical issues closely related to Petitioner's detention, including the content of the Due Process Clause and the role of federal habeas review. That court's decision implicitly recognized that important constitutional questions like those presented here should be determined through "the orderly operation of the federal judicial system," *Bancorp*, 513 U.S. at 27, not by opinions like this. To leave the panel's opinion in place would certainly have nothing to do—as it must when it comes to vacatur—with "basic notions of fair play and justice." *Ass'd Gen. Contractors of Conn., Inc. v. City of New Haven*, 41 F.3d 62, 67 (2d Cir. 1994).

CONCLUSION

The Court should vacate the motions panel's stay opinion.

Dated: August 17, 2020

Respectfully submitted,

/s/ *Jonathan Hafetz*

A. Nicole Hallett
Mandel Legal Aid Clinic
University of Chicago Law School
6020 S. University Avenue
Chicago, IL 60637
773.702.9611
nhallett@uchicago.edu

Jonathan Manes
Roderick & Solange MacArthur Justice Center
160 E. Grand Ave., 6th Floor
Chicago, IL 60611
312.503.0012
jonathan.manes@law.northwestern.edu

Counsel for Petitioner–Appellee

Jonathan Hafetz
Brett Max Kaufman
Charles Hogle
Judy Rabinovitz
Celso Perez
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
212.549.2500
jhafetz@aclu.org

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*
Jonathan Hafetz
Counsel for Petitioner–Appellee

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,174 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

/s/ *Jonathan Hafetz*
Jonathan Hafetz
Counsel for Petitioner–Appellee