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

BRIEF OF PROFESSOR STEPHEN I. VLADECK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLEE'S MOTION TO VACATE

Stephen I. Vladeck
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

Counsel for Amicus Curiae

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

This is an unusual *amicus* brief, but *Hassoun* v. *Searls* is an unusual case. As the Petitioner-Appellee explains in his motion to vacate (Doc. 87), the motions panel "reached significant jurisdictional and constitutional issues of first impression that neither party expected, or needed, this Court to decide," and did so "eight days *after* the government released Petitioner into a foreign country as a free man." Mot. at 1; *see Hassoun* v. *Searls*, No. 20-2056-cv, 2020 WL 4355275 (2d Cir. July 30, 2020). Against (and in light of) this unusual backdrop, I agree with Petitioner-Appellee that the motion to vacate should be granted.

My interest in this case stems from my academic work, which has extensively analyzed 8 U.S.C. § 1226a—the USA PATRIOT Act provision at the center of the jurisdictional dispute before the motions panel—along with the broader constitutional issues surrounding the government's long-term civil and military detention of non-citizen

---

1. Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person contributed money that was intended to fund preparing or submitting the brief.

terrorism suspects.[2] Indeed, my support of Petitioner-Appellee's motion to vacate stems entirely from a concern that these issues were not adequately (or correctly) addressed by the motions panel.

In the unique circumstances of this case, where, through no fault of Petitioner-Appellee, there is no opportunity for further review from a merits panel, the en banc Court, or the Supreme Court, the motions panel's analysis should not remain in place as the *only* extant appellate discussion of these issues. *See Camreta* v. *Greene*, 563 U.S. 692, 713 (2011) ("Vacatur then rightly 'strips the decision below of its binding effect,' and 'clears the path for future relitigation.'" (citations omitted)).[3]

---

2. *See, e.g.*, Stephen I. Vladeck, *Detention After the AUMF*, 82 FORDHAM L. REV. 2189, 2196–205 (2014) (discussing and analyzing detention under section 412 of the USA PATRIOT Act); Stephen I. Vladeck, *Terrorism Prosecutions and the Problems of Constitutional "Cross-Ruffing,"* 36 CARDOZO L. REV. 709 (2014) (discussing the constitutional limits on terrorism-related detention); STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 957–58 (7th ed. 2020) (same); STEPHEN DYCUS ET AL., COUNTERTERRORISM LAW 609–10 (4th ed. 2020) (same).

And as relevant to the arguments offered herein, I have written extensively on the uptick in stay requests from the federal government in recent years. *See, e.g.*, Stephen I. Vladeck, *The Supreme Court, 2018 Term—Essay: The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

3. Indeed, Petitioner-Appellee would likely have received significant *amicus* support if he had an opportunity to contest the motions panel's analyses before a merits panel or the en banc Court.

Specifically, this brief offers two modest points in support of vacatur: First, as appellate rulings on stays have become more common and significant in recent years, they have also been given increasing precedential value and prominence by lower courts. Thus, it is not only possible, but likely, that the motions panel's opinion would impact future cases if left in place; indeed, that may have been the point.

Second, at least largely at the federal government's urging, the Supreme Court has recently issued so-called "*Munsingwear*" vacaturs, *see United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), in circumstances beyond the classic case—in which there is no question that the prevailing party mooted the case while an appeal was pending.

What these decisions reinforce is that the propriety *vel non* of a *Munsingwear* vacatur turns not only on *who* is responsible for the mootness, but also on case-specific equitable considerations relating to whether that particular decision ought to be left on the books. Here, Petitioner-Appellee convincingly explains how the government is responsible for the mootness now at issue. Mot. at 16. But the relevant point for present purposes is that these equitable considerations militate in favor of vacatur *regardless* of who was responsible.

Petitioner-Appellee consents to the filing of this brief. I am authorized to represent that Respondent-Appellant consents to the filing of this brief "so long as it is filed within 3 days after Hassoun's motion, and so long as it otherwise complies with all applicable Federal Rules of Appellate Procedure and Local Rules." To that end, I have construed Fed. R. App. P. 27(d)(2)(A) and 29(a)(5), which do not expressly contemplate *amicus* briefs in support of motions, to allow the filing of an *amicus* brief in these circumstances (1) with the consent of the parties; (2) at least seven days before the response is due; and (3) of no more than 2,600 words—half the total available to the parties.

ARGUMENT

I. THE MOTIONS PANEL'S ANALYSIS OF THE JURISDICTIONAL AND CONSTITUTIONAL QUESTIONS PRESENTED IN THIS CASE IS LIKELY TO "SPAWN[] . . . LEGAL CONSEQUENCES"

For better or worse, there has been an uptick in recent years in federal judges relying upon appellate stay orders as precedent. *See, e.g.*, *People for the Ethical Treatment of Animals* v. *U.S. Dep't of Agriculture*, 912 F.3d 641, 642 (D.C. Cir. 2019) (mem.) (Katsas, J., concurring). Just two weeks ago, a divided panel of the Fourth Circuit reversed a preliminary injunction against the so-called "public charge" rule at least

partly because, in a *different* case challenging the same rule, the Supreme Court had stayed a *different* injunction. *CASA de Maryland* v. *Trump*, No. 19-2222, 2020 WL 4664820, at *1 (4th Cir. Aug. 5, 2020).

To similar effect, Judge Tatel noted earlier this year that he was declining to pursue rehearing en banc of a panel opinion from which he had vehemently dissented only because the Supreme Court, in summarily denying a stay in the same case, had cryptically instructed the Court of Appeals to "proceed 'with appropriate dispatch.'" *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-5322, order at 2 (D.C. Cir. May 15, 2020) (Tatel, J., respecting denial of rehearing en banc) (quoting *Barr* v. *Roane*, 140 S. Ct. 353, 353 (2019) (mem.)).[4]

Whatever the reasons for—and merits of—the growing reliance upon even *summary* stay orders in these contexts, at least two conclusions should follow: First, it is even more likely that a published, 25-page opinion in support of a stay—the motions panel's ruling here—would be treated as a strongly persuasive, if not binding, precedent in the relevant jurisdictions. Indeed, that likelihood is only magnified

4. The D.C. Circuit's order is not reported. It is available at https://www.cadc.uscourts.gov/internet/orders.nsf/4296E931F3545176852585690051 5F5F/%24file/19-5322CCEN.pdf.

because the motions panel's opinion addresses two important legal questions for which there are *no* other on-point appellate precedents.[5]

Second, insofar as the purpose of a *Munsingwear* vacatur is "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences," 340 U.S. at 41, it seems increasingly likely that the motions panel's actions—and opinion—in this case *will* "spawn[] . . . legal consequences" in future cases raising the same issues. After all, there are a number of non-citizens who were convicted in the 2000s of serious terrorism offenses, whose sentences are nearing their end, and against whom the government may well pursue similar detention measures pending their removal from the country. Although the jurisdictional and constitutional issues raised in Petitioner-Appellee's case are of first impression, they aren't likely to remain that way for long. *See* Steve Vladeck, *A Test Case for Post-Criminal Terrorism Detention*, JUST SECURITY, Mar. 26, 2019,

5. There have been two significant discussions of 8 U.S.C. § 1226a in previous circuit-level opinions—but both were subsequently vacated by the Supreme Court. *See Kiyemba* v. *Obama*, 555 F.3d 1022, 1035–36 (D.C. Cir. 2009) (Rogers, J., concurring in the judgment), *vacated*, 559 U.S. 131 (2010) (per curiam); *al-Marri* v. *Pucciarelli*, 534 F.3d 213, 248–49 (4th Cir. 2008) (en banc) (Motz, J., concurring in the judgment), *vacated sub nom. al-Marri* v. *Spagone*, 555 U.S. 1220 (2009) (mem.).

https://www.justsecurity.org/63393/a-test-case-for-post-criminal-terrorism-detention/.

The focus on whether the decision at issue will "spawn[] . . . legal consequences" distinguishes this case from *Hand* v. *DeSantis*, 946 F.3d 1272 (11th Cir. 2020), and *FTC* v. *Food Town Stores, Inc.*, 547 F.2d 247 (4th Cir. 1977). In those cases, courts of appeals refused to vacate prior opinions granting emergency relief when the appeals became moot before the merits could be resolved—on the ground that the emergency rulings would not have any res judicata effect. *Wood*, 946 F.3d at 1275 n.5 (citing *Food Town Stores*, 547 F.2d at 249). But res judicata is only one way in which a decision can "spawn[] . . . legal consequences," especially at the appellate level. And whether or not a Second Circuit merits panel is formally bound by a published motions panel ruling, *see Rezzonico* v. *H&R Block, Inc.*, 182 F.3d 144, 148–49 (2d Cir. 1999), it is not at all difficult to imagine that a published opinion analyzing important questions of first impression will "spawn[] . . . legal consequences" even in contexts in which no tribunal is formally bound by its analysis. Indeed, that result was at least *foreseeable* to the motions panel when it published its opinion—if not intended.

II. THE SUPREME COURT, AT THE GOVERNMENT'S URGING, IS ISSUING VACATE-AND-DISMISS ORDERS IN CIRCUMSTANCES BEYOND THOSE PRESENTED IN *MUNSINGWEAR*

It is well settled that, under *Munsingwear*, "[v]acatur is in order when mootness occurs through happenstance—circumstances not attributable to the parties—or . . . 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) (quoting *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'Ship*, 513 U.S. 18, 23 (1994)); *see also Penguin Books USA Inc.* v. *Walsh*, 929 F.2d 69, 73 (2d Cir. 1991) (discussing the conventional justifications for *Munsingwear* vacaturs).

At least recently, however, the government has urged for an even broader reading of *Munsingwear*'s vacatur rule—and the Supreme Court has acquiesced. The most significant example came in the so-called "Travel Ban" cases. In June 2017, the Supreme Court granted certiorari in two cases to review the legality of the second iteration of President Trump's controversial suspension of entry from a handful of Muslim-majority countries. *See Trump* v. *Int'l Refugee Assistance Proj.*, 137 S. Ct. 2080 (2017) (per curiam).

But a month before the scheduled oral argument, the government substantially revised the policy to an extent that arguably mooted the disputes. In response to requests for supplemental briefing from the Supreme Court, *see Trump* v. *Int'l Refugee Assistance Proj.*, 138 S. Ct. 50 (2017) (mem.); *Trump* v. *Hawaii*, 138 S. Ct. 50 (2017) (mem.), the Solicitor General argued that the cases were indeed moot—and that vacatur of the adverse lower-court rulings was not just appropriate under *Munsingwear*, but "necessary . . . where the lower-court opinions could spawn[] * * * legal consequences in future cases on critical issues including justiciability and the President's authority to protect national security." Letter Brief for the Petitioners at 1, *Trump* v. *Int'l Refugee Assistance Proj.*, 138 S. Ct. 353 (2017) (mem.) (No. 16-1436) (citation and internal quotation marks omitted; alteration and second omission in original).

Over the Respondents' objections, all of the Justices except for Justice Sotomayor agreed. Even though the *appealing* party in both cases (the government) was responsible for the mootness, the Court issued *Munsingwear* vacaturs of the lower-court rulings. *See Trump* v.

Hawaii, 138 S. Ct. 377 (2017) (mem.); *Trump* v. *Int'l Refugee Assistance Proj.*, 138 S. Ct. 353.

What the Supreme Court's actions in these Travel Ban cases underscore is that, even when the party seeking vacatur is deemed responsible for mooting its own appeal—which was traditionally an obstacle to vacatur under *Munsingwear*—the Supreme Court has been willing to consider whether *other* equitable considerations might nevertheless justify the same relief. "Because this practice is rooted in equity," the Court explained in a 2018 ruling vacating an emergency D.C. Circuit order that had denied a stay, "the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Azar* v. *Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (quoting *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916)).

Here, the "conditions and circumstances of the particular case" strongly militate in favor of vacatur, for at least five separate reasons:

1. Whether or not the government is responsible for mooting the case while its appeal was pending (as noted above, Petitioner-Appellee

makes a compelling case that it was), all agree that it was *not* mooted by any action of Petitioner-Appellee.

2. Because the opinion at issue was decided by a motions panel, there was not the usual opportunity for plenary briefing and oral argument from the parties—let alone participation by *amici curiae*.

3. The district court ruling from which the government sought emergency relief was handed down on December 13, 2019. *See Hassoun* v. *Searls*, 427 F. Supp. 3d 357 (W.D.N.Y. 2019). The government waited over seven months to seek emergency review in this Court—even though the subsequent proceedings in the district court (on whether Petitioner-Appellee was lawfully detained under section 412 of the USA PATRIOT Act) were indisputably beyond *this* Court's jurisdiction to review on appeal. *See* 8 U.S.C. § 1226a(b)(3). It was the government's dilatory pursuit of this appeal, then, that deprived this Court of the opportunity to conduct plenary review of the matter.

4. As Petitioner-Appellee notes, the case was already practically moot by the time the motions panel issued the stay, and it was *certainly* moot by the time it issued its 25-page opinion in support thereof—further cutting against the wisdom and propriety of leaving the ruling

in place. Indeed, the opinion may be subject to vacatur on the independent ground that it is advisory. *See* Mot. at 10–15.

5. The motions panel's opinion analyzed in detail jurisdictional and constitutional questions of first impression in the courts of appeals, and is therefore likely to have a more significant impact on future cases if left intact than would a run-of-the-mill opinion resting upon case-specific facts or applying an extensive body of existing precedent. If anything, the unusual timing of the motions panel's actions gives rise to at least the appearance that this effect was intended.

On the other side of the coin, there is simply no compelling argument for leaving the motions panel's opinion *in place*. The government itself was no longer seeking such a ruling at the time the stay was granted (let alone when the opinion was subsequently handed down); Petitioner-Appellee is legally ineligible to return to the United States without the permission of the federal government (so the government can hardly claim prejudice from a vacatur); and there is no other party *besides* the federal government that is in a position to benefit from the motions panel's analysis (since no one else could purport to invoke these detention authorities).

In those circumstances, the equitable considerations underpinning *Munsingwear* all point in the same direction: the motions panel's opinion—which was moot when it was issued and which reaches deeply contestable conclusions about this Court's jurisdiction and the merits of Petitioner-Appellee's prior detention—should be vacated.

CONCLUSION

The Court should grant Petitioner-Appellee's motion to vacate the motions panel's stay opinion.

Dated: August 20, 2020

Respectfully submitted,

Stephen I. Vladeck
727 East Dean Keeton Street
Austin, TX 78705
512/475-9198
svladeck@law.utexas.edu

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 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 20, 2020

Stephen I. Vladeck
Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,551 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 Century Schoolbook.

Date: August 20, 2020

Stephen I. Vladeck
Counsel for Amicus Curiae