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December 14, 2020

Hon. Elizabeth A. Wolford
United States District Judge
Kenneth B. Keating Federal Building
100 State Street
Rochester, New York 14614

RE: *Hassoun v. Searls*, Case No. 1:19-cv-00370-EAW
Letter in Response to Text Order of December 7, 2020 (ECF No. 293)

Dear Judge Wolford,

Petitioner submits this letter in response to the Court's text order of December 7, 2020, requiring the parties to state their positions on two matters: (1) "the required procedural steps for this Court in carrying out the D.C. Circuit's instruction to 'consider [Respondent's] request for vacatur as a motion for relief from an order pursuant to Federal Rule of Civil Procedure 60(b),' " ECF No. 239; and (2) the "appropriate step[s]" for the Court to take in response to the Second Circuit's remand instructions, ECF No. 293.

For the reasons discussed below, Petitioner believes that additional briefing and oral argument are necessary to carry out the D.C. Circuit's instruction. First, the Court must address the distinct requirements that apply to motions brought under Rule 60(b), none of which were briefed in the appellate court. Second, the Court will be required to make factual findings about whether the government is responsible for this case's mootness, which is a key element of the vacatur analysis, and the Court can ask the parties to submit additional evidence on that question along with their briefs.

With respect to the Second Circuit's decision, Petitioner agrees with the Court's proposed disposition on remand: the Court can proceed directly "to issue an Order dismissing the Petition as moot to the extent, and only to the extent, that it challenged the legality of Petitioner's ongoing detention pursuant to 8 C.F.R. § 241.14(d)." ECF No. 293.

I. Additional briefing and argument are appropriate to adjudicate the government's request to vacate this Court's rulings on 8 U.S.C. § 1226a under Rule 60(b).

The D.C. Circuit's remand order instructs this Court "to consider appellant's request for vacatur as a motion for relief from an order pursuant to Federal Rule of Civil Procedure 60(b)." Order, *Hassoun v. Searls*, No. 20-5191 (D.C. Cir. Oct. 13, 2020). The D.C. Circuit does not dictate what procedures this Court must use in order to comply with those instructions, and nothing in the D.C. Circuit's order constrains this Court, which of course has broad discretion to determine the need and scope of briefing to resolve matters before it, to rely solely on the parties' briefing on vacatur to the D.C. Circuit. To the contrary, it would make little sense to rule on the basis of briefing that did not even address Rule 60(b).

First, additional briefing is necessary to address legal questions about the requirements for a party to obtain vacatur in the district court under Rule 60(b). While the Supreme Court has explained that "a request for vacatur of a district-court judgment" may be considered on remand by a district court "pursuant to Federal Rule of Civil Procedure 60(b)," there are a number of open questions about how exactly this Court should assess such a request. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994).

Most importantly, the standard governing vacatur in the district court under Rule 60(b) likely differs from the one that applies to a motion for vacatur on appeal. *Hall v. Louisiana*, 884 F.3d 546, 550 (5th Cir. 2018) ("The Circuit courts that have addressed whether *Bancorp* or other Supreme Court decisions [regarding vacatur of lower court decisions] necessarily bind a district court in assessing a Rule 60(b) motion have held that they do not. We agree." (emphasis in original)). Additional briefing will assist the Court in clarifying what the standards for vacatur under Rule 60(b) actually are. Indeed, the law on this question is unsettled. At least one circuit has held that "the fact-intensive nature of the inquiry required" means that "it seems appropriate that a district court should enjoy greater equitable discretion when reviewing its own judgments [for possible vacatur] than do appellate courts operating at a distance." *Am. Games, Inc. v. Trade Prod., Inc.*, 142 F.3d 1164, 1170 (9th Cir. 1998). At least two other circuits have held that "the *Bancorp* considerations that are relevant to appellate vacatur for mootness are also relevant to, and likewise largely determinative of, a district court's vacatur decision for mootness under Rule 60(b)(6)," but that "those considerations do not necessarily exhaust the permissible factors that may be considered by a district court in deciding a vacatur motion." *Valero Terrestrial v. Page*, 211 F.3d 112 (4th Cir. 2000); accord *Hall*, 884 F.3d at 551. It appears that there is no binding authority on this question in the D.C. Circuit, which makes briefing all the more necessary. See *Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Sessions*, 344 F. Supp. 3d 1, 8–9 (D.D.C. 2018) ("[T]he D.C. Circuit has not addressed whether the ruling in *Bancorp* should apply to a request that a district court vacate its own order under Rule 60(b).").

Further, to inform the parties' briefing and this Court's eventual decision, the government must clarify the paragraph(s) of Rule 60(b) on which it intends to rely.¹ The standard for obtaining relief may vary depending on which paragraph(s) the government invokes. *See, e.g., Ackermann v. United States*, 340 U.S. 193, 199 (1950) (stating that "extraordinary circumstances" are required to obtain relief under Rule 60(b)(6)). Additionally, the parties should have an opportunity to address legal questions regarding the scope of this Court's discretion to grant or deny vacatur and the quantum of evidence required to obtain relief. *See, e.g., Wright & Miller*, 11 Fed. Prac. & Proc. Civ. § 2857 (3d ed.) ("[A] motion for relief from a judgment under Rule 60(b) is addressed to the discretion of the court . . ."); *Fields v. N.Y. State Office of Mental Retardation & Developmental Disabilities*, 164 F.R.D. 313, 316 (N.D.N.Y. 1995) ("[C]ourts typically require that the evidence in support of the motion for relief be 'highly convincing.'"). Moreover, briefing may be helpful to air and resolve any dispute among the parties about whether the law of the D.C. Circuit or Second Circuit applies to that issue, and about any relevant distinctions in the law between the two circuits.² In briefing all of these questions, Petitioner will have an opportunity to explain why the Second Circuit's decision to grant the government's motion to vacate this Court's rulings with respect to 8 C.F.R. § 241.14(d) should not be followed with respect to the Court's rulings under 8 U.S.C. § 1226a on remand from the D.C. Circuit. *Cf. Hassoun v. Searls*, 976 F.3d 121 (2d Cir. 2020).

Second, beyond these legal questions, additional submissions are also necessary to crystallize and resolve disputed factual issues about whether the government was responsible for the timing of Mr. Hassoun's removal, which mooted this case while the government's appeal was pending. That factual dispute goes to the heart of the government's motion because a party generally cannot obtain vacatur of an adverse

¹ Under Rule 60(b), a party may be relieved from a judgment or order for a number of distinct reasons, including that "(4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief."

² To be clear, Petitioner's position is that the law of the D.C. Circuit plainly applies to this matter on remand. *See* 8 U.S.C. § 1226a(b)(4) (prescribing D.C. Circuit law as the "rule of decision"); § 1226a(b)(3) (providing exclusive jurisdiction in the D.C. Circuit for "review, on appeal" of a "final order" in habeas proceedings under § 1226a). However, if the government contends that Second Circuit law may apply, briefing will be necessary to resolve that issue and to inform the parties' substantive briefing. The government's motion to vacate presented to the D.C. Circuit did not rely on or discuss Second Circuit law. *See* Appellant's Motion to Dismiss and to Vacate the District Court's Decisions and Order Granting Judgment to Appellee, *Hassoun v. Searls*, No. 20-5191 (D.C. Cir. Aug. 5, 2020) (Doc. No. 1855258).

judgment when it is responsible for mootng the case before it can be decided on appeal. See *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 351 (D.C. Cir. 1997) (“[V]acatur is usually inappropriate when ‘the party seeking relief from the judgment below caused the mootness by voluntary action.’” (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23–25 (1994))). This rule recognizes that it would be inequitable to permit a party to engineer the vacatur of adverse judgments – and thereby avoid the development of adverse precedent – by deliberately mootng cases only after they have been lost. See *Nat'l Black Police Ass'n*, 108 F.3d at 351 (“*Bancorp* accords with the longstanding practice of this court, under which we have denied vacatur in some instances so as to avoid unfairness to parties who prevailed in the lower court, and in particular refused to order vacatur where mootness resulted from the deliberate action of the losing party before the district court.” (quotations omitted)).

In its motion for vacatur at the D.C. Circuit, the government relied heavily on the notion that the timing of Mr. Hassoun’s removal from the United States was essentially happenstance and should not count against its motion for vacatur. See Appellant’s Motion to Dismiss and to Vacate the District Court’s Decisions and Order Granting Judgment to Appellee, at 17–18, *Hassoun v. Searls*, No. 20-5191 (D.C. Cir. Aug. 5, 2020) (Doc. No. 1855258); Appellant’s Reply in Support of Motion to Dismiss and to Vacate the District Court’s Decisions and Order Granting Judgment to Appellee, at 1–4, *Hassoun v. Searls*, No. 20-5191 (D.C. Cir. Aug. 24, 2020) (Doc. No. 1858077). Petitioner vigorously disputed that characterization of the impetus for Mr. Hassoun’s release, pointing to evidence that strongly suggests that the timing of the government’s removal of Mr. Hassoun was intimately connected to and motivated by developments in this case, including the government’s late concession that it could not prove its factual case against Petitioner, which was followed almost immediately by the government’s request to modify the protective order to permit confidential discussions between the parties regarding Petitioner’s potential removal. See Petitioner-Appellee’s Response to Respondent’s Motion to Vacate the District Court’s Decisions and Order Granting Judgment to Appellee, at 8–12, *Hassoun v. Searls*, No. 20-5191 (D.C. Cir. Aug. 17, 2020) (Doc. No. 1856943). Whether the timing of Mr. Hassoun’s release was mere happenstance or was in fact propelled by the government is, at bottom, a factual question that this Court must examine in the course of deciding whether to grant vacatur.

For these reasons, Petitioner asks the Court to set a briefing schedule and, if the Court deems necessary, oral argument with respect to the government’s motion for vacatur under Rule 60(b). Moreover, to the extent the Court’s disposition of that motion depends upon disputed factual questions, the Court should direct the parties to submit, with their briefs, any additional evidence that they wish to rely upon as well as any requests for further factfinding proceedings.

II. The Court's proposed disposition of the Second Circuit's remand order is appropriate.

The Court informed the parties that, in response to the Second Circuit's instructions on remand, "the Court intends to issue an Order dismissing the Petition as moot to the extent, and only to the extent, that it challenged the legality of Petitioner's ongoing detention pursuant to 8 C.F.R. § 241.14(d)." ECF No. 239. The Court invited the parties to advise the Court if they had other views about the appropriate next steps. Petitioner agrees with the Court's proposed disposition and does not believe that any additional steps are required.

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Respectfully Submitted,

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