No. 19-_____

In the
Supreme Court of the United States

Larry Watkins,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the judgment below should be vacated for deciding a moot question.

The question was whether Petitioner, who had already been convicted, merited pretrial bail. In discussing that question, the court held the residual clause definition of "crime of violence" in the Bail Reform Act, 18 U.S.C. § 3156(a)(4)(B), is not unconstitutionally vague. The court so ruled despite this Court invalidating, as unconstitutionally vague, the identical clause at § 16(b) and § 924(c)(3)(B). *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *United States v. Davis*, 139 S. Ct. 2319 (2019).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont.)

Page(s)

Statutes

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 940 F.3d 152 and appears at Petitioner's Appendix ("Pet. App.") 1a-32a.

JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and entered judgment on August 26, 2019.

The Second Circuit had jurisdiction over Petitioner's bail motion pursuant to 18 U.S.C. § 3145(c) and 28 U.S.C. § 1291. It denied the motion in an order on January 30, 2019. Pet. App. 33a. Thereafter, following Petitioner's conviction, the Circuit issued its opinion and Judgment on October 3, 2019. Pet. App. 34a. The Circuit denied rehearing on November 19, 2019. Pet. App. 53a.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2106.

RELEVANT CONSTITUTIONAL PROVISION

Article III, Section 2, of the United States Constitution provides, in relevant part, that the "judicial Power" is limited to "Cases" and "Controversies."

INTRODUCTION

After Petitioner Larry Watkins pleaded guilty and was sentenced to prison, the Court of Appeals issued an opinion on whether he merited pretrial bail.

In discussing that moot issue, the Circuit considered the also-moot question whether the residual clause definition of "crime of violence" in the Bail Reform Act ("Act"), 18 U.S.C. § 3156(a)(4)(B), applied to Watkins or is unconstitutionally vague. The Circuit held the clause is not vague despite this Court invalidating, as vague,

the identical clause at § 16(b) and § 924(c)(3)(B). *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *United States v. Davis*, 139 S. Ct. 2319 (2019).

Besides the constitutionality of the Act's residual clause being a moot question, it was decided needlessly: bail was denied for an alternative reason unrelated to the "crime of violence" issue.

Watkins asked the Circuit to withdraw its opinion. It refused.

This Court should vacate the Circuit's judgment.

Watkins's "claim to pretrial bail was moot once he was convicted," *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam) (emphasis omitted), and "federal courts may not 'give opinions upon moot questions.'" *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (citation omitted). When "a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

Hunt resolves this case. There, as here, the Court of Appeals opined on a bail question after the defendant was convicted. In doing so, and also as here, the court expounded on the constitutionality of a bail law. In a per curiam ruling, this Court vacated that judgment on mootness grounds. It should do so here too.

Given the equities of this case and the importance of the question whether the Act's residual clause is constitutional, vacatur of the Circuit's opinion is appropriate to "prevent [that] judgment, unreviewable because of mootness, from spawning any legal consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950).

STATEMENT OF THE CASE

1. In June 2018, Watkins "led [] FBI agents to his relative's home, where they recovered a fully-loaded, semi-automatic pistol." Pet. App. 5a. He did this after they "promised Watkins that they would not seek to have him charged with possession of the firearm if he revealed its location." *Id*. They kept their promise: they had him charged with possessing the bullets instead.

In the agents' defense, there was evidence Watkins had "fired nine bullets at a fleeing vehicle on a residential street in broad daylight," although, in Watkins's defense, there was evidence he had seen "the vehicle's occupants target his son in a drive-by shooting. To protect his son, Watkins immediately chased the vehicle into the street and began firing." Pet. App. 4a.

In any case, "Watkins was charged in a one-count indictment for possession of ammunition as a convicted felon" in violation of 18 U.S.C. § 922(g)(1). Pet. App. 5a.

The government moved to jail Watkins pending trial. On July 19, 2018, a magistrate judge denied him bail. *See* W.D.N.Y. 18-cr-131, Docket Entry 15.

Watkins sought reconsideration and bail from the district judge, who denied relief on October 9, 2018. *See id*., Docket Entry 40.

The judge found him subject to pretrial detention under "two subparagraphs" of the Act. First, possession of ammunition is a "crime of violence" under the Act's residual clause definition of that term, found at 18 U.S.C. § 3156(a)(4)(B). That clause defines a "crime of violence" as a felony that, "by its nature, involves a substantial risk that physical force against the person or property of another may

be used in the course of committing the offense." Second, if possessing ammunition is not a "crime of violence," Watkins's possession "involve[d] the possession or use of a firearm" under another provision of the Act, § 3142(f)(1)(E), given his alleged firing of a gun. *See* W.D.N.Y. 18-cr-131, Docket Entry 15 at 2.

Finding Watkins subject to detention for those two alternative reasons, and agreeing with the magistrate that "no condition or combination of conditions would reasonably assure the safety of any other person or the community" if Watkins were released, *id*. at 1, the district judge denied him bail.

2. Watkins then filed a motion for bail in the Second Circuit.

In opposing the motion, the government said the "district court did not err either in its holding that possession of ammunition by a prior felon constitutes a crime of violence as defined in the Bail Reform Act or in its alternative holding that it qualifies as a crime involving the possession or use of a firearm." 2d Cir. 18-3076, Docket Entry 22 at 6. Nor, the government said, was there a "basis for this Court to find that the district court erred when it concluded: '[T]here is clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of any other person or the community.'" *Id*. at 7.

There was no oral argument. *See* id., Docket Entry 30.

On January 30, 2019, the Circuit issued an order stating in full: "Defendant-Appellant's Motion for Bail is DENIED, with an opinion forthcoming." Pet. App. 33a.

Meanwhile, the case against Watkins proceeded.

On May 1, 2019, Watkins pleaded guilty to the sole count in the indictment.

See W.D.N.Y. 18-cr-131, Docket Entry 69.

On August 16, 2019, the district judge sentenced him to 27 months in prison. *See id.*, Docket Entry 78.

Watkins did not appeal.

3. On October 3, 2019, some eight months after it denied Watkins bail, the Circuit issued a 32-page opinion "set[ting] forth our reasoning." Pet. App. 3a.

The Circuit held Watkins had properly been found subject to detention for the two alternative reasons the district judge gave.

The first, the Circuit said, was because the charged offense – possessing ammunition – is a "crime of violence" under the Act. Specifically, it fits the Act's residual clause at 18 U.S.C. § 3156(a)(4)(B). *See* Pet. App. 22a-24a. The Circuit noted *Dimaya* and *Davis*, which hold residual clauses identical to § 3156(a)(4)(B) are void for vagueness, but it ruled the Act "is not amenable to a due process challenge and is therefore not unconstitutionally vague." Pet. App. 19a.

Second, "[e]ven if possession of ammunition by a felon were not a categorical crime of violence," Pet. App. 27a, the Circuit said Watkins was subject to detention because, given his alleged firing of a gun, the charge of possessing ammunition "involved the use of a firearm" under § 3142(f)(1)(E). Pet. App. 31a.

Finally, finding "no clear error in the District Court's assessment of Watkins's future dangerousness or its decision to order Watkins's detention," the Circuit "affirmed the District Court's October 9[, 2018,] Order" denying bail. Pet. App. 31a.

The Circuit's Judgment issued the same day, October 3, 2019. Pet. App. 34a.

4. Watkins sought panel and *en banc* rehearing, noting the bail question had been moot well before the opinion issued. He asked the Circuit to withdraw its opinion. Pet. App. 35a. It refused. Pet. App. 53a.

REASONS FOR GRANTING THE WRIT

I. Here, as in *Hunt*, the Circuit Opined on a Moot Question

Watkins's "claim to pretrial bail was moot once he was convicted." *Hunt*, 455 U.S. at 481 (emphasis omitted). And "federal courts may not 'give opinions upon moot questions.'" *Moore*, 518 U.S. at 150 (citation omitted). *See also Ah How v. United States*, 193 U.S. 65, 78 (1904) ("We are asked to express an opinion as to the right of the appellants to give bail pending their appeal, but that now is a moot point.").

"Article III, § 2, of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' which restricts the authority of federal courts to resolving 'the legal rights of litigants in actual controversies.'" *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (citations omitted). "A corollary to this case-or-controversy requirement is that 'an actual controversy must be extant at all stages of review.' . . . If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id*. at 71-72 (citations omitted).

By the time the Circuit issued its opinion on whether Watkins merited bail, he had been convicted and thus had no "stake in the outcome" of that question. The "intervening circumstance" of his conviction mooted the bail question well before the opinion issued. And courts may not give opinions on moot questions.

The Circuit said its October 3, 2019, opinion "sets forth our reasoning" for its order denying Watkins bail on January 30, 2019, when the question was still live. Pet. App. 3a. But that does not license the Circuit to opine on a moot question. An "'actual controversy must be extant at all stages of review.'" *Genesis Healthcare*, 569 U.S. at 71 (citation omitted). "If an intervening circumstance" resolves what had once been "an actual controversy," the "action can no longer proceed and must be dismissed as moot." *Id*. at 72. This is because federal courts "are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." *Spencer v. Kemna*, 523 U.S. 1, 18 (1998). A dispute that "becomes moot at any point during the proceedings is 'no longer a "Case" or "Controversy" for purposes of Article III,' and is outside the jurisdiction of the federal courts." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (citation omitted).

When "the existing controversy has come to an end, the case becomes moot and should be treated accordingly. However convenient it might be to have decided the question . . . , this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.'" *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920) (citation omitted).

When the Circuit issued its opinion, its and the district court's denials of Watkins's requests for pretrial bail were "past actions which ha[d] no demonstrable continuing effect." *Spencer*, 523 U.S. at 18. Watkins's "claim to pretrial bail was

moot once he was convicted. The question was no longer live because even a favorable decision on it would not have entitled [him] to bail." *Hunt*, 455 U.S. at 481-82 (footnote and emphasis omitted). Likewise, whether the Act's residual clause is valid or void was an "abstract proposition" that could not "affect the result." *Alaska S.S. Co.*, 253 U.S. at 116. Whatever the answer, the bail ship had sailed.

"If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler*, 547 U.S. at 341.

Yet "expound[] the law" the Circuit did, opining on the meaning of the Act and whether it is "amenable to a due process challenge." Pet. App. 19a. This was improper, as "a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies.'" *Alvarez v. Smith*, 558 U.S. 87, 93 (2009). It was also unnecessary, as both the district court and Circuit found Watkins subject to detention under a provision wholly separate from the "crime of violence" clause: Watkins's possession of ammunition "involve[d] the possession or use of a firearm," § 3142(f)(1)(E), given his alleged firing of a gun. *See* Pet App. 9a, 31a.

Thus, not only did the Circuit opine on the moot bail question— it expounded needlessly on the meaning of the Act and the question, also moot in the case, whether the residual clause definition of "crime of violence" is void for vagueness.

The Circuit then declined its opportunity to correct these errors when it refused to withdraw its opinion as Watkins requested. *See* Pet. App. 52a, 53a.

II. Here, as in *Hunt,* Vacatur is Warranted

This Court's "supervisory power over the judgments of the lower federal courts is a broad one." *Munsingwear*, 340 U.S. at 40 (citing 28 U.S.C. § 2106, which provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.").

Given the circumstances here, "vacatur [of the Circuit's opinion] is the equitable solution." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997).

The Bail Reform Act applies in every federal criminal case, and whether its residual clause is valid or void matters to defendants and the government alike.

A detention hearing may not even be held – meaning the accused cannot be jailed – unless one or more prerequisites is met. *See* 18 U.S.C. § 3142(f). One thing that triggers a detention hearing is a "crime of violence" charge. *See* § 3142(f)(1)(A). If the residual clause is void, that narrows the "crime of violence" definition and, accordingly, the number of people subject to the possibility of detention.

Moreover, in many cases a "crime of violence" charge does not merely expose the defendant to possible detention. Detention is mandatory if someone charged with a "crime of violence" is found to be an irremediable flight risk or danger to the community. *See* § 3142(e)(1) (In such cases, the "judicial officer shall order the detention of the person before trial."). Indeed, unless another prerequisite for

detention applies, an irremediable flight risk or danger to the public *cannot be* jailed absent a "crime of violence" charge. *See, e.g., United States v. Dillard*, 214 F.3d 88, 91 (2d Cir. 2000) ("[I]f the arrest offense is not within the statutory definition of 'crime of violence,' no detention hearing will be held (unless the defendant comes within some other provision for detention), and the defendant must be released.").

Because the presence or absence of a "crime of violence" charge often determines whether the accused is jailed, it is important to both defendants and the government whether the residual clause definition of "crime of violence" is void.

Despite the importance of that question, mootness precludes this Court from reviewing the Circuit's answer.[1]

Though mootness prevents merits review, it does not prevent vacatur of the Circuit's opinion. *See, e.g., Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018) (That the "claim here became moot before certiorari does not limit this Court's discretion" to order vacatur.); *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677-78 (1944) ("If a judgment has become moot, this Court may not consider its merits, but may make such disposition of the whole case as justice may require," including ordering that "the judgment of the Court of Appeals be vacated.").

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[1] Still, the wrongness of that answer is notable. The opinion says the Act is "not amenable to a due process challenge," Pet. App. 19a, but this very Court subjected the Act to "due process scrutiny" in *United States v. Salerno*, 481 U.S. 739, 746 (1987). The Act is employed to jail presumptively innocent people, and "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). As *Salerno* confirms, the Act is subject to due process review. And its residual clause, identical to those in *Dimaya* and *Davis*, is void for the same reasons.

The "circumstances of this case and the balance of equities weigh in favor of vacatur." *Garza*, 138 S. Ct. at 1793. Vacatur is just what this Court ordered in *Hunt*, where, as here, the Court of Appeals opined on a bail question after the defendant had been convicted. Specifically, and also as here, the Court of Appeals opined on the constitutionality of a bail law. It ruled that Nebraska's "exclusion of violent sexual offenses from bail before trial violates the Excessive Bail Clause of the Eighth Amendment of the United States Constitution." 455 U.S. at 480-81. This Court vacated that ruling, as "Hunt's claim to pretrial bail was moot once he was convicted." *Id.* at 481 (emphasis omitted). *See also id.* ("Because we find that Hunt's constitutional claim to pretrial bail became moot following his convictions in state court, we now vacate the judgment of the Court of Appeals.").

The Circuit's issuing a one-sentence order when the bail question was live – "Defendant-Appellant's Motion for Bail is DENIED, with an opinion forthcoming." Pet. App. 33a – does not counsel against vacatur of the Circuit's opinion.

As shown, denying bail when the question was live did not license the Circuit to expound on the Act after the question became moot. "[F]ederal courts may not 'give opinions upon moot questions.'" *Moore*, 518 U.S. at 150 (citation omitted). A question that "becomes moot at any point during the proceedings" is "outside the jurisdiction of the federal courts." *Sanchez-Gomez*, 138 S. Ct. at 1537.

Moreover, the one-sentence order was opaque as to why bail was denied. The district court found Watkins subject to detention on two alternative grounds, only one of which involved the Act's residual clause. For all the Circuit's order revealed, the

Circuit denied bail on the second ground without reaching the question of the residual clause's constitutionality. *See, e.g., Arizonans for Official English*, 520 U.S. at 75 ("In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?"). Watkins cannot fairly be accused of "having slept on [his] rights," *Munsingwear*, 340 U.S. at 41, by not seeking review of a constitutional ruling the Circuit's order did not make. And he showed diligence by asking the Circuit to withdraw the opinion as soon as it issued. Pet. App. 52a.

Here, as in *Arizonans for Official English*, a mooting event meant the "case had lost the essential elements of a justiciable controversy and should not have been retained for adjudication on the merits by the Court of Appeals." 520 U.S. at 48. And here, as there, "[b]ecause the [] Circuit refused to stop the adjudication when [the mooting event] came to its attention," this Court should "set aside the unwarranted [] Court of Appeals judgment." *Id*. at 73. *See also id.* (citing *Iron Arrow Honor Soc. v. Heckler,* 464 U.S. 67 (1983) (per curiam), which "vacat[ed] judgment below where Court of Appeals had ruled on the merits although case had become moot"); *Los Angeles Cty. v. Davis*, 440 U.S. 625, 634 (1979) ("[T]he controversy has become moot during the pendency of this litigation. Accordingly, we vacate the judgment of the Court of Appeals.").

It matters whether the Act's residual clause is constitutional, but that question was moot when the Circuit opined on it. The ruling was also unnecessary and cannot be reviewed. Here, as in *Hunt* and the cases above, vacatur is the proper course.

CONCLUSION

The Court should grant the petition for a writ of certiorari and vacate, summarily or otherwise, the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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