No. 25-194

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RAHEEM DELANO FULTON,

Petitioner-Appellant,

v.

KRISTI NOEM, in her official capacity as Secretary of the Department of Homeland Security; **CALEB VITELLO,** in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement; **EDWARD NEWMAN,** in his official capacity as Acting Field Office Director, Buffalo Field Office, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security; and **MICHAEL BALL,** in his official capacity as Warden, Buffalo Federal Detention Facility,

Appellees-Appellees.

REPLY TO APELLEES-APPELLEES' OPPOSITION TO PETITIONER-APPELLANT'S MOTION FOR STAY OF REMOVAL

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INTRODUCTION

Mr. Fulton does not ask for review of a removal order or challenge the decision to execute it. Rather, he asks this Court to ensure the government complies with its own mandatory rules-the Performance Based National Detention Standards ("PBNDS")—that govern immigration detention—rules that in this case, have life or death consequences. *See* District Court ECF No. 1-1 (Letter from Dr. Amin). Mr. Fulton's claims regarding the deprivation of life-sustaining medication upon removal remain justiciable and distinct from the execution of his removal order. The necessity of a stay of removal is not an attempt to circumvent removal but a practical measure to ensure that his legal claims are not rendered moot before they can be adjudicated. Mr. Fulton's request for ultimate relief is simple: a declaration that the agency must follow its own rules and an injunction requiring it to do so.[1]

The legal questions raised in Mr. Fulton's case concern compliance with the PBNDS, which are too remote from execution of an order of removal to be considered as "aris[ing] from it." Therefore, jurisdiction is proper.

Moreover, because his claims are filed under the Administrative Procedures Act ("APA") and habeas corpus, the Court can award him relief on the first cause of action alone. Nonetheless, habeas remains the appropriate vehicle for Mr. Fulton's

[1] The government misleads this Court by stating that this case is related to another case, *K.K. v. McHenry*, No. 25-190 (2d Cir.), Dkt. No. 14.1. These two cases are entirely unrelated and therefore Mr. Fulton's Form C (Dkt. No. 19) is correct.

claims as he is challenging the severest of restraints on individual liberty: a threat to his life.

ARGUMENT

I. MR. FULTON SEEKS A 30-DAY SUPPLY OF MEDICATION, NOT A PERMANENT STAY OF REMOVAL, SO JURISDICTION LIES.

Because Mr. Fulton's claims do not "arise from" a decision or action to execute a removal order, the district court had jurisdiction over this case. Even if this Court finds 8 U.S.C. § 1252(g) applies, the district court may still adjudicate his petition under Article III or the Suspension Clause.

Section 1252(g) is "narrow," imposes no "general jurisdictional limitation[,]" and, as relevant here, applies only to claims that "arise from" a decision or action to execute a removal order. *Dep't of Homeland Sec. v. Regents of Univ. of Calif.*, 591 U.S. 1, 19 (2020) ("*Regents*"). The government declares ipso facto that Mr. Fulton's claim "unquestionably" (Opp. At 4) "arise[s] from" execution of a removal order. This misinterpretation relies on the kind of "uncritical literalism" that the Supreme Court has repeatedly rejected. *Jennings v. Rodriguez*, 583 U.S. 281, 293-94 (2018) (collecting cases) ("*Jennings*"). In doing so, it neglects to inform this Court of the actual legal test for determining if a claim "arises from" execution of a removal order.

The test, as set out in *Jennings*, "is not whether . . . an action taken [is] to remove an alien but whether *the legal questions* in this case arise from such an

action." *Id.* at. 295 n.3 (2018) (emphasis in original). "Where those legal questions are too remote from the actions taken," jurisdiction is proper. *Id.*[2] In *Jennings*, a case asking whether the government was required to comply with procedural rules governing detention during removal proceedings, the Court assumed that detention could be construed to literally be an action taken to remove a non-citizen. *Id.* But finding that detention-related claims do not automatically "arise from" the execution of a removal order merely because they occur within the broader context of removal proceedings, the Court concluded that the legal questions in the case were "too remote" to bar jurisdiction. *Id.* at 293.

The Supreme Court reaffirmed the idea that agency rule violations can be reviewed separately from removal in *Regents.* When presented with the question of whether the government was required to comply with procedural rules governing agency decision-making prior to rescinding the Deferred Action for Childhood Arrivals program, the Court held that the rescission itself was not a decision to "execute" a removal order. *Regents*, 591 U.S. 1, 19. Since challenges to agency-

[2] By contrast, part of Justice Thomas's concurrence in *Jennings*, rejected by the majority of the Court, adopted the sweeping and circular reasoning of 1252(g) that the government advances here: Because Mr. Fulton's claims supposedly "unquestionably arise from the execution of his removal order" his challenge is "arising from" an action to remove a non-citizen, and no court has jurisdiction over that claim. *Jennings,* 583 U.S. at 317 (Thomas, J., concurring). That reading was rejected by eight other Justices (Justice Kagan took no part in the decision of *Jennings*). Yet the government presses forward with it here.

decision making processes such as rule violations are distinct from challenges to removal itself, the legal question raised by rescission was too remote to bar jurisdiction.

Here, too, Mr. Fulton raises legal questions that are too remote to bar jurisdiction. As in *Jennings*, even assuming Mr. Fulton's detention could be construed to literally be an action to execute removal, he asks whether the government is required to comply with the rules it created to govern that detention. As in *Regents*, the action challenged here—refusal to follow agency rules—is not a decision or action to execute a removal order. Unlike cases cited by the government where petitioners sought to halt their deportations outright, Mr. Fulton does not contest his removability; he seeks only adherence to legally mandated procedural safeguards. The distinction is crucial: courts retain jurisdiction to review claims that agencies have violated their own rules, even when those claims arise within the context of removal proceedings.

Put another way, the substance of the relief that Mr. Fulton seeks has nothing to do with stopping his removal.[3] On this point, the government is simply wrong.[4]

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[3] The parties agree that "whether the district court has jurisdiction will turn on the substance of the relief that a plaintiff is seeking." *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011); Opp. at 7 (urging the Court to look at the "substance of the relief").

[4] The government relies upon inapposite out-of-circuit case law—*E.F.L. v. Prim*, 986 F.3d 959 (7th Cir. 2021) and *Tazu v. Attorney Gen. United States*, 975 F.3d 292, 296 (3d Cir. 2020). Opp. at 5. In both cases the Petitioners argued that removal from the

Opp. at 7. Had Mr. Fulton won relief from removal, and the government sought to discharge him from detention in the United States without a 30-day supply of medication, he would still have the same legal claim. It is not true that Mr. Fulton "unequivocally[,] emphatically[,] and openly admits that he seeks to enjoin his removal." *Id.* His has instead always sought injunctive, declaratory, and other relief (e.g. mandamus) ordering a 30-day supply of medication, with a temporary stay of removal to prevent the government from mooting his case, conditioned on the government's compliance with its rules and dissolvable whenever the government chooses to comply. *See* Petition, Prayer for Relief, ¶¶ 2-3 (requesting declaratory and injunctive relief regarding removal only insofar as defendants act "without ensuring that he has scheduled dialysis treatment") (emphasis added); ¶ 6 (requesting other relief this Court deems proper, e.g. mandamus). In fact, were the government to arrange for a 30-day supply of medication in Jamaica today, Mr. Fulton's "ultimate goal" would be obtained, *Delgado v. Quarantillo*, 643 F.3d 52, 55, his removal order would *not* be "invalidate[d]", *Freire v. U.S. Dep't of Homeland Sec.*, 711 F. App'x 58, 59 (2d Cir. 2018), and he would withdraw his claims.

United States would vitiate their right to pursue immigration related relief. In *E.F.L.*, the Petitioner was seeking VAWA relief and in *Tazu* the Petitioner was seeking a motion to reopen immigration removal proceedings.

Small wonder that the government is "confus[ed]" by Mr. Fulton's request on this motion alone for a stay of removal only during the pendency of his appeal. Opp. At 5. It is deliberately seeking to confuse this Court as to the nature of Mr. Fulton's ultimate request for relief. The *Nken* stay factors, merely a restating of the traditional factors for preliminary relief to maintain the status quo, unquestionably apply to Mr. Fulton's request that the government not be permitted to moot his case while this Court considers it.

Moreover, given that Mr. Fulton does not ultimately seek to enjoin his removal, the government sets loose a red herring by citing the circuit split over whether jurisdiction holds depending on if a challenge is to the government's authority or its discretion to remove. *Compare* Opp. At 4 (citing cases addressing "discretion" to remove) with *Arce v. United States*, 899 F.3d 796 (9th Cir. 2018) (jurisdiction lies over challenge to "authority" to remove). This case does not ask the Second Circuit to take a position on this split because it challenges neither authority nor discretion to remove. Because Mr. Fulton is "not asking for review of an order of removal; [he is] not challenging the decision to . . . seek removal; and [he is] not even challenging any part of the process by which [his] removability will be determined," § 1252(g) is no bar to jurisdiction with the district court. *Jennings*, 583 U.S. 281, 294.

Even if this Court finds that Mr. Fulton's claims "arise[] from" the execution of a removal order, jurisdiction is still proper over his habeas claims, which require judicial review: first under Article III,[5] and then under the Suspension Clause.[6] In *Ragbir v. Homan*, a case seeking to enjoin a removal order based on allegations that it was enforced in violation of the First Amendment retaliation, this Court concluded that the Suspension Clause required habeas review. 923 F.3d 53, 78 (2d Cir. 2019), *cert. granted, judgment vacated sub nom. Pham v. Ragbir*, 141 S. Ct. 227 (2020). The same reasoning applies here, where Mr. Fulton alleges a Fifth Amendment violation from the agency's refusal to follow its own rules.

II. RELIEF IS AVAILABLE ON MR. FULTON'S CAUSES OF ACTION.

The government waives argument, and thus apparently concedes, that it violates the APA and the Constitution by failing to comply with its own rules requiring provision of a 30-day supply of medication. The government's blatant disregard of mandatory rules with life-or-death consequences "shocks the conscience." *See* District Court ECF No. 1 (Petition), ¶¶46-48. Yet, the government calls this Court powerless to stop it because Mr. Fulton's challenge arises by habeas,

[5] "The judicial power shall extend to all cases, in law and equity, arising underth[e] Constitution." U.S. Const. art. III, § 2.

[6] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when the Cases of Rebellion or Invasion the public safety may require it." U.S. Const. art. I, § 9, cl. 2.

a supposedly inappropriate vehicle. That is neither an accurate description of Mr. Fulton's claims nor the law of habeas.

As an initial matter, Mr. Fulton raised a § 706 APA claim, permitting a court to "compel agency action unlawfully withheld or unreasonably delayed," or "hold unlawful . . . agency action" that is arbitrary and capricious or unconstitutional. 5 U.S.C. § 706. On this ground alone, the Court can find that he raised a proper cause of action to obtain injunctive, mandamus, and declaratory relief.

Habeas is also a proper vehicle for Mr. Fulton's claims because he challenges a severe restraint by his custodian on the most fundamental of liberties: the government's decision to deny him medication that would preserve his life. Habeas is "a remedy for severe restraints on individual liberty" and its "custody requirement "is not to be "suffocate[d] . . . in stifling formalisms or . . . the manacles of arcane and scholastic procedural requirements." *Hensley v. Mun. Ct., San Jose Milpitas Jud. Dist., Santa Clara Cnty., California*, 411 U.S. 345, 350 (1973). Habeas is therefore unquestionably available "to attack future confinement and obtain future releases." *Preiser v. Rodriguez*, 411 U.S. 475, 487, (1973). The government's refusal to provide life-sustaining medication leaving its physical custody is a severe restraint on Mr. Fulton's liberty. This restraint is not speculative. The government concedes that it feels sympathy for Mr. Fulton's medical needs, but claims it has no legal obligation to meet them, despite its own mandatory rules. Opp. at 8.

The government contends that Mr. Fulton's claims are not proper because "simple release" is the only relief available through habeas. Opp. At 9. But here, that is precisely the relief Mr. Fulton seeks: "simple release" consistent with the law. The agency rules mandate that to remove Mr. Fulton, he must receive up to a 30-day supply of medication. *See* District Court ECF No. 1 (Petition), ¶¶33-36.

Regardless, simple release from physical detention is not the only relief available at habeas. *See St. Cyr*, 533 U.S. at 300 (upholding judicial review over "non-core" habeas claims); *Black v. Dir. Thomas Decker*, 103 F.4th 133, 138 (granting detained noncitizens additional procedural due process protections in the form of an individualized bond hearing); *Boumediene v. Bush* (finding that procedures for review of a detainee's status at Guantanamo Bay were not adequate and effective substitutes for habeas). *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020), overruled none of these cases, because it stands only for the narrow proposition that a noncitizen with no ties to the U.S. cannot resort to habeas as a means of "gaining entry" and that due process is not offended by the expedited removal of such an individual pursuant to statute.

CONCLUSION

For the foregoing reasons, the Court should find that it has jurisdiction and grant a stay, permitting Mr. Fulton to proceed with his appeal.

Date: February 13, 2025
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Respectfully submitted

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 32(a)(7)(B) and Second Circuit Local Rule 32.1(a)(4)(B) because the total number of words in the reply, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, and certificate of compliance, is 2,292. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Procedure 32(a)(6) because it has been prepared using 14-point Times New Roman proportionally spaced typeface, double-spaced.

Dated: February 13, 2025

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate ACMS system on February 13, 2025. I further certify that participants in the case are registered ACMS users will be served by the appellate ACMS system.

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