No. 25-194

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RAHEEM DELANO FULTON,

Petitioner-Appellant,

v.

ALEJANDRO MAYORKAS, in his official capacity as Secretary of the Department of Homeland Security; **PATRICK LECHLEITNER,** in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement; **THOMAS BROPHY,** 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,[1]

Appellees -Appellees.

EMERGENCY MOTION FOR A STAY TO ENJOIN APPELLEES-APPELLES FROM REMOVING PETITIONER-PLAINTIFF TO JAMAICA PENDING THE ADJUDICATION OF HIS APPEAL

Sarah T. Gillman
ROBERT F. KENNEDY
HUMAN RIGHTS
88 Pine St., 8th Fl., Ste. 801
New York, NY 10005
T: (646)289-5593
E: gillman@rfkhumanrights.org

Sarah Decker
ROBERT F. KENNEDY
HUMAN RIGHTS
1300 19th Street, N.W., Ste. 750
Washington, D.C. 20036
T: (646)289-5593
E: decker@rfkhumanrights.org

[1] Petitioner-Plaintiff-Appellant commenced the underlying proceeding in the United States District Court for the Western District of New York prior to January 20, 2025.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Petitioner-Appellant, Raheem Delano Fulton, ("Appellant" or "Mr. Fulton") respectfully moves this Court for an emergency stay to enjoin Appellees-Appellees ("Appellees" or "government") from removing him from the United States to Jamaica pending the adjudication of his appeal. Mr. Fulton appeals the Decision and Order of the Honorable John L. Sinatra, Jr. (entered on January 24, 2025, that granted the government's motion to dismiss and denied Appellant's petition, complaint, and motion for a temporary restraining order). *See* District Court Docket ECF Nos. 9, 5 and 1.

Mr. Fulton is a thirty-nine (39) year old man who suffers from End Stage Renal Disease ("ERSD"), a permanent medical condition where the kidneys can no longer function on their own. Mr. Fulton requires dialysis for his condition three times a week in order to survive. Mr. Fulton also suffers from many complications related to his kidney disease including severe renal osteodystrophy,[2] intermittent episodes of gross hematuria,[3] and cystic renal disease.[4] *Id.* The devastating results should Mr.

---

[2] Renal osteodystrophy is a condition that can weaken the bones, causing bone pain and fractures. *Renal Osteodystrophy*, Cleveland Clinic, https://my.clevelandclinic.org/health/diseases/24006-renal-osteodystrophy (last visited Jan. 18, 2025).

[3] Gross hematuria refers to when the blood is visible in urine. *Hematuria*, Nat'l Inst. of Diabetes and Digestive and Kidney Diseases, https://www.niddk.nih.gov/health-information/urologic-diseases/hematuria-blood-urine (last visited Jan. 18, 2025).

[4] Acquired cystic renal disease "happens when a person's kidneys develop fluid-

Fulton not receive continuous dialysis treatment are supported by the expert medical opinion of Dr. Sahar Amin. *Id.* at ECF No. 1-1, Letter from Dr. Sahar Amin dated January 2, 2025 ("Dr. Amin Letter").

Before the United States District Court for the Western District of New York, Mr. Fulton sought narrow and specific relief—that the Court require the government to comply with its own standards requiring that Mr. Fulton receive a 30-day supply of all medication, including dialysis treatment, upon his removal to Jamaica. Because the government has failed to provide Mr. Fulton with 30 days of his medication, including scheduled dialysis appointment three times per week, the current effectuation of Mr. Fulton's removal order violates the Performance Based National Detention Standards ("PBNDS"), the Administrative Procedure Act ("APA"), 5 USC §551 et seq., and the Due Process Clause of the Fifth Amendment to the United States Constitution.

The risk of rapid deterioration is not theoretical but rather is confirmed by Dr. Amin's Letter, which explains the rapid medical deterioration Mr. Fulton suffered in March 2024 when he missed one dialysis appointment during the course of his

---

filled sacs, called cysts, over time.*" Acquired Cystic Kidney Disease*, Nat'l Inst. of Diabetes and Digestive and Kidney Diseases, https://www.niddk.nih.gov/health-information/kidney-disease/acquired-cystic-kidney-disease#:~:text=Clinical%20Trials-,What%20is%20acquired%20cystic%20kidney%20disease%3F,kidneys%20to%20develop%20multiple%20cyst (last visited Jan. 18, 2025).

transfer by ICE from Florida to New York. *Id* at ECF No. 1-1. After missing one appointment and going without dialysis for almost five days, Mr. Fulton's health rapidly declined, and he was taken to the Emergency Department at the Erie County Medical Center ("ECMC"). *Id.* He suffered from a fluid overload and high potassium and needed to be "dialyzed urgently due to severe life-threatening hyperkalemia of 7 mmol/lit and pulmonary edema." *Id.*

The *only evidence* that the government submitted in support of its' motion to dismiss proved that that the Appellees were not in compliance with the law. More specifically, the government only submitted the Declaration of Nathan Gray ("Gray Decl.") in support of its motion to dismiss. *See* District Court Docket ECF No. 5-2. However, the Gray Decl. states that Mr. Fulton is "scheduled to receive dialysis treatment at the ICE staging facility on both January 27, 2025, and January 29, 2025" but does not state that the government will provide Mr. Fulton receive with a 30-day supply of all medication, including dialysis treatment, upon his removal to Jamaica. *See id.* at ¶11.

Mr. Fulton respectfully requests that the Court grant his emergency motion for a stay of his removal pending the adjudication of his appeal. As is set forth more fully *infra,* the United States District Court for the Western District of New York erred in finding that it did not have jurisdiction to consider Mr. Fulton's claims for relief.

Upon information and belief, Mr. Fulton continues to be scheduled for removal to Jamaica on January 30, 2025.

RELEVANT STATEMENT OF FACTS AND PROCEDURAL HISTORY[5]

Mr. Fulton is a native and citizen of Jamaica. He is 39-years-old and has been on dialysis due to ESRD for the past 21 years. *See* District Court Docket ECF No. No. 1 at ¶5. He has lived in the United States since 2003 and is the father to three (3) United States Citizen ("USC") children. *See id.* at ¶¶14-16. Mr. Fulton was born on June 1, 1985, in St. Ann, Jamaica. As a child, he often traveled to the United States with his family for vacations. *Id.* at ¶14. He started living in the United States in July 2003 after entering on a B2 visa and has remained here ever since. *Id.*

In July 2003, Mr. Fulton was diagnosed with kidney disease and underwent kidney removal surgery. *Id.* at ECF No. 1-1, Dr. Amin Letter. Since then, he requires dialysis treatment three times a week to survive. *Id.* ESRD is a permanent medical condition where the kidneys can no longer function on their own. The devastating results should Mr. Fulton not receive continuous access to dialysis are supported by the expert medical opinion of Dr. Sahar Amin.

[5] Given the emergent nature of this application, the statement of facts and references therein are taken directly from the pleadings that were filed with the United States District Court for the Western District of New York and upon information and belief based upon the events that have occurred following the Decision and Order of the Honorable John L. Sinatra, Jr. on January 24, 2025. *See* District Court Docket ECF No. 9.

On February 6, 2021, Mr. Fulton was arrested on an attempted burglary charge. Mr. Fulton was convicted of attempted burglary in the second degree in the Supreme Court of the State of New York, Queens County on September 29, 2022. *Id.* at ECF No. 1, ¶¶17-19. On October 14, 2022, he was sentenced to three years in prison and ultimately served thirty (30) months at Elmira Correctional Facility. *Id.* On May 23, 2023, DHS served Mr. Fulton with a Notice to Appear ("NTA") that charged him as removable based on his criminal conviction. *Id.* At the conclusion of the sentence related to his criminal conviction, ICE detained Mr. Fulton at the Buffalo Federal Detention Facility (BFDF) on August 25, 2023. *Id.* In removal proceedings, Mr. Fulton applied for relief from removal, but his application was denied by the Immigration Judge and the Board of Immigration Appeals ("BIA") affirmed the Immigration Judge's decision on May 2, 2024. *Id.* at ¶ 20. Therefore, Mr. Fulton has had a final order of removal since May 2, 2024.

During the time he was detained at BFDF, Mr. Fulton received consistent, regular dialysis and was under the care of Dr. Sahar Amin since May 2024. He receives dialysis treatment three times a week on Tuesdays, Thursdays, and Saturdays for four hours each session. *Id.* at ECF No. 1-1, Dr. Amin Letter. Mr. Fulton also received regular doxercalciferol injections during his sessions to strengthen his bone health and takes Cinacalcet and calcium acetate medication regularly with his meals. *See id.* Mr. Fulton was recently diagnosed with a

pulmonary embolism (blood clots in his lungs). *See id.* Mr. Fulton is now taking blood thinner medication and has received additional treatment and reviews to address his growing medical issues. *See id.* Dr. Amin recommends that Mr. Fulton "continues his treatment at ECMC strictly as [they] have optimized his care very diligently." *Id.* Without regular care, Mr. Fulton "stands a great risk of rapid deterioration." *Id.*

Respondents-Defendants initially planned to deport Mr. Fulton to Jamaica on July 25, 2024. *Id.* at ECF No. 1 at ¶ 30. However, two days before his departure, ICE informed Mr. Fulton that he could not be deported due to, upon information and belief, an issue with the Jamaican consulate and the fact that they could not schedule dialysis treatment during and after his deportation. *Id.*

On January 16, 2025, Mr. Fulton learned that he was scheduled to deportation to Jamaica on January 30, 2025. *Id.* at ¶31. However, there continues to be, as was the case in July 2024, no scheduled dialysis treatment for Mr. Fulton in Jamaica on Saturday, February 1, 2025, and for at a minimum thirty (30) days thereafter.

On January 18, 2025, Mr. Fulton filed a petition and complaint with the United States District Court for the Western District of New York. *See* ECF No. 1, Petition, ¶ 30. Mr. Fulton filed a petition and complaint on January 16, 2025, because, based upon information and belief at the time of the filing, he was scheduled to be removed to Jamaica on January 30, 2025. *Id.* at ¶ 31.

On January 22, 2025, the United States District Court for the Western District of New York officially opened Mr. Fulton's case, and it was assigned to the Honorable John L. Sinatra, Jr. On January 22, 2025, Mr. Fulton filed a motion for a temporary restraining order. *See* District Court Docket ECF Nos. 3, 3-1 and 3-2. On January 23, 2025, the Honorable John L. Sinatra, Jr. issued a text order for the parties to appear for a status conference. *Id.* at ECF No. 4. On January 23, 2025, prior to the status conference, the government filed a motion to dismiss. *Id.* at ECF No. 5. At the status conference on January 23, 2025, the Honorable John L. Sinatra, Jr. permitted Mr. Fulton to reply to the government's motion to dismiss by January 24, 2025, and he government to submit a reply thereto. *Id.* at ECF No. 6. The parties submitted their respective papers on January 24, 2025, by noon and thereafter on January 24, 2025, the Honorable John L. Sinatra, Jr. issued his Decision and Order granting the government's motion to dismiss and denying the relief requested in the petition and complaint. *Id.* at ECF No. 9. A final judgment was issued on January 24, 2025. *Id.* at ECF No. 10.

Mr. Fulton filed a notice of appeal on January 24, 2025. *Id.* at ECF No. 11. Upon information and belief, ICE transferred Mr. Fulton to an ICE staging facility in Louisiana, the Pine Prairie ICE Processing Center, on or about January 25, 2025, for his planned removal to Jamaica on January 30, 2025.

ARGUMENT

I. LEGAL STANDARD

The Second Circuit Court of Appeals has, for "the last five decades," permitted a stay or preliminary injunction where a party has either shown a "likelihood of success on the merits" ***or,*** at least, "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010). Just as the Supreme Court determined in *Nken v. Holder*, 556 U.S. 418, 42 (2009) in a slightly different context, this Court should consider: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will

substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id*. at 434.

While "not a matter of right," courts may grant stays in the "exercise of judicial discretion" based on the circumstance of the particular case. *Id*. In immigration cases, *Nken* found that the last two stay factors, injury to other parties and the public interest, merge because the opposing litigant is also the public interest representative. *Id*. at 436. The Court in *Nken* found that "the first two factors are most critical." *Id.*

II. THE BALANCE OF THE FACTORS DECIDEDLY TIPS IN FAVOR OF MR. FULTON.

Mr. Fulton is likely to succeed on his argument that the District Court erred in finding that it did not have jurisdiction to consider Mr. Fulton's claims for relief and in granting the government's motion to dismiss. Like the government, the District Court misconstrued Mr. Fulton's claims for relief and thereby erred in finding it did not have jurisdiction. The District Court found that Mr. Fulton was challenging the government's discretionary decision to stay his removal to Jamaica and therefore the District Court was stripped of jurisdiction to consider his claims for relief. *See* District Court Docket at ECF No. 9 at 9.

However, as Mr. Fulton set forth before the District Court, he does not seek to challenge a discretionary decision by the government or to make a direct or indirect challenge to the order of removal. Rather, as is set forth below, Mr. Fulton narrowly seeks to challenge the government's failure to provide him with a 30-day supply of all medications post-removal to Jamaica.

A. Mr. Fulton's Claims Before the District Court.

Before the District Court, Mr. Fulton sought specific and narrow relief; not that this Court halt his deportation, but rather that this Court require the government to comply with its own standards mandating that Mr. Fulton receive a 30-day supply of all medication upon his removal to Jamaica. Because the government has failed to provide Mr. Fulton with 30 days of his medication, including scheduled dialysis

appointments three times per week, the current effectuation of Mr. Fulton's removal order violates the PBNDS, the APA and the Due Process Clause of the Fifth Amendment to the United States Constitution.

Section 4.3(V)(Z) of the PBNDS, which concerns medical care and continuity of care, supplies that the ICE facility "must ensure that a plan is developed that provides for continuity of care in the event of a change in detention placement or status. . . . Upon removal or release from ICE custody, the detainee ***shall receive up to a 30 day supply of medication*** . . . and a detailed medical care summary[.]" Section 4.3(V)(U)(4) of the PBNDS defines "delivery of medication" as: "All prescribed medications ***and medically necessary treatments*** shall be provided to detainees on schedule and without interruption, absent exigent circumstances." (emphasis added). Dialysis, a medically necessary treatment that is required for Mr. Fulton to survive, is therefore "medication" included in the PBNDS's mandate, requiring the government to provide 30 days of continuity of medical care upon removal. Dialysis treatment is a not a one-off specialized surgical procedure; it is a consistent, medically necessary treatment that Mr. Fulton receives three times per week as part of his current medication regime. *See* District Court Docket, ECF No. 1-1, Dr. Amin Letter.

The APA provides that a court "shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise

not in accordance with law." 5 U.S.C. § 706(2)(A). When the government has promulgated "[r]egulations with the force and effect of law," those regulations "supplement the bare bones" of federal statutes, such that the agencies are bound to follow their own "existing valid regulations." *United States ex rel. Accardi Shaugnessy*, 347 U.S. 260, 266, 268 (1954); *see also Montilla v. I.N.S.*, 926 F.2d 162, 166-167 (2d Cir. 1991).

In *Accardi,* the court held that the BIA must follow its own regulations in its exercise of discretion. 347 U.S. at 268. In *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), the Court struck down a Bureau of Indian Affairs benefits determination because it did not comply with procedures set forth in the agency's internal manual. The Court explained that *Accardi* applies with particular force in those cases in which "the rights of individuals are affected," stating that "it is incumbent upon agencies to follow their own procedures . . . even where [they] are possibly more rigorous than otherwise would be required." *Id.* at 235; *see also Battle v. F.A.A*, 393 F.3d 1330, 1336 (D.C. Cir. 2005) ("*Accardi* has come to stand for the proposition that agencies may not violate their own rules and regulations to the prejudice of others."); *Damus v. Nielson*, 313 F. Supp. 3d 317, 337 (D.D.C. 2018) ("[T]he premise underlying the *Accardi* doctrine is that agencies can be held accountable to their own codifications of procedures and policies — and particularly those that affect individual rights.").

In *Damus*, the U.S. District Court for the District of Columbia found that a

2009 ICE directive laying out "procedures ICE must undertake to determine whether a given asylum-seeker should be granted parole" fell "squarely within the ambit of those agency actions to which the [*Accardi*] doctrine may attach," in part because it "establish[ed] a set of minimum protections for those seeking asylum" and "was intended—at least in part—to benefit asylum-seekers navigating the parole process." 313 F. Supp. 3d at 337. There, the court also rejected Respondents-Defendants' argument that only regulations requiring notice and comment are binding on the government. *Id.* at 337-38 (finding that "the policies and procedures contained within the Directive establish a set of minimum protections for those seeking asylum, including an opportunity to submit documentation, the availability of an individualized parole interview, and an explanation of the reasons for a parole denial"). In rejecting the government's argument, the court in *Damus* addressed the government's reliance on *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006). At issue in *Miller* were DOJ guidelines relied upon by the government in issuing subpoenas. *Id.* at 1152. The court in *Miller*, *id.* at 1153, found that the DOJ guidelines were not like the Bureau of Indian Affairs manual in *Morton v. Ruiz*, 415 U.S. at 235. In *Damus*, the court also found that the ICE Directive at issue "falls clearly on the side of *Morton* rather than *Miller*." 313 F. Supp. 3d at 338.

The PBNDS, which are contractually binding in the operation of all ICE facilities, set out a standard of minimum conduct that the agency is required to follow

in its treatment of detained people. *See, e.g.*, *Torres v. D.H.S.*, 411 F. Supp. 3d 1036, 1068-69 (C.D. Cal. 2019) (noting that ICE's failure to abide by PBNDS constituted an impermissible denial of detainees' access to counsel); *Innovation L. Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1079 (D. Or. 2018) (same); *Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 2086482, at *6 (S.D. Fla. Apr. 30, 2020) (finding unlawful agency conduct during the COVID-19 pandemic when ICE failed to follow PBNDS standards that called for the agency to abide by Centers for Disease Control and Prevention guidance). Pursuant to the *Accardi* doctrine, the government is bound to apply and uphold the rules and regulations contained in the PBNDS.

In addition, substantive due process precludes a state actor from affirmatively acting to create or enhance a danger that will ultimately harm an individual. *See Butera v. D.C.*, 235 F.3d 637, 649–51 (D.C. Cir. 2001) (citing cases). The State "owes a duty of protection when its agents create or increase the danger to an individual." *Id.*; *see also Paine v. Cason*, 678 F.3d 500, 510 (7th Cir. 2012) (due process was violated where police officers left detainee in a more dangerous neighborhood, away from public transportation and without a cell phone); *Wang v. Reno*, 81 F.3d 808, 817 (9th Cir. 1996) (noncitizen could not be removed to China where U.S. government convinced him to testify about topic that would lead Chinese government to torture and possibly execute him). Due process is implicated when the state actor's conduct in such a case is "'so egregious, so outrageous, that it may

fairly be said to shock the contemporary conscience.'" *Butera*, 235 F.3d at 651 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)).

Mr. Fulton has received consistent, regular dialysis at the ECMC since August 2023 and has been under the care of his current provider, Dr. Sahar Amin, since May 2024. He currently receives dialysis three times a week on Tuesdays, Thursdays, and Saturdays for four hours each session. *See* District Court Docket ECF, No. 1-1, Dr. Amin Letter. Despite the risks to Mr. Fulton's life, Respondents-Defendants' seek to effectuate Petitioner-Plaintiff's removal without scheduled dialysis appointments for Mr. Fulton in Jamaica for three times a week after his removal on January 30, 2025, for—at a minimum—the 30 days required by ICE's own PBNDS or any day thereafter. This failure to follow ICE's own standards, resulting in the likely death of Mr. Fulton upon deportation, is egregious and shocks the conscience.

Finally, the Fifth Amendment of the United States Constitution guarantees that noncitizens receive adequate procedural protections in the course of any executions of the government's detention and removal authorities. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Such protections are flexible and guided by considerations for the "private interest that will be affected[,]" "the risk of an erroneous deprivation of such interest through the procedures used[,]" and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement

would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The government's actions in effectuating Mr. Fulton's removal without ensuring that he has scheduled dialysis treatment on February 1, 2025, or any day thereafter creates a substantial risk of an erroneous deprivation of Appellant's core interest in life and liberty.

B. The District Court Erred in Finding that It Did Not Have Jurisdiction to Consider Mr. Fulton's Claims for Relief.

The District Court erred in its finding that it was stripped of jurisdiction to hear the foregoing claims raised by Mr. Fulton pursuant to 8 U.S.C. §1252(g).[6] While the District Court cited to its' own decision in *Taveras-Tejada v. Mayorkas,* No. 22-CV-918 (JLS), 2022 U.S. Dist. LEXIS 218759 (W.D.N.Y. Dec. 5, 2022), *Taveras-Tejada* does not support finding in favor of the government. First, in *Taveras-Tejada*, the relief that was sought (release from detention through a challenge to the manner of removal) was broader than the claims and relief that Mr. Fulton seeks in this case. Second, the District Court's analysis of the application of

[6] The government also argued that Mr. Fulton's claims could not be considered by the District Court pursuant to 8 U.S.C. § 1252(a)(5). The District Court did not address this argument by the government, but Mr. Fulton did address in his opposition to Appellee's motion to dismiss. *See* District Court Docket, ECF No. 7. As is set forth by Mr. Fulton before the District Court, the claims that Mr. Fulton raises in this case could not have been brought in a petition for review because his claims are outside the removal proceedings which resulted in a final order of removal and that removal order is only reviewable by the United States Court of Appeals for the Second Circuit. Mr. Fulton is not seeking to undue the order of removal and therefore 8 U.S.C. § 1252(a)(5) does not strip this Court of jurisdiction.

§1252(g) in *Taveras-Tejada*, like in this case, is incorrect because it incorrectly framed the challenge as akin to a challenge to a discretionary decision by the government, namely, the execution of a removal order.

While the District Court cited to this Court's decision in *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011), *Delgado* does not support finding in favor of the government. At issue in *Delgado* was whether 8 U.S.C. § 1252(a)(5) and (b)(9) stripped the Court of jurisdiction to adjudicate claims raised in that case. *Id.* In *Delgado*, the United States Citizenship and Immigration Services ("USCIS") had already adjudicated the I-212 waiver and had denied it, and Delgado sought review of that decision. *Id.* at 54. Thus, Delgado asked the Court to overturn the decision of the agency to deny her relief. *Id.* In this case, Mr. Fulton is not bringing either a "direct" or "indirect" challenge to the removal order. Rather, the claims that Mr. Fulton raises in this case could not have been brought in a petition for review because his claims are outside the removal proceedings which resulted in a final order of removal and that removal order is only reviewable by the United States Court of Appeals for the Second Circuit.

However, here, Mr. Fulton argues that, per the government's own standards, it is required to provide him with a 30-day supply of medication in Jamaica upon removal, pursuant to the APA and the Due Process Clause of the Fifth Amendment to the United States Constitution. This is exactly the type of claim that the Supreme

Court blessed as outside the bounds of the jurisdictional bars in *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) ("*AADC*").

The presumption of judicial review is deeply rooted in our history and separation of powers. To guard against arbitrary government, our founders knew, elections are not enough: "An elective despotism was not the government we fought for." *The Federalist No. 48*, p. 311 (C. Rossiter ed. 1961) (J. Madison) (emphasis deleted). In a government "founded on free principles," no one person, group, or branch may hold all the keys of power over a private person's liberty or property. *Id*. Instead, power must be set against power, "divided and balanced among several bodies . . . checked and restrained by the others." *Id.* As Chief Justice Marshall explained, "It would excite some surprise if, in a government of laws and of principle . . . a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals," a statute might leave that individual "with no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust." *United States v. Nourse*, 34 U.S. 8, 8-9 (1835).

In *AADC*, consistent with the presumption of judicial review, the Supreme Court emphasized that 8 U.S.C. § 1252(g) does not strip jurisdiction for the "universe of deportation claims," but rather for a "narrow" class of noncitizen challenges to "discrete actions" of the Attorney General. *AADC*, 525 U.S. at 482. The Supreme Court stressed that the "discretion-protecti[on]" of Section 1252(g) was not crafted

to bar non-final-order review of "*all* claims arising from deportation proceedings." *Id.* (emphasis added). Instead, as Justice Scalia, writing for the Court, noted, Section 1252(g) demands "much narrower" application. *Id.* at 482. Justice Scalia explained that "[t]here are of course many other decisions or actions that may be part of the deportation process" that do not fall within the three acts identified by 8 U.S.C. § 1252(g) and that it would be "implausible that the mention of three discrete events along the road to deportation [serve] as a shorthand way of referring to all claims arising from deportation proceedings." *Id.*

The Supreme Court has further clarified that, in interpreting the language of subsection (g), it "did not interpret this language to sweep in any claim that can technically be said to 'arise from' the three listed actions" but instead read the language "to refer to just those three specific actions themselves." *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (citing *AADC*, 525 U.S. at 471).

The statute's legislative history further supports a narrow reading of § 1252(g). Congressional testimony regarding the scope of § 1252(g) from the then-General Counsel of the Immigration and Naturalization Service made clear that the agency remained "committed to ensuring that [noncitizens] in deportation proceedings are afforded appropriate due process."[7] Ultimately, Congress

[7] *Removal of Criminal and Illegal Aliens, Hearing before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary*, 104th Cong, 1st Sess. 15 (1995) (statement of T. Alexander Aleinikoff, General Counsel,

considered and was concerned not with wholly insulating immigration decisions from judicial review, but instead with preventing numerous "frivolous" appeals in various venues.[8] The "presumption of reviewability" can only be overcome by "clear and convincing evidence of congressional intent to preclude judicial review." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020). If anything, the plain text and legislative history of IIRIRA "clear[ly] and convincing[ly]" reflects Congress's intent not to sweep so broadly. *Id.* To hold otherwise would ignore the Supreme Court's "consistent[] appli[cation]" of the presumption of reviewability to immigration statutes and concomitant narrow reading of jurisdiction-stripping provisions. *Id*.

In *Vasquez v. Wolf*, 830 F.App'x 556 (9th Cir. 2020), the United States Court of Appeals for the Ninth Circuit Court found that that 8 U.S.C. §1252(g) does not strip jurisdiction to hear a claim that challenge the manner of removal of a person, in that case a five (5) year old boy, who suffered from a traumatic brain injury. District Courts in this Circuit have also found that §1252(g) also does not completely strip jurisdiction of Courts. *See S.N.C. v. Sessions*, No. 18 CIV. 7680 (LGS), 2018 WL 6175902, (S.D.N.Y. Nov. 26, 2018); *Torres-Jurado v. Biden*, No. 19 CIV. 3595

Immigration and Naturalization Service).

[8] *See id.; see also* The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 104th Cong., 2d Sess., in 142 Cong. Rec. S10572 (daily ed. Sept 16, 1996) (statement of Sen. Simpson).

(AT), 2023 WL 7130898 at *4 (S.D.N.Y. Oct. 29, 2023) (the court rejected the government's jurisdictional arguments and found that "[a]lthough procedural requirements can seem like a mere formality, they promote 'agency accountability' and ensure that the parties—and where relevant, the public—can respond fully and in a timely manner to an agency's exercise of authority." *Torres-Jurado*, 2023 WL 7130898, at *4 (citing *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 591 U.S. 1, 23 (2020)).

Although the District Court found that the decision in *Michalski v. Decker*, 279 F. Supp. 3d 487, 493-494 (S.D.N.Y. 2018), was not applicable to this case, the reasoning of that court was consistent with the presumption of judicial review that the Supreme Court in *AADC* maintained. In *Michalski*, the court considered 8 U.S.C. § 1252(a)(5), (b)(9) and (g). *Id.* With respect to 8 U.S.C. § 1252(a)(5) and (b)(9), the court explained that "this language simply provides that if a petitioner fails to consolidate a question of law or fact in a petition for review of an order of removal by the court of appeals, he cannot seek review by habeas or otherwise." *Id.* With respect to §1252(g), the court dismissed the government's broad reading and found that the mere presence of a removal order does not defeat jurisdiction and thus not determinative because "[f]inally, without a removal order in this case, the third category would be akin to Hamlet without the prince." *Id.* at 495.

The District Court did not reach Mr. Fulton's argument that even if it found

that 8 U.S.C. § 1252(g) does apply, the Supreme Court has made clear that courts have federal question jurisdiction over Fifth Amendment due process claims. *Bell v. Hood*, 327 U.S. 678, 683 (1946); *see also Davis v. Passman*, 442 U.S. 228, 236 (1979) ("It is clear that the district court had jurisdiction under 28 U.S.C. § 1331(a) to consider petitioner's [Fifth Amendment] claim.") (citation omitted). While the Supreme Court has recognized Congress's generally broad authority to strip jurisdiction, *see Patchak v. Zinke*, 138 S. Ct. 897, 906, (2018) (plurality opinion), this power is not without limitation with respect to constitutional claims. *Id.* at n.3; *see also Webster v. Doe*, 486 U.S. 592, 603 (1988). Mr. Fulton's petition (District Court Docket, ECF No. 1) raises claims pursuant to the Fifth Amendment and therefore this Court does have jurisdiction to review even if it finds that 8 U.S.C. § 1252(g) strips jurisdiction to review.

Despite the risks to Mr. Fulton's life, the government seeks to effectuate Petitioner-Plaintiff's removal without scheduled dialysis appointments for Mr. Fulton in Jamaica for three times a week after his removal on January 30, 2025, for—at a minimum—the 30 days required by ICE's own PBNDS or any day thereafter. This failure to follow ICE's own standards, resulting in the likely death of Mr. Fulton upon deportation, is egregious and shocks the conscience. The governments' actions in effectuating Mr. Fulton's removal without ensuring that he has scheduled dialysis treatment on February 1, 2025, or any day thereafter creates

a substantial risk of an erroneous deprivation of Petitioner-Plaintiff's core interest in life and liberty.

C. The Balance of Hardships Tips Decidedly in Favor of a Stay.

The *Nken* Court recognized that the public has an interest in the Court "ensur[ing] that whatever compassionate conditions are written into law are carefully adhered to, no matter how slim the alien's chances to escape deportation may be." *Rosario v. INS*, 962 F.2d. 220, 221 (2d Cir. 1992), superseded by statute on other grounds; *see also Tesfamichael v. Gonzales*, 411 F.3d 169, 178 (5th Cir. 2005) (holding under pre-*Nken* standard that the public interest in the correct and even handed application of immigration laws weighed in favor of granting stay of removal).; *S.N.C. v. Sessions*, 325 F. Supp. 3d 401, 412 (S.D.N.Y. 2018) (finding that an order for the maintenance of the status quo may simply "enable Respondents[-Defendants] to fully brief the Petition without the time pressure of a looming removal date").

The issuance of a stay of removal will not substantially injure the government and the public interest. The Court in *Nken* found that the last two stay factors, injury to other parties in the litigation and the public interest, merge in immigration cases because the government is both the opposing litigant and public interest representative. *Nken*, 556 U.S. at 435.

Mr. Fulton has received consistent, regular dialysis at the ECMC since August

2023 and has been under the care of his current provider, Dr. Sahar Amin, since May 2024. He currently receives dialysis three times a week on Tuesdays, Thursdays, and Saturdays for four hours each session. *See* District Court Docket, ECF, No. 1-1.

Despite the risks to Mr. Fulton's life, the government seeks to effectuate Appellant's removal without scheduled dialysis appointments in Jamaica for three times a week after his removal on January 30, 2025, for—at a minimum—the 30 days required by ICE's own PBNDS or any day thereafter.

The government's actions in effectuating Mr. Fulton's removal without ensuring that he has scheduled dialysis treatment on February 1, 2025, or any day thereafter creates a substantial risk of an erroneous deprivation of his core interest in life and liberty.

CONCLUSION

For the foregoing reasons, Mr. Fulton respectfully requests that this Court grant his emergency motion and enjoin the government from removing him from the United States to Jamaica pending the adjudication of his appeal.

DATED: January 27, 2025
New York, New York

Respectfully Submitted,

/s/ Sarah T. Gillman

Sarah T. Gillman
Robert F. Kennedy Human Rights
Director of Strategic U.S. Litigation
U.S. Advocacy & Litigation
88 Pine Street, Suite 801
New York, NY 10005

T: (646)289-5593
E: gillman@rfkhumanrights.org

/s/ Sarah E. Decker
Sarah E. Decker
Staff Attorney
Robert F. Kennedy Human Rights
1300 19th Street NW, Ste. 750
Washington, DC 20036
T: (646) 289-5593
E: decker@rfkhumanrights.org

Counsel for Petitioner-Plaintiff-Appellant