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,

Respondents-Appellees.

PETITIONER-APPELLANT'S OPENING BRIEF & JOINT APPENDIX

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INTRODUCTION

For the past 22 years, Mr. Raheem Delano Fulton has required dialysis three times a week in order to survive. Mr. Fulton suffers from end-stage renal disease (ESRD), the final and permanent stage of chronic kidney disease, where the kidneys can no longer function on their own. Dialysis mimics the function of a healthy kidney, allowing Mr. Fulton to stay alive. When Mr. Fulton missed even one dialysis appointment while in immigration detention, he was taken to the emergency room for a life-threatening medical complication. The government knows that Mr. Fulton cannot survive without dialysis. But it refuses to facilitate his temporary access to dialysis upon his removal to Jamaica and release from detention for such time as is reasonably necessary for him to secure his own treatment. Under both constitutional and statutory law, this is an essential element of his medical discharge planning.

The district court held that federal courts are powerless to stop this threat to Mr. Fulton's life because of 8 U.S.C. § 1252(g), a jurisdictional bar on claims arising from execution of a removal order. That ruling grants the government carte blanche to remove someone in any manner it chooses, regardless of whether it violates well settled law or is all but certain to result in death. But § 1252(g) limits challenges to discretionary decisions to execute a removal order, not challenges to deadly conditions of confinement related to the manner of removal. The district

court also failed to seriously consider whether, assuming § 1252(g) applies, Mr. Fulton's habeas claims could be heard under the Suspension Clause.

This Court should reverse the district court's erroneous holding on jurisdiction and remand for further proceedings.

JURISDICTIONAL STATEMENT

Mr. Fulton challenges a final judgment in the Western District of New York denying his petition for writ of habeas corpus and complaint on January 24, 2025. *See* J.A. 25. He filed a timely notice of appeal on January 24, 2025. *See* ECF No. 11. The district court had jurisdiction over Mr. Fulton's habeas petition and complaint under U.S. Const. art. I § 9, cl. 2 (Suspension Clause); U.S.C. § 1331 (federal question); 28 U.S.C. § 1651 (the All Writs Act); 28 U.S.C. § 2241 (habeas corpus); and 5 U.S.C. § 701 (the Administrative Procedure Act). This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 and 28 U.S.C. § 1651(a) (the All Writs Act).

STATEMENT OF THE ISSUE

Whether the district court erred in denying jurisdiction of Mr. Fulton's constitutional and statutory claims seeking discharge planning upon release from detention?

STATEMENT OF THE CASE

I. Mr. Fulton's Background and Medical Condition

Mr. Raheem Delano Fulton is a 39-year-old citizen of Jamaica who has lived in the United States since July 2003 after entering on a B2 tourism visa. J.A. 4. Mr. Fulton is a father to three U.S. citizen children: Treselle Patrice Fulton, age 17, Naheema Carmen Fulton, age 14, and Lilliana Tsungani, age 10. J.A. 5.

In July 2003, Mr. Fulton was diagnosed with ESRD and has since required dialysis regularly in order to survive. J.A. 5. ESRD is the final and permanent stage of chronic kidney disease, where the kidneys can no longer function on their own and are unable to filter waste and excess fluid from the blood. J.A. 5. Dialysis allows an individual with ESRD to stay alive by taking on the role of a kidney. J.A. 5. Mr. Fulton also suffers complications related to his kidney disease including severely weakened bones that fracture easily, intermittent episodes of blood in his urine, cysts on his kidneys, and a pulmonary embolism (blood clots in his lungs). J.A. 17. Mr. Fulton requires dialysis three times a week in order to prevent electrolyte imbalances leading to shortness of breath, fatal arrhythmias, and heart blocks. J.A. 17.

Mr. Fulton has a final order of removal since May 2, 2024 that he does not challenge with his habeas petition and complaint. J.A. 5. He has been detained at Buffalo Federal Detention Facility (BFDF) since August 25, 2023. J.A. 5. Mr. Fulton has been under the care of Dr. Sahar Amin at the Erie County Medical Center ("ECMC") since May 2024. J.A. 17. There, he receives dialysis treatment

three times a week on Tuesdays, Thursdays, and Saturdays, for four hours each session. J.A. 17. He also takes medication to address complications from his kidney disease. J.A. 17. Mr. Fulton has received phlebotomy sessions and oncology scans to address his growing medical issues. J.A. 17. In the uncontested expert medical opinion of Dr. Amin, Mr. Fulton "stands a great risk of rapid deterioration" without regular care. J.A. 17.

In March 2024, Mr. Fulton missed a single dialysis appointment while in Immigration and Customs Enforcement (ICE) custody. J.A. 17. His health declined with such speed and severity that he was taken to the Emergency Department at the ECMC because he needed to be "dialyzed urgently due to severe life-threatening hyperkalemia of 7 mmol/lit and pulmonary edema." J.A. 17.

The government initially planned to deport Mr. Fulton to Jamaica on July 25, 2024. J.A. 8. However, two days before his departure, an ICE an official informed Mr. Fulton that he could not be deported because the Jamaican consulate was unable to issue travel documents. J.A. 8. On January 16, 2025, Mr. Fulton learned that he was scheduled for deportation to Jamaica on January 30, 2025, without any confirmed dialysis appointments post-removal and release from detention. J.A. 8.

II. Procedural History

On January 18, 2025, Mr. Fulton filed a petition for a writ of habeas corpus and complaint before the United States District Court for the Western District of New York. *See* J.A. 1-16. He alleged that the government's failure to provide him with medically necessary discharge planning violated the Due Process Clause of the Fifth Amendment to the United States Constitution and the Administrative Procedure Act (APA). *See* J.A. 1-16. He sought narrow relief for an interim supply of dialysis upon removal and release from detention for such time as reasonably necessary for him to secure his own treatment. *See* J.A. 1-16.

On January 22, 2025, Mr. Fulton filed a motion for a temporary restraining order. *See* ECF Nos. 3, 3-1, and 3-2. On January 23, 2025, the government filed a motion to dismiss, attaching a declaration from ICE Detention and Deportation Officer Nathan Gray. *See* ECF No. 5; J.A. 22-23. The declaration stated that Mr. Gray had "spoke[n] with the Security Attache at the Embassy of Jamaica on January 21, 2025, and confirmed that dialysis will be available for Mr. Fulton in Jamaica." *See* J.A. 23. Mr. Fulton responded to the government's motion to dismiss on January 24, 2025, and the government submitted a reply that same day. *See* ECF Nos. 7; 8. Later the same day, the district court granted the government's motion to dismiss. *See* J.A. 24. The district court understood Mr. Fulton to be challenging the execution of a removal order rather than seeking medically

necessary discharge planning and concluded that 8 U.S.C. § 1252(g) barred review of Mr. Fulton's claims. J.A. 34-35.

Mr. Fulton filed a notice of appeal on January 24, 2025. *See* ECF No. 11. On January 27, 2025, Mr. Fulton filed before this Court a motion for a stay of removal pending adjudication of his appeal. On January 29, 2025, this Court granted Mr. Fulton a temporary stay until the motion could be considered by a three-judge panel. The government filed an opposition to Mr. Fulton's motion for a stay of removal pending adjudication of his appeal on February 6, 2025, and Mr. Fulton filed his reply on February 13, 2025. The parties argued the motion before this Court on April 29, 2025. On April 30, 2025, this Court granted Mr. Fulton's motion for a stay, finding him likely to succeed on the merits of his argument that "[b]ecause Fulton challenges the manner of his removal, and not the discretionary decision to remove him, § 1252(g) likely does not deprive the district court of jurisdiction to hear his claims." *See* ECF No. 34.

STANDARD OF REVIEW

The denial of a petition for a writ of habeas corpus based on subject matter jurisdiction raises questions of law that this Court reviews *de novo*. *Wang v. Ashcroft*, 320 F.3d 130, 139 (2d Cir. 2003).

SUMMARY OF THE ARGUMENT

The district court wrongly concluded that it lacked jurisdiction to hear Mr. Fulton's claims for three reasons.

First, the statute it relied on to refuse jurisdiction, 8 U.S.C. § 1252(g), bars only claims "arising from the decision or action [to] . . . execute removal orders." But Mr. Fulton's claims under the APA, 5 U.S.C. § 551 et seq., and the Constitution challenge conditions of confinement related to the manner of his removal—namely, failure to provide medical discharge planning upon release from detention, including temporary access to dialysis for such time as is reasonably necessary for him to secure his own treatment. Because his claims do not challenge the decision to execute his removal order, they are not barred.

Second, even assuming Mr. Fulton's claims could be said to concern execution of a removal order, the legal questions in his case do not "arise from" execution. In *Öztürk v. Hyde*, No. 2:25-cv-374, 2025 WL 1318154, at *9 (2d. Cir. May 7, 2025), this Court held that challenges to unlawful detention that are independent of, or wholly collateral to, the removal process do not "arise from" commencement of proceedings and therefore do not implicate § 1252(g). Mr. Fulton's challenges to the conditions of confinement related to the manner of his removal—that is, removal without medical discharge planning—raise legal questions that are entirely independent from execution of his removal order.

If this Court finds that § 1252(g) does bar Mr. Fulton's claims, jurisdiction still lies under the Suspension Clause. Mr. Fulton's claims for release consistent with the law implicate the core of the writ of habeas corpus. No adequate substitute exists for the writ and it has not been formally suspended for claims like Mr. Fulton's. Federal courts also have jurisdiction under 28 U.S.C. § 1331 to hear Mr. Fulton's constitutional claims based on substantive and procedural due process.

Finally, the government has not carried its burden to establish that Mr. Fulton's case is moot. The government's lone evidence of mootness is ambiguous on its face, rests on unreliable hearsay, and offers no assurance that Mr. Fulton will receive temporary dialysis treatment upon release from detention. Therefore, the district Court erred in denying jurisdiction.

ARGUMENT

I. The district court erroneously denied jurisdiction of Mr. Fulton's claims.

The District Court erred in dismissing Mr. Fulton's petition for lack of jurisdiction because his claims do not seek to enjoin the discretionary decision to "execute a removal order." 8 U.S.C. § 1252(g). Mr. Fulton instead challenges his conditions of confinement related to the manner of his removal: the refusal to provide medical discharge planning. Section 1252(g) is therefore inapplicable.

A. This case challenges conditions of confinement related to the manner of removal, not execution of a removal order.

This Court's narrow reading of § 1252(g) and the statute's legislative history show that it does not bar Mr. Fulton's challenge to unlawful conditions of confinement.

1. Section 1252(g) is narrow.

The presumption of judicial review is deeply rooted in our history and separation of powers. *See United States v. Nourse*, 34 U.S. 8, 28 (1835) ("It would excite some surprise if, in a government of laws and of principle, furnished with 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."). Thus, the Supreme Court has long recognized a "strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001); *see also Mach Mining, LLC v. EEOC*, 575 U.S. 480, 495 (2015) ("Judicial review of administrative action is the norm in our legal system.").

Consistent with the presumption in favor of judicial review, this Court interprets 8 U.S.C. § 1252(g) narrowly. *Öztürk*, No. 2:25-cv-374, 2025 WL 1318154 at *8 (citing *Reno v. Am.-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 482 (1999)). "Section 1252(g) is directed 'against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion.'" *Id.* (quoting

AADC, 525 U.S. at 485 n.9); *see also AADC*, 525 U.S. at 485 (Section 1252(g) was intended only to give "some measure of protection to 'no deferred action' decisions and similar discretionary determinations.").

Section 1252(g)'s jurisdictional bar therefore applies only "to three discrete actions" to "commence proceedings, adjudicate cases, or execute removal orders." *Öztürk*, No. 2:25-cv-374, 2025 WL 1318154 at *8 (quoting *AADC*, 525 U.S. at 482) (internal quotation marks omitted). "There are 'many other decisions or actions that may be part of the deportation process' but that do not fall within the three discrete exercises of 'prosecutorial discretion' covered by § 1252(g)." *Id.* (quoting *AADC*, 525 U.S. at 482, 489); *see also Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 19 (2020) (reiterating that "Section 1252(g) is . . . narrow" and rejecting as "implausible the Government's suggestion that §1252(g) covers 'all claims arising from deportation proceedings or imposes a general jurisdictional limitation") (internal quotations omitted).

In *Öztürk*, this Court found that constitutional challenges to detention during the removal process "fall outside of § 1252(g)'s narrow jurisdictional bar." No. 2:25-cv-374, 2025 WL 1318154 at *9. The § 1252(g) bar on jurisdiction over challenges to execution of a removal order therefore stands only for the limited proposition that courts cannot hear challenges to the discretionary decision to decline to stay execution of a removal order.

Mr. Fulton does not challenge the discretionary decision to execute his final order of removal. Rather, he challenges only the government's failure to provide discharge planning upon his release from detention, owed to him both under the Fifth Amendment and the APA. *See infra* Section I.B (explaining how the government's manner of removal violates the Constitution and the APA). Because Mr. Fulton's claims relate solely to the conditions of confinement related to his manner of removal—not to the discretionary decision by the Executive to execute his removal—they do not implicate the concerns that 8 U.S.C. § 1252(g) addresses and are not barred from review.

Section 1252(g)'s legislative history also supports a narrow reading of the statue. Congressional testimony regarding the scope of § 1252(g) from the former 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."[1] Congress was concerned not with wholly insulating immigration decisions from judicial review, but instead with preventing numerous "frivolous" appeals in various venues.[2] Mr. Fulton's

[1] *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, Immigration and Naturalization Service).
[2] *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).

legitimate due process and APA claims with life and death consequences are far from the types of claims Congress was targeting with § 1252(g).

2. The "substance of the relief" that Mr. Fulton seeks is release in accordance with the law.

In a related context, this Court has previously looked at "the substance of the relief that a plaintiff is seeking" to hold that a district court has no jurisdiction over an indirect challenge to removal. *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2nd Cir. 2011). Here, the substance of the relief that Mr. Fulton seeks is a safe and constitutional release from ICE detention with discharge planning—not vacature of his order of removal or a permanent stay of removal.

In *Delgado*, this court concluded that a request to overturn the decision by United States Citizenship and Immigration Services to deny an application for immigration relief was an "indirect challenge" to a removal order. *Id.* at 55. The relief sought by Delgado would, in effect, "render the reinstatement [of removal] order invalid." *Id.* (internal quotation marks omitted). Delgado's "ultimate goal" was to prevent removal. *Id.* Here, unlike in *Delgado*, Mr. Fulton is not bringing a direct or indirect challenge to his removal order. Mr. Fulton's claims based on the government's failure to provide discharge planning would not prevent his removal but rather mandate release in accordance with constitutional and statutory law. Granting Mr. Fulton that relief would not render his removal order invalid. If the

government were to facilitate interim dialysis appointments in Jamaica today, Mr. Fulton's "ultimate goal" would be obtained.

The district court repeatedly mischaracterized the relief sought in this case as a permanent stay of removal or rescission of removal order. *See* J.A. 33-34 (stating that "'if granted, the relief would undo his removal order" and that the court was "foreclosed[d]...from granting Fulton the relief he seeks: a stay of removal which arises from 'an action by the Attorney General . . . to execute removal orders.'"). This misrepresents the substance of the relief Mr. Fulton seeks: discharge planning. Before the district court, Mr. Fulton only requested an injunction on immediate removal "without ensuring that he has scheduled dialysis treatment." J. A. 13-14. He did not challenge the validity of his order of removal or seek a permanent injunction barring his removal. A finding in Mr. Fulton's favor would not impact his order of removal and his claims for relief would be the same regardless of whether he was released in Jamaica or the United States. Because Mr. Fulton seeks only discharge planning and not to invalidate his removal order, § 1252(g) does not bar jurisdiction over his claims.

B. The legal questions in this case do not "arise from" execution of a removal order.

Assuming for argument that this case concerns execution of a removal order, jurisdiction still holds because the legal questions presented here do not "arise

from" execution of a removal order, as the § 1252(g) bar requires. Mr. Fulton's claims do not challenge the government's discretionary decision to execute removal, but only the unlawful manner by which the government seeks to remove him: without medical discharge planning. His claims alleging that the government's failure to provide him discharge planning violates the Constitution and APA are independent of, and collateral to, execution of a removal order. So they are not barred by § 1252(g).

"Because the phrase 'arising from' [in § 1252(g)] is not infinitely elastic, it does not reach claims that are independent of, or wholly collateral to, the removal process." *Öztürk*, No. 2:25-cv-374, 2025 WL 1318154 at *9 (citing *Kong v. United States*, 62 F.4th 608, 614 (1st Cir. 2023)) (internal quotation marks omitted). In *Öztürk*, this Court held that challenges to unlawful detention are "independent of, and collateral to, the removal process." *Id.* Detention claims "do not arise from the government's decision to execute removal orders within the meaning of § 1252(g) simply because the claims relate to that discretionary, prosecutorial decision." *Id.* (citing *Kong*, 62 F.4th at 613) (internal quotation marks omitted). Where claims "'may be resolved without affecting pending [removal] proceedings,' they do not arise from the three discrete exercises of prosecutorial discretion that are shielded by § 1252(g)." *Id.* at *10 (quoting *Parra v. Perryman*, 172 F.3d at 954, 957 (7th Cir. 1999)*; see also Vasquez v. Wolf*, 830 F.App'x 556, 557 (9th Cir. 2020)

(§1252(g) does not bar a challenge to the manner of removal of a five-year-old boy with a traumatic brain injury); *Madu v. U.S. Att'y Gen.*, 470 F.3d 1362, 1368 (11th Cir. 2006) (a challenge to legality of detention is not a challenge to the discretionary decision to execute a removal order and thus not barred by § 1252(g)).

Mr. Fulton's detention claims are independent, and wholly collateral to, the removal process. He alleges that the government's failure to provide him with adequate discharge planning constitutes deliberate indifference in violation of his substantive due process rights. *See Charles v. Orange County*, 925 F.3d 73, 85, 90 (2d. Cir. 2019) (release of people with serious mental illnesses from immigration detention without discharge planning, including an interim supply of medication, plausibly constituted deliberate indifference in violation of substantive due process); *see also Lugo v. Senkowski*, 114 F. Supp. 2d 111, 115 (N.D.N.Y. 2000) (state had a duty to provide follow-up surgery to an outgoing prisoner for the period of time reasonably necessary for him to obtain treatment on his own behalf) (internal quotations omitted). He also alleges violation of his Fifth Amendment procedural due process rights. Additional procedures requiring the government to schedule and pay for temporary dialysis in Jamaica, or an opportunity to contest the denial of discharge planning, would significantly reduce the erroneous risk of deprivation of his right to life. Finally, he alleges violation of the APA under the

Accardi doctrine, which enables courts to compel agencies to follow their own internal rules. *See United States ex rel. Accardi Shaugnessy*, 347 U.S. 260, 268 (1954) (agencies are bound to follow their own existing regulations); *Montilla v. I.N.S.*, 926 F.2d 162, 167 (2d Cir. 1991) (*Accardi*'s "ambit is not limited to rules attaining the status of formal regulations."). The internal rules at issue here, the Performance Based National Detention Standards[3], require ICE to "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." PBNDS 4.3(Z). Medication is defined as "[a]ll prescribed medications and medically necessary treatments." PBNDS 4.3(U)(4).

These claims can be resolved without affecting Mr. Fulton's removal proceedings. So they do not "arise from" the execution of a removal order. The district court improperly held that Mr. Fulton's claims arise from execution of his removal order merely because they are factually connected to removal. J.A. 32, This misreading of § 1252(g) relies on "uncritical literalism" that leads to "staggering results" that "'no sensible person could have intended.'" *Jennings v. Rodrigiuez*, 583 U.S. 281, 293-94 (2018) (internal quotation marks omitted). The district court's overly expansive interpretation of § 1252(g) improperly

[3] Available at: https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf.

encompasses the types of claims this Court has held fall outside the statute's scope. Its decision should be reversed.

C. Even if 1252(g) applies, the court has jurisdiction under the Suspension Clause and federal question jurisdiction.

Even if this Court finds that Mr. Fulton's claims arise from the execution of a removal order, jurisdiction is proper under the Suspension Clause (U.S. Const. art. I § 9, cl. 2) and 28 U.S.C. § 1331.

1. The district court has jurisdiction over Mr. Fulton's habeas claims under the Suspension Clause.

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I § 9, cl. 2. The Suspension Clause was "designed to protect against [] cyclical abuses. The Clause protects the rights of the detained by ensuring that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty." *Boumediene v. Bush*, 553 U.S. 723, 745 (2008) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004)). The government's disregard for Mr. Fulton's life during removal exemplifies the very abuses the founders sought to prevent through the writ and the Suspension Clause. To safeguard fundamental constitutional rights and uphold the separation of powers,

the Judiciary must retain some authority to review the Executive's unlawful actions when removing individuals.

In *Ragbir v. Homan*, 923 F.3d 53, 73 (2d Cir. 2019), the Second Circuit held that even if Section 1252(g) bars review of a claim for retaliatory removal, noncitizen petitioners in executive custody must be afforded access either to the writ of habeas corpus itself or to an adequate substitute, absent a formal suspension of the writ. The Second Circuit underscored the continuing necessity of judicial review as a means of protecting individual rights against unlawful detention. *Id.*

Here, as in *Ragbir*, Mr. Fulton has no adequate substitute to the writ of habeas corpus. He could not have brought his case in a petition for review as he does not challenge his final order of removal. Mr. Fulton also states cognizable claims under the Constitution as explained above. *See supra* Section I.B (describing Mr. Fulton's Fifth Amendment procedural and substantive due process claims). "Because Congress has provided no 'adequate substitute' and because there has been no formal suspension of the writ," *Boumediene*, 553 U.S. at 771-72, Mr. Fulton is "entitled to a habeas corpus proceeding." *Ragbir*, 923 F.3d at 78.

Although *Ragbir* was vacated and remanded by the Supreme Court's subsequent decision in *Department of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103 (2020), its reasoning survives. In *Thuraissigiam*, the respondent "requested a writ of habeas corpus, an injunction, or a writ of mandamus directing [the

Department] to provide [him] a new opportunity to apply for asylum and other applicable forms of relief" and "made no mention of release from custody." 591 U.S. at 115 (internal quotation marks omitted). The court rejected the argument that the Suspension Clause saved Thuraissigiam's petition for a writ, concluding that at the time of the Constitution's adoption, the writ of habeas corpus was not meant to "permit a petitioner to claim the right to enter or remain in a country or to obtain administrative review potentially leading to that result." *Id.* at 117. *Thuraissigiam* therefore 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 or staying in the United States. *See, e.g., Siahaan v. Madrigal*, No. 20-cv-02618, 2020 WL 5893638, at *6 n.9 (D. Md. Oct. 5, 2020) (distinguishing *Thuraissigiam* because "*Thuraissigiam* did not analyze § 1252(g) in the context of a Suspension Clause claim"); *Sergio S.E. v. Rodriguez*, No. 20-cv-6751, 2020 WL 5494682, at *4 (D.N.J. Sept. 11, 2020) (finding *Thuraissigiam* not applicable to petitioner's Suspension Clause argument).

In contrast, Mr. Fulton is not seeking admission to the United States, nor is he requesting a second chance at immigration relief. Rather, he asserts a core habeas claim—seeking release consistent with statutory and constitutional requirements. *See Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that

custody.") As Justice Alito clarified in *Thuraissigiam*, the writ of habeas corpus remains available to noncitizens, like Mr. Fulton, who are "already in the country [and] held in custody pending deportation." 591 U.S. at 137; *see also Trump v. J.G.G.*, 604 U. S. ___ (2025) (finding petition for a writ of habeas corpus appropriate vehicle for a claim that necessarily implies the unlawfulness of detention or removal).

2. The district court has federal question jurisdiction over Mr. Fulton's constitutional claims.

The district court did not address Mr. Fulton's argument that, even if § 1252(g) applies, federal courts retain jurisdiction under 28 U.S.C. § 1331 to hear constitutional claims, including those arising under the Fifth Amendment. *See Bell v. Hood*, 327 U.S. 678, 683 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution."); *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). Although the Supreme Court has acknowledged that Congress possesses broad authority to limit judicial review, see *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (plurality opinion), that authority is not absolute, particularly where constitutional claims are at issue. *Id.* at n.3; see also *Webster v. Doe*, 486 U.S. 592, 603 (1988) ("Where Congress intends to preclude judicial review of constitutional claims, its intent to

do so must be clear."). Because Mr. Fulton's petition raises constitutional claims for violations of his Fifth Amendment rights, *see* J.A. 12-13, the district retains jurisdiction to review those claims even if § 1252(g) otherwise limits review.

D. This case is not moot.

"To show that a case is truly moot, a defendant must prove no reasonable expectation remains that it will return to its old ways." *Fed. Bureau of Investigation v. Fikre*, 601 U.S. 234, 241 (2024) (cleaned up); *see also Pinkhasov v. Vernikov*, 2024 WL 2188356, at *5 (E.D.N.Y. May 15, 2024) ("a defendant's sparse declaration, containing only contingent promises cannot, without more in the way of assurance, carry the heavy burden of persuading the court" that a case is moot) (cleaned up).

Here, the only evidence that the government submitted in support of its assertion that Mr. Fulton will receive discharge planning is a sparse declaration that is far from assurance of scheduled dialysis appointments. *See* J.A. 22-23. The Gray Declaration states generally that the government has spoken to the Jamaican Ministry of Health and that "dialysis will be available for Mr. Fulton in Jamaica," J.A. 23. It offers no clarity as to when specifically, this treatment might be available. Mr. Fulton currently receives dialysis three times a week on Tuesday, Thursday, and Saturdays and goes at most two days a week in between dialysis

sessions. General availability, without more, is far from an assurance that he will receive dialysis in time to sustain his life.

Moreover, the government submits unreliable hearsay in the Gray Declaration to establish the supposed truth of availability of dialysis for Mr. Fulton. The government's declarant references only an unnamed security attaché as the source of the statement from the Jamaican Ministry of Health that dialysis is unavailable. It provides no information as to how the attaché knows this or whether the attaché is a reliable source. Such flimsy evidence of the truth of the matter asserted is insufficient to meet the government's heavy burden to establish mootness.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Dated: May 8, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rules 32.1(a)(4)(A) because it contains words 5,050, which is fewer than the 13,000-word limit for principal briefs. This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: May 8, 2025

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I hereby certify that I electronically filed the foregoing brief and attached appendix with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate ACMS system on May 8, 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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