IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

Raheem Delano Fulton,

Petitioner-Plaintiff,

v.

Mayorkas et al.,

Respondents-Defendants.

Civil Action No.: 1:25-cv-00063-JLS

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

PRELIMINARY STATEMENT

Petitioner-Plaintiff Raheem Delano Fulton ("Petitioner" or "Mr. Fulton"), respectfully submits this opposition to Respondents' motion to dismiss and memorandum of law (ECF Nos. 5, 5-1 and 5-2) (collectively "Resp'ts' Mot. to Dismiss").

In arguing that this Court should dismiss Mr. Fulton's claims, the government mischaracterizes the narrow relief Mr. Fulton seeks and attempts to absolve itself of its obligations under its own Performance Based National Detention Standards ("PBNDS"). Even the evidence Respondents-Defendants submit in support of their argument indicates that they have *already* violated the PBNDS in effectuating Mr. Fulton's removal. The Declaration of Nathan Gray ("Gray Decl.") (ECF No. 5-2) states that Mr. Fulton is "scheduled to receive dialysis treatment at the ICE staging facility on both January 27, 2025, and January 29, 2025." ECF No. 5-2, ¶ 11. Upon information and belief, the government is transferring Mr. Fulton from the Buffalo Federal Detention Facility ("BFDF") to the Jena Staging Facility in Alexandria, Louisiana on January 25, 2025 at approximately 12:00 pm EST. He will consequently be denied access to his regularly scheduled dialysis appointment on January 25, 2025 at 3:00 pm EST, in violation of Section 4.3(V)(U)(4) of the PBNDS. As stated in the Declaration of Dr. Sahar Amin, the last time Mr. Fulton missed one dialysis treatment during a transfer by the government, the consequences to his health were so devastating that he required immediate emergency care to survive. *See* ECF No. 1-1, Letter from Dr. Sahar Amin dated January 2, 2025 ("Dr. Amin Letter"). Resp'ts' Mot. to Dismiss to dismiss should be denied.

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a party to challenge the court's subject matter jurisdiction by means of a motion to dismiss. In reviewing a motion to dismiss under Rule 12(b)(1), however, a court must "accept as true any facts plausibly alleged in a complaint and

must draw all inferences in favor of the [non-moving party]." *MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 44 (2d Cir. 2017). In considering a motion to dismiss, courts may look to documents referenced in the complaint, documents that the plaintiff relied on in initiating the lawsuit, and matters of which judicial notice may be taken. *See Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016) (citing *Concord Assocs., L.P. v. Entm't Props. Tr.*, 817 F.3d 46, 51 n.2 (2d Cir. 2016); *Chambers v. Time Warner, Inc*., 282 F.3d 147, 153 (2d Cir. 2002)).

In support of the Resp'ts' Mot. to Dismiss, the government incorrectly states that Mr. Fulton is arguing that this court should halt his deportation to Jamaica because he "might receive lesser health care" in Jamaica than in the United States. *See* ECF No. 5-1 at 1. The government then proceeds to argue that therefore, this Court does not have jurisdiction over Mr. Fulton's claims. *Id.* But this entirely misconstrues the relief Mr. Fulton seeks. Here, Mr. Fulton does not seek to make a direct or indirect challenge to the order of removal. And he does not assert that the government must provide him with continuous, quality healthcare in Jamaica indefinitely. Mr. Fulton's claims are narrow and he requests specific 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 Administrative Procedure Act ("APA"), and the Due Process Clause of the Fifth Amendment to the United States Constitution.

The government also relies upon this Court's decision in *Taveras-Tejada v. Mayorkas*, No. 22-CV-918 (JLS), 2022 U.S. Dist. LEXIS 218759 (W.D.N.Y. Dec. 5, 2022), and *Frederick v. Feeley*, No. 19-CV-6090-FPG, 2019 U.S. Dist. LEXIS 74266 (W.D.N.Y. May 2, 2019), to argue

that this Court does not have jurisdiction. However, neither of these cases support finding in favor of Respondents. While this Court did find that it was stripped of jurisdiction to consider the claims raised by the Petitioner in *Taveras-Tejada*, the relief that was sought, release from detention through a challenge to the manner of removal were broader than the claims and relief that Mr. Fulton seeks in this case. Likewise, in *Frederick,* the *pro se* Petitioner did not raise the claims or seek the relief at issue in Mr. Fulton's case.

At this stage in the proceedings, Mr. Fulton is entitled to the presumption that the allegations contained in his petition are true, to test the veracity of Respondents' proffered evidence, and to engage in sufficient discovery to further establish his claims. While the government argues that the PBNDS are not enforceable, this Court should not, at this stage of the proceeding, dismiss Mr. Fulton's claims prior to permitting full discovery on that issue. As is set forth below, the PBNDS are binding standards that dictate the rights of people in the government's custody, and Mr. Fulton should be given an opportunity to present additional evidence through discovery to support his claim. The government does not present any evidence at this stage of the proceeding to support its conclusion that Mr. Fulton's claims should be dismissed.

The Court should deny Resp'ts' Mot. to Dismiss and grant Mr. Fulton's temporary restraining order.

ARGUMENT

I. THE PBNDS ARE LEGALLY BINDING ON THE GOVERNMENT AND REQUIRE THE PROVISION OF THE NARROW RELIEF REQUESTED BY MR. FULTON.

The government argues that the PBNDS are not legally binding and are "only internal guidelines, not regulations requiring notice and comment." ECF No. 5-1 at 3. In support of this argument, the government cites to *Wright v. FBI*, 2006 U.S. Dist. LEXIS 52389, at *33 (D.D.C.

July 31, 2006). However, *Wright* is easily distinguished, and in assessing whether the PBNDS are legally enforceable, this Court should rely upon the reasoning of another more analogous decision, *Damus v. Nielson*, 313 F. Supp. 3d 317, 337 (D.D.C. 2018).

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." *Id.* 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. The court in *Miller* found that the DOJ guidelines were not like the Bureau of Indian Affairs manual in *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). In *Morton*, 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. *Id.* 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.* Specifically, the court in *Miller* explained that the "Supreme Court found that the publication requirement was intended to benefit potential beneficiaries and therefore invalidated a Bureau of Indian Affairs attempt to limit general assistance benefits to otherwise eligible beneficiaries based on an unpublished eligibility requirement." 438 F.3d at 1152. 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).

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. Pursuant to the *Accardi* doctrine, this Court should apply the PBNDS and the mandatory provision cited above as legally enforceable standards.

The government is further restricted from taking any actions that are arbitrary, capricious, an abuse of discretion, or not in accordance with law. The Declaration of Nathan Gray ("Gray Decl.") (ECF No. 5-2) confirms that the government has not complied with the mandatory provision of the PBNDS that is at issue in this case. It is neither the responsibility of the Jamaican government nor Mr. Fulton to set up dialysis treatment on February 1, 2025, or any day thereafter for—at a minimum 30 days—after his removal. It is the United States government's legal obligation to do so pursuant to the PBNDS.

II. THIS COURT DOES HAVE JURISDICITON.

Contrary to the government's argument that Mr. Fulton's request "interferes with the separation of powers," the presumption of judicial review is deeply rooted in our history and indeed promotes the separation of powers by guarding against arbitrary government action. *See, e.g., Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 488 (2015) ("Absent such review, the [agency's] compliance with the law would rest in [its] hands alone."). Respondents argue that the Court is stripped of jurisdiction over Mr. Fulton's claims pursuant to 8 U.S.C. §1252(a)(5) and 8 U.S.C. §1252(g). *See* ECF No. 5-1 at 4-7. The Court should reject these arguments.

8 U.S.C. §1252(g) states that "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal." In *Michalski v. Decker*, 279 F. Supp. 3d 487, 493-494 (S.D.N.Y. 2018), the Court considered 8 U.S.C. § 1252(a)(5), (a)(9) and (g). With respect to 8 U.S.C. § 1252(a)(5)

and (a)(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.*

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.

8 U.S.C. § 1252(g) prohibits judicial review of challenges to the discretionary decision of whether to execute a removal order. In this case, Mr. Fulton is not challenging a discretionary decision by the government but rather argues that the government has failed to abide by the PBNDS and brings his challenge 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*"); *see also Demore v. Kim*, 538 U.S. 510, 516-17 (2003) (finding jurisdiction and distinguishing between a challenge to the discretionary judgment about detention or release and a challenge to the statutory framework that permits detention without bail). In *Michalski,* the Court rejected the government's broad reading of §1252(g) and as to the last category—the category at issue in this case—found that the presence of a removal order is not determinative because "[f]inally, without a removal order in this case, the third category would be akin to Hamlet without the prince." *Michalski*, 279 F. Supp. 3d at 495.

While in *Taveras*, this Court found that it was stripped of jurisdiction pursuant to 8 U.S.C. § 1252(g), the relief sought in that case was broader than the narrow relief Mr. Fulton seeks here.

In *Taveras*, the petitioner challenged the government's denial of a stay of removal, arguing that the petitioner's removal should be halted because of his heart condition, which rendered removal itself dangerous to his health. There, this Court found that the challenge was akin to a challenge to a discretionary decision by the government, namely, the execution of a removal order. Instead, 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. In *AADC*, 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. *Id.* 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).

If this Court concludes 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 (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.

Mr. Fulton has received consistent, regular dialysis at the Erie County Medical Center ("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* ECF, No. 1-1, Dr. Amin Letter. Mr. Fulton also receives regular doxercalciferol injections during his sessions to strengthen his bone health and takes Cinacalcet and calcium acetate medication regularly with his meals. *Id.* Mr. Fulton was recently diagnosed with a pulmonary embolism (blood clots in his lungs). *Id.* Mr. Fulton is now taking blood thinner medication and has received additional treatment and reviews to address his growing medical issues. *Id.* Dr. Amin recommends that Mr. Fulton "continues his treatment at ECMC strictly as [they] have optimized his care very diligently." *Id.*

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, or any day thereafter, for—at a minimum—the 30 days required by ICE's own PBNDS. This failure to follow ICE's own standards, resulting in the likely death of Mr. Fulton upon deportation, is egregious and shocks the conscience.

Respondents-Defendants' actions in effectuating Petitioner-Plaintiff'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.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in his memorandum of law in support of his request for a temporary restraining order (ECF No. 3-1) Mr. Fulton respectfully

requests that the Court grant his motion for a temporary restraining order and maintain the status quo and deny the government's motion to dismiss.

//

DATED: January 24, 2025
Washington, DC

Respectfully Submitted,

/s/ Sarah E. Decker
Sarah E. Decker
Staff Attorney
Medha Raman*
Dale and James J. Pinto Fellow
ROBERT F. KENNEDY HUMAN RIGHTS
1300 19th Street NW, Ste. 750
Washington, DC 20036
T: (646) 289-5593
E: decker@rfkhumanrights.org

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

Attorneys for Petitioner-Plaintiff

**Application for admission forthcoming*