UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Vincenzo PULLARA,

Petitioner-Plaintiff,

v.

Bill JOYCE, in his official capacity as New York Field Office Director for U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; Caleb VITELLO, in his official capacity as the Acting Director for U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; Kristi Noem, in her official capacity as Secretary of the U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondents-Defendants.

Case No. 25-cv-870 (Gujarati, J.)

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER-PLAINTIFF'S MOTION FOR SECOND TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND RELATED RELIEF

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INTRODUCTION[1]

Petitioner-Plaintiff Mr. Vincenzo Pullara is a 71-year-old man suffering from a myriad of critical health conditions. He has lived in New York for half a century, since he was 14 when he legally entered as a lawful permanent resident. *See* Declaration of Vincenzo Pullara, dated Mar. 15, 2025, Ex.[2] A ¶ 1 (hereinafter "Pullara Sr. Decl."). Mr. Pullara has a removal order based on a quarter-century-old conviction but was deemed too sick to detain and deport by ICE two years ago and released from detention on OSUP. Ex. F, OSUP.

In reliance upon ICE's representation that he could live out his final years in New York, Decl. of Vincenzo Pullara, dated May 20, 2023, Ex. B ¶ 5 (hereinafter "2023 Pullara Sr. Decl."), Mr. Pullara and his family have devoted themselves to building a complex and lifesaving team of doctors and caregivers here in New York. Decl. of Vincent Pullara, Jr. dated Mar. 19, 2025, Ex D ¶¶ 5-7, 15-19, 21 (hereinafter "Pullara Jr. Decl."). Unfortunately, since his release, his health has only deteriorated. His doctors are currently treating him for 28 diagnosed medical conditions including severe systolic heart failure, chronic atrial fibrillation, chronic kidney disease, type 2 diabetes, and spinal cord compression, Medical Affidavit of Dr. Jonathan Taylor, M.D., Ex. C ¶¶ 10-14. (hereinafter "Dr. Taylor Aff."), which collectively require him to take 17 daily prescription medications. Ex. L, Active Medications and Conditions List.

Notwithstanding, Mr. Pullara's deteriorating health and his compliance with all conditions of his OSUP, last month, without notice, without knowledge or consideration of his severe medical condition and without any process whatsoever, ICE abruptly decided to revoke

[1] Petitioner filed a motion, without opposition from Respondents, to exceed the Court's default page limit by five pages. ECF 18. That motion remains pending.
[2] "Ex." refers to exhibits affixed to attorney declaration of Elizabeth Wu dated March 19, 2025, and submitted in support of this motion.

his OSUP and redetain Mr. Pullara, if he did not leave the country on his own within two weeks. Ex. A, Pullara Sr. Decl. ¶ 9; Ex. D, Pullara Jr. Decl. ¶¶ 8-13.

Mr. Pullara is currently working diligently with a team of doctors to assess and stabilize him for travel to Italy. Pullara Jr. Decl. ¶ 33. In the course of that assessment, his doctors recently discovered a new serious spinal condition, currently under active evaluation and treatment, that puts him at risk of losing the ability to stand or walk. Ex. A, Pullara Sr. Decl. ¶¶ 38–39, 53, 55; Ex. D, Pullara Jr. Decl. ¶¶ 15-19; Exs. O-T (progress notes and after visit summaries from recent appointments with his neurologist, neurosurgeon and related provider on Feb. 21, Mar. 7, Mar. 12, Mar. 14, and Mar. 17). ICE's abrupt reversal of its decision to allow Mr. Pullara to remain in the United States, and its order that he depart by as soon as tomorrow or risk being detained on Friday, puts him at imminent risk of losing the loss of his legs and of complete cardiac failure. *Id.*; Ex. C, Dr. Taylor Aff. ¶¶ 15-17.

Moreover, undersigned counsel recently discover that Mr. Pullara has a strong claim related to U.S. citizenship, which prior ineffective legal representatives overlooked. Ex. V, Pullara Imm. Ct. Mot. To Reopen for Naturalization, (hereinafter "Imm. Ct. MTR"). Accordingly, this week, Petitioner filed motion in immigration court, supported by binding Second Circuit precedent, to reopen to allow him to complete his naturalization *nunc pro tunc*. *Id.*; *see also Azize v. Bureau of Citizenship & Immigration Services*, 594 F.3d 86 (2d Cir. 2010).

The instant proceeding was initiated on February 14, 2025, and, after the issuance of a temporary restraining order ("TRO"), ECF No. 7, Respondents agreed to refrain from detaining Mr. Pullara and rescinding his OSUP, only through tomorrow, March 20, 2025, at the earliest. Accordingly, the instant motion seeks a TRO restraining Respondents from detaining Mr. Pullara or revoking his OSUP for such period as is necessary for the Court to complete its assessment and issue

a decision on the motion for a preliminary injunction. Petitioner seeks a preliminary injunction prohibiting Respondents from detaining him revoking his order of supervision for such time as is necessary for the Court to consider and resolve the merits of the First Amended Petition-Complaint[3] or, in the alternative, protection from detention during the pendency of this matter under the Court's inherent authority to admit to bail individuals properly within their jurisdiction under *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001). The instant motion also seeks limited expedited discovery to assess the legality of ICE's revocation of Petitioner's OSUP.

BACKGROUND

Naturalization Application & Removal Proceedings

In 1984, Mr. Pullara hired an attorney who prepared and submitted an application for naturalization. Ex. A, Pullara Sr. Decl. ¶¶ 5, 7; Ex. W, Natz. App. Mr. Pullara was unquestionably eligible to naturalize at the time. After submitting the application, Mr. Pullara attended the required interview, passed all of the required tests, and was deemed prima facie eligible for naturalization by the immigration authorities. Ex. A, Pullara Sr. Decl. ¶ 9; Ex. W, Natz. App; Ex. X, Prima Facie Natz. Elig. Determ. At his interview, he was questioned about a 1972 arrest. Ex. A, Pullara Sr. Decl. ¶ 9. Mr. Pullara accurately explained that the arrests never ripened into a conviction. Ex. Y, Crim. Record of 1972 Arrest; Decl. of Hayley Sandoval, dated March 18, 2025, Ex. Z ¶ 4 (hereinafter "Sandoval Decl."). The immigration agent told Mr. Pullara that he would look into how that arrest resolved. Ex. A, Pullara Sr. Decl. ¶¶ 9-12. Relying on the agent's assurance, Mr. Pullara took no further action. *Id.*

That was the last Mr. Pullara heard about his naturalization application. *Id.* at ¶¶ 12-13.

[3] The First Amended Petition ultimately seeks a prohibitory injunction ordering Respondents not to detain Mr. Pullara or revoke his OSUP for such period as is necessary for him to complete his medical assessment and stabilization and to fully adjudicate his collateral remedies related to his claim related to U.S. citizenship.

Despite years of following up with his attorney and being told he needed to be patient and wait, he did not receive any further updates on the status of his naturalization application. *Id.* Mr. Pullara raised the issue again later with two different legal representatives who represented him in his removal proceedings. *Id.* at ¶¶ 19, 21. These legal representatives, however, erroneously informed Mr. Pullara that his naturalization application was irrelevant to his removal proceedings. *Id.* They were wrong. In fact, Mr. Pullara could have moved at that time to terminate the removal proceedings and complete his naturalization *nunc pro tunc*. Ex. V, Imm. Ct. MTR. As a result of the ineffectiveness of his legal representative, he was ordered removed.

It was recently discovered that the agent apparently never sought the document and that the INS thereafter concluded—erroneously—that Mr. Pullara had failed to prosecute the application. Ex. AA, Natz. Routing and Transmittal Not. Notice of this determination never reached Mr. Pullara—it was returned to sender to the immigration agency. Ex. A, Pullara Sr. Decl. ¶¶ 15, 25; Ex. BB, Proof of Unclaimed Mail. His attorney, however, apparently did receive such notice and never took any action or communicated the determination to Mr. Pullara. Ex. U, Mail Delivery Conf. to Atty. Moore; Ex. A, Pullara Sr. Decl. ¶¶ 13, 15, 25. Yesterday, on March 18, 2025, undersigned counsel filed a motion to reopen to pursue nu*nc pro tunc* naturalization in the immigration court. Ex. V, Imm. Ct. MTR.

Transfer to ICE Detention and Release on OSUP

In May 2023, Mr. Pullara was released on parole after serving 26 years in New York State prison for a murder that he has steadfastly maintains he did not commit.[4] Ex. A, Pullara Sr. Decl.¶ 26. Upon his release on parole, Mr. Pullara was transferred to ICE custody at Batavia Detention Center in Buffalo, New York, where he was placed in the infirmary as soon as he

[4] Indeed, his "credible claim of *actual* innocence" was recently screened by the Legal Aid Society's Wrongful Conviction Unit and is awaiting placement with a legal clinic. Ex. H, Feb. 10, 2025 Letter of Lisa Packard, LAS Managing Attorney.

arrived. Ex. A, Pullara Sr. Decl ¶ 27. Mr. Pullara's health had been deteriorating for years and by the time he reached Buffalo, he was a severely and chronically ill man. *Id.* He couldn't walk unassisted and his heart was incredibly weak. *Id.*; Ex. G, May 9, 2023 ICE Medical Transfer Summary (hereinafter "ICE Medical Summary"). For the next four days, Mr. Pullara did not leave the infirmary. Ex. A, Pullara Sr. Decl ¶ 28. On May 9, 2023, ICE informed Mr. Pullara that he was "too sick to get on a plane" and that he would be released on an OSUP and into the custody of his two adult sons, Salvatore (Sal) and Vincent Jr. (Enzo). *Id.*; Ex. F, OSUP. Upon his release he was told that he would be allowed to stay in the United States and the ICE did not intend to deport him in the future. Ex. A, Pullara Sr. Decl. ¶ 56; Ex. B, 2023 Pullara Sr. Decl. ¶ 5 (contemporaneous record).

Deteriorating Health and Medical Treatment and Compliance with OSUP

Upon release, Mr. Pullara and his family immediately worked to establish a complex interconnected system of doctors and care providers. Ex. A, Pullara Sr. Decl. ¶¶ 29-31; Ex. D, Pullara Jr. Decl. ¶¶ 5-7. This team has been critical to his survival as, over the last two years he has: required no less than two surgeries (one cardiac, to implant life-sustaining cardiac device, and one spinal, to prevent paralysis); an emergency cardiac procedure, Ex. T, Mar. 17 Dr. Pekkerman Visit Progress Notes, after experiencing cardiogenic shock, a "life-threatening condition with a very high risk of mortality and death (approximately 50%)," Ex. C, Dr. Taylor Aff. ¶ 12; had no less than six trips to the emergency room with difficulty breathing and other life-threatening circumstances, Ex. O, Feb. 21, 2025, Neurologist Progress Notes, Ex. N, Sept. 15, 2023 Northwell Health Report; seen countless doctors of doctors for innumerable visits who are collectively treating him for 28 diagnosed medical conditions including severe systolic heart failure, chronic atrial fibrillation, chronic kidney disease, type 2 diabetes, and spinal cord

compression, Medical Affidavit of Dr. Jonathan Taylor, M.D., Ex. C ¶¶ 10-14. (hereinafter "Dr. Taylor Aff."); which require him to take 17 daily prescription medications. Ex. L, Active Meds. and Conditions List. The complexity and gravity of his medical condition cannot be overstated.

Most recently, in the last few weeks, he has been diagnosed with "severe degenerative disc disease and central foraminal stenosis at multiple segments in the lumbar spine," Ex. S, Mar. 14, 2025, Neurosurgery Progress Note. The condition is being actively evaluated and treated, but which likely will require surgery for him to preserve the use of his legs. Ex. A, Pullara Sr. Decl. ¶¶ 38–39, 53, 55; Ex. D, Pullara Jr. Decl. ¶¶ 15-19; Exs. O-T (progress notes and summaries from recent appts. with his neurologist, neurosurgeon and related provider on Feb. 12, Mar. 7, 12, 14, and 17). Nevertheless, he has remained fully compliant with his OSUP but increasingly dependent, not just on his medical team, but also a robust network of family support. Ex. A, Pullara Sr. Decl. ¶¶ 38–39, 53, 55; Ex. D, Pullara Jr. Decl. ¶¶ 6, 19-22, 25-31.

ICE's Abrupt Processless Decision to Redetain Mr. Pullara and Revoke his OSUP

On February 5, 2025, Mr. Pullara's family was informed by ICE Deportation Officer ("DO") Love that if he was still here in two weeks, he would be redetained. Ex. D, Pullara Jr. Decl. ¶ 9. DO Love provided no reason to explain ICE's reversal. *Id.* at ¶¶ 8-13. When pressed for an explanation, she responded only with facts well known at the time of ICE's original decisions: stating that Mr. Pullara was a "felon" and "has a deportation order." *Id.* at ¶ 9. She confessed that she was completely unaware of Mr. Pullara medical situation but, thereafter, rebuffed or failed entirely to respond to multiple attempts by Mr. Pullara's family, and then later his attorneys, to seek clarification and an opportunity to provide critical information about his dire medical situation. *Id.* at ¶ 10; Declaration of Lindsay Nash, Esq., Ex. E ¶ 3-5 (hereinafter "Nash Decl."); Ex. I, Pullara Jr. email to DO Love; Ex. K, Prof. Nash email to DO Love. Most

egregiously, when counsel did get DO Love on the phone and identified herself as representing Mr. Pullara, "the line went dead" such that counsel was unable "to tell whether [DO Love] hung up the phone or the call simply dropped." *Id.* When counsel called back right after, the call went directly to voicemail. *Id.* Counsel left yet another voicemail and never heard back.[5] *Id.*

Developments Since the Initiation of this Action

With no way to communicate with the agency, and no process to participate in related to ICE's decision to revoke Mr. Pullara's OSUP and redetain him, Petitioner filed the instant action on February 14, 2025, one business day before he was told he must depart. ECF 1. A TRO was issued, ECF 7, and thereafter, ICE agreed not to detain Mr. Pullara or revoke his OSUP before March 21, 2025, or before it makes a determination on an application for an administrative stay, whichever is later, ECF 16. The administrative stay application has been submitted and is pending, as is the motion to reopen discussed *supra* together with a related motion to stay removal. However, Mr. Pullara remains at imminent risk of redetention as soon as March 21, 2025 because the administrative stay application can be resolved at any time and: (1) ICE has refused to extend its commitment not to detain him for a few days after its imminent decision to allow Petitioner to seek redress of this Court, if necessary, ECF 14, and (2) because an administrative stay provides no protection against detention. *See generally* 8 C.F.R. § 241.6.

Mr. Pullara has been clear, that whenever he is "ordered to leave, [he] will." Ex. A, Pullara Sr. Decl. ¶ 57. Since February 5, 2025, when he was alerted that he would be required to relocate to Italy, has been working diligently to obtain the medical evaluations and treatment

[5] Respondents counsel have asserted that DO Love was not permitted to speak with Petitioner's counsel because, a typo in an email address, had prevented submission of their Notices of Appearance. This explanation conflicts with the record and common sense. If DO Love were concerned about the need for such notice, she could simply have alerted counsel to the concern and given them an opportunity to resubmit the notices.

necessary to stabilize himself for relocation to Italy. During this period, he has had eleven in-person office visits with his physicians and two telehealth appointments. Exs. O-T (progress notes and after visit summaries from most recent appointments related to newly discovered spinal issue on Feb. 21, Mar. 7, Mar. 12, Mar. 14, and Mar. 17); Ex. D, Pullara Jr. Decl. ¶ 33. In addition, during this period, he has had numerous critical medical tests including five MRIs (three on his spine, one on his femur, and one on his brain), an ultrasound of his spleen, two cardiac device remote checks, and a CT scan of his spine and an x-ray of his spine. Ex. D, Pullara Jr. Decl. ¶ 33. The effort is ongoing, but the medical evidence is clear that if he is forced to relocate to Italy without completing the necessary evaluations and stabilization, it could trigger life-threatening cardiac complication, stroke, or the loss of use of his legs. Ex. C, Dr. Taylor Aff. ¶¶ 15-18; Ex. A, Pullara Sr. Decl. ¶ 34; Ex. O, Feb. 21, 2025, Neurology Progress Notes.

The risks to Mr. Pullara's life and health in immigration detention are even more severe. Recent studies of healthcare in immigration detention confirm ICE's prior conclusion that Mr. Pullara is too sick to be detained. *See, e.g.*, Altaf Saadi, *et al.*, *Duration in Immigration Det ention and Health Harms*, J. Am. Med. Assoc., Jan. 24,2025, https://rb.gy/j0ptgf (hereinafter "Immigration Detention and Health Harms Study"); Chanelle Diaz, *et al.*, *Harmful by Design—a Qualitative Study of the Health Impacts of Immigration Detention*, 38 J. Gen. Internal Medicine 2030 (2023), https://doi.org/10.1007/s11606-022-07914-6 (hereinafter "Health Impacts of Immigration Detention Study"). The studies find persistent "poor conditions and inhumane treatment" and "structural barriers limiting access to care" in immigration detention. Health Impacts of Immigration Detention Study at p. 2032. Most alarmingly, they identified significant barriers to urgent care, that it can require "multiple sick call requests" and "waiting weeks" and that barriers to "urgent medical needs" were "insurmountable." *Id.* at 2033.

ARGUMENT

Courts in this circuit apply the same legal standard for preliminary injunctions and TROs. *See Andino v. Fischer*, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008). For either, the moving party must establish: (1) a likelihood of irreparable harm absent preliminary relief; (2) a likelihood of success on the merits; (3) that the balance of equities tips in favor of the moving party; and (4) that the public interest is served by an injunction. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Because of the "gravity of the injury to the alien" facing removal "compared to the lesser 'injury' to the Government if one alien is permitted to remain" the Second Circuit has held that the "the degree of likelihood of success need not be set too high," explaining this means "less than 50 percent." *Mohammed v. Reno*, 309 F.3d 95, 102 (2d Cir. 2002). If the moving party is unable to demonstrate a likelihood of success on the merits, a court may still issue preliminary relief if the movant demonstrates "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 Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (internal quotation marks and citation omitted).

I. A PRELIMINARY INJUNCTION WILL PREVENT IRREPARABLE HARM

As Dr. Taylor explains in his sworn medical declaration, detaining and abruptly removing Mr. Pullara before full medical assessment and stabilization, subjecting him to prolonged air travel, and potential delays in access to specialist care and prescription medication could lead to "serious health deterioration or even life-threatening complications." Ex. C, Dr. Taylor Aff. ¶ 15; *see also* Ex. M, *Average Specialist Wait Times* (documenting the average wait time in Italy to see a cardiologist as 7 months and to see a neurologist as 9.5 months). These complications could include "acute decompensation of heart failure" resulting in "cardiogenic

shock, a life-threatening event Mr. Pullara has already experienced once," "stroke," and an in-flight emergency with "no access to necessary care." *Id.* ¶ 16(d). Moreover, in the course of seeking medical clearance for relocation to Italy, Mr. Pullara has learned that he will likely need a second spinal surgery to prevent further deterioration of his spine, as his degenerative condition could suddenly require emergency intervention to avoid loss of the use of his legs. *See* discussion *supra* pp. 6-7 (providing record cites).

Courts in this circuit have also routinely recognized the risk of detention and injuries to constitutional rights, which Mr. Pullara faces absent the relief sought, as sufficient irreparable harm to justify injunctions. *See, e.g.*, *Torres-Jurado v. Biden*, No. 19 CIV. 3595, 2023 WL 7130898, at *5 (S.D.N.Y. Oct. 29, 2023); *Basank v. Decker*, 613 F. Supp. 3d 776, 788 (S.D.N.Y. 2020); *Sajous v. Decker*, No. 18 Civ. 2447, 2018 WL 2357266, at *12 (S.D.N.Y. May 23, 2018); *Hardy v. Fischer*, 701 F. Supp. 2d 614, 619 (S.D.N.Y. 2010).[6]

II. PETITIONER IS LIKELY TO SUCCEED ON THE MERITS

A. ICE's Arbitrary and Capricious Decision to Abruptly Redetain Mr. Pullara and Rescind His OSUP, Absent Any Changed Circumstance or Violation, While He is Diligently Pursuing Efforts to Stabilize his Grave Medical Condition and to Advance His Colorable Claim Related to U.S. Citizenship, Violates the APA.

The APA is principally aimed at ensuring that federal agencies engage in "reasoned decisionmaking" within the bounds of the by law. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 104 (1983). Accordingly, under the APA, a court shall "hold unlawful

[6] Moreover, even if Mr. Pullara survives detention and deportation unscathed medically, he will nevertheless be irreparably injured in his ability to pursue his colorable claim related to U.S. citizenship. The record is clear that, from abroad, he would be "effectively prevented him from obtaining the meaningful assistance of appointed counsel," *Dennis v. I.N.S.*, No. CIV.A. 301CV279SRU, 2002 WL 295100, at *3 (D. Conn. Feb. 19, 2002), Ex. D, Pullara Jr. Decl. ¶ 22, and thereby deprived of the meaningful ability to participate in prosecuting his claim, and that he would not subject himself a second time to the medical risks associated with relocations, Ex. A, Pullara Sr. Decl. ¶ 57.

and set aside agency action" that is "arbitrary, capricious." 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat. Res. Def. Council v. EPA*, 658 F.3d 200, 215 (2d Cir.2011) (citation omitted); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

Agency reversals of prior decisions are subject to heightened scrutiny under the APA. An agency's "'unexplained departure from prior agency determinations is inherently arbitrary and capricious in violation of APA § 706(2)(A).'" *Rochester-Genesee Reg'l Transp. Auth. v. Hynes- Cherin*, 531 F. Supp. 2d 494, 506 (W.D.N.Y. 2008) (quoting *Nat'l Treas. Employees Union v. Federal Labor Relations Auth.*, 404 F.3d 454, 457 (D.C. Cir. 2005)); *see also National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("Unexplained inconsistency is ... a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA]."); *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (noting an "agency's duty to explain its departure from prior norms"). The Supreme Court has also specifically made clear that before rescinding a prior grant of administrative protection from deportation, the agency is "required to assess the existence and strength of any reliance interests" and that "failure to do so [is] arbitrary and capricious." *Dep't of Homeland Sec. v. Regents of the Univ. of Ca.*, 140 S. Ct. 1891, 1896 (2020).

As set forth below, the two separate and distinct challenged decisions of the agency—the decision to revoke Mr. Pullara's OSUP and the decision to re-detain him—each

independently violate these legal principles. This case involves an egregious example of arbitrary decision-making: (1) a decision issued by an agency actor who offered no explanation for the agency's reversal, 8 C.F.R. § 241.4(e) (requiring determination that he was not a flight risk or danger before initial OSUP issuance); 8 C.F.R. § 241.5(c)(2) (identifying the only relevant basis upon which his OSUP could have been issued: his removal was it "impracticable or contrary to the public interest"); (2) where the agency admitted a lack of knowledge of the relevant facts, *see* discussion and citations to record at pp. 7-8; (3) rebuffed efforts by the Petitioner's family and counsel to provide such facts, *see* discussion and citations to record at pp. 7-8; (4) thus failed to consider critical facts related to Mr. Pullara's health and reliance on ICE's prior representation that he would remain in the United States, and (5) provided no process whatsoever for the Petitioner to be heard, in violation of the statutory and regulatory procedures required for such decisions, *see* discussion and citations to record at pp. 7-8.

Nor can the agency cure the defects in its decision-making through post-hoc rationalizations via the pending administrative stay process. *See Regents of the Univ. of Ca.*, 140 S. Ct. at 1908-09 (cautioning court against upholding agency actions under APA "on the basis of impermissible post hoc rationalization") (internal quotation marks and citation omitted); *Am. Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 539 (1981) ("[T]he post hoc rationalizations of the agency ... cannot serve as a sufficient predicate for agency action."); *Kakar v. U.S. Citizenship & Immigr. Servs.*, 29 F.4th 129, 133 (2d Cir. 2022) (reversing lower court for upholding immigration agency action against APA challenge based on agency's post-filing rationale that was "not reasonably discernible from its initial decision").

Even to the extent that the agency could permissibly cure some of these deficiencies post-hoc, absent reversal, its effort is doomed to fail in the near-term. There is simply no

available factual basis to support the agency's abrupt about-face from its prior decision that he was too sick to be detained or deported and that he posed no danger or flight risk. Rather, any such agency's decision appears plainly based on a politically directed impermissible "no discretion" policy at odds with the legal scheme requiring individualized fact-based discretion.[7]

What is certain is that, in reaching her decision, the DO failed to comply with even the most basic legally required procedures, including notice, interview, high level decisionmaker, consideration of enumerated facts, services of decision and related documents. *See* 8 U.S.C. § 1231(a)(6); 8 C.F.R. §§ 241.4(d)(2), (l); *see also Rombot v. Souza*, 296 F. Supp. 3d 383, 387-88 (D. Mass. 2017) (ordering release based, in part, on failure of ICE to follow its own procedures for revocation of OSUP); *Torres-Jurado,* 2023 WL 7130898 (same); *You, Xiu Qing v. Nielsen*, 321 F. Supp. 3d 451 (S.D.N.Y. 2018) (same); *D'Alessandro v. Mukasey*, 628 F. Supp. 2d 368, 387–406 (W.D.N.Y. 2009) (same); *see generally* 5 U.S.C. § 706(2)(D).

Moreover, the record demonstrates that, Mr. Pullara's diligent attempts to obtain medical

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[7] The statutory and regulatory scheme regarding the detention and deportation of people with final orders of removal mandate individualized assessment of certain enumerated factors, including for example, risk of flight, danger to the community, and compliance with conditions of release. *See* 8 U.S.C. § 1231(a)(6); 8 C.F.R. §§ 241.4(e), (d), (l). However, on his first day in office, President Trump issued an order directing ICE to "ensur[e] the successful enforcement of final orders of removal" and "the detention of aliens . . . pending . . . their removal," *Protecting the American People Against Invasion*, Executive Order (Jan. 20, 2025), and to "to detain, to the fullest extent permitted by law, aliens . . . until their successful removal from the United States," *Securing Our Borders*, Executive Order (Jan. 20, 2025). As the Congressional Research Service has explained, these executive orders have been interpreted to "terminate a long-standing policy of releasing into the country certain aliens who are found by immigration authorities to pose no security threat or flight risk and whose continued detention is determined not to be in the public interest." *See also Recent White House Actions on Immigration*, Cong. Research Serv. (Feb. 10, 2025); *see also* ICE, Removal: ERO's Robust Removal Program Reduces the Number Of Illegal Alien Absconders in the U.S., available at https://www.ice.gov/remove/removal (last visited Mar. 18, 2025) (explaining that "ICE ERO removes aliens from the United States who are subject to a final order of removal" and that they are "developing and implementing strategies to support the return of *all* removable aliens to their country of origin." (emphasis added)); Nicole Acevedo, *Immigrants fear required ICE check-ins could lead to deportations*, NBC NEWS (Jan. 30, 2025), *available at* https://www.nbcnews.com/news/latino/immigrants-fear-ice-appointments-deportations-rcna189803 (documents dozens of cases of people with removal orders on OSUP being detained by ICE's NYFO and more around the country). Further development of this claim requires the limited expedited discovery sought herein. *See* discussion *infra* at Section V.

clearance for relocation to Italy have uncovered a serious spinal issue that is still be actively evaluated, but which may require a second spinal surgery to preserve his ability to stand or walk. *See* discussion *supra* pp. 6-9 (providing record cites). Because of the myriad of serious health issues he faces, Mr. Pullara's attempt to complete his medical evaluations and stabilization since his DO first told him he would have to leave has involved no fewer than eleven medical appointments, with at least four different doctors, and he has been ordered to undergo three MRIs, a CT scan, and various other tests. Exs. O-T (progress notes and after visit summaries from recent appointments with his neurologist, neurosurgeon and related provider on Feb. 21, Mar. 7, Mar. 12, Mar. 14, and Mar. 17); Ex. D, Pullar Jr. Decl ¶ 33. In addition to his emergent spinal issues, uncertainty remains regarding how long it would take for him to be able to see the appropriate specialists upon any return to Italy and the risks associated with a lapse in care are potentially life-threatening. *See* discussion *infra* pages 8-9. The gravity, complexity, and uncertainty regarding his medical situation cannot be overstated.

As other courts in this circuit have found, this type of irrational uninformed decision-making related to immigration detention and revocation of protection from removal, without any process for impacted individuals to participate, is precisely what the APA is aimed at preventing. *See, e,g. Torres-Jurado v. Biden*, No. 19 CIV. 3595, 2023 WL 7130898, at *4 (S.D.N.Y. Oct. 29, 2023) (holding that revocation of stay of removal was unlawful and that it is arbitrary and capricious for ICE to ignore in the reliance of individuals on its determination not to remove them). As one court explained "Defendants' cursory, abrupt, and predetermined notice that Plaintiff must self-deport within one month after permitting him to live in the United States pursuant to the ICE Stay" without "an opportunity to be heard in a meaningful time and in a meaningful manner" is unlawful. *Id.* (internal quotation marks and citations omitted); *see also*

You, Xiu Qing, 321 F. Supp. 3d at 463 (prohibiting redetention of a noncitizen with a final order of removal because, *inter alia*, such redetention was likely arbitrary and capricious); *see also Anderson v. McElroy*, 953 F.2d 803 (2d Cir.1992) (holding, in a habeas context, that the agency had abused its discretion by refusing to grant a stay of deportation in order to allow an noncitizen to fully litigate his motion to reopen); *D'Alessandro*, 628 F. Supp. 2d at 387–406 (recommending immediate release on OSUP of individual with a final order of removal based ICE's failure to comply with its own detention regulations and because ICE's flight risk and danger determinations were "patently unreasonable in light of the evidence in the record").

The agency's decision to re-detain Mr. Pullara and revoke his OSUP is arbitrary and capricious because: (1) it represented an unexplained departure from its prior decision to release him; (2) was done without consideration of the gravity of his medical situation or his reliance upon the agency's prior decision; (3) did not comply with the procedures required by law; (4) cannot be justified by any changed circumstances, violation of his OSUP, or upon any other permissible ground; (4) cannot be cured by post-hoc agency rationalizations through the administrative stay procedures; and (5) appears to flow from an impermissible change in agency policy prohibiting the individualized consideration of discretionary factors required by law.

B. In the Absence of a Violation of His OSUP or Changed Circumstances, the INA Does Not Authorize ICE to Revoke Mr. Pullara's OSUP or Redetain Him.

Under the APA, a court shall "hold unlawful and set aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2)(A). ICE decision to redetain Mr. Pullara and revoke his OSUP violates the controlling statute and regulations and must be set aside.

There is a complex statutory and regulatory scheme governing detention, release, and redetention of individuals with orders of removal ("post-order individuals"). Generally, the INA dictates that "except as otherwise provided in this section" a noncitizen ordered removed shall

be removed "within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A). After the removal period, an individual can only be detained only if they are "a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6). The regulations make clear that an individual can be released on OSUP only if the individual is "presently a non-violent person," "not likely to pose a threat to the community following release," "not likely to violate the conditions of release," and "does not pose a significant flight risk if released." 8 C.F.R. § 241.4(e); *see also* 8 CFR § 241.4(f) (enumerating additional factors to consider in release determinations). A decision to rescind OSUP based on a blanket policy that does not require the individualized consideration of the factors enumerated in regulation is contrary to law. *See* discussion *supra* at note 7.

The statutory scheme recognizes that, in addition to noncitizens who "cannot be removed due to the refusal of all countries designated by the alien" (the common scenario), *see Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), there are other post-order individuals where "the removal of the alien is otherwise impracticable or contrary to the public interest." 8 U.S.C. § 1231(a)(7); *see also* 8 C.F.R. § 241.4(e)(1) (explaining that an individual can only be released on OSUP if the receiving country has not issues travel documents *or* if removal "is otherwise not practicable or not in the public interest."); 8 C.F.R. § 241.5 (providing for specific conditions for release).

Once ICE makes a determination to release a post-order individual from detention and place him under an OSUP, that decision is reversable under certain circumstance but the power of the agency to redetain and revoke OSUP is not unbounded. The statute's plain language continues to dictate that post-order detention is only permissible if an individual is a "a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6). The implementing regulations articulate certain bases upon which an OSUP can be revoked, *see*

generally 8 C.F.R. § 241.4(l)(2), that fit into two categories: (1) a "violation of the conditions of the [OSUP]," or (2) "[c]hanged [c]ircumstances." Detention and Deportation Officer's Field Manual (DDOFM), Chp. 17.12(b), (c), *available at* https://rb.gy/j0ptgf.

Changed circumstances refers, almost universally to the situation where removal that was not previously feasible because of an uncooperative receiving country, becomes feasible. 8 C.F.R. § 241.4(l)(2)(iii).[8] Accordingly, individuals like Mr. Pullara, who were not released because of impediments to removal imposed by an uncooperative receiving country, cannot be redetained absent a violation of an OSUP, 8 C.F.R. § 241.4(l)(2)(ii), and a finding that he is a "a risk to the community or unlikely to comply with the order of removal" 8 U.S.C. § 1231(a)(6).

ICE has confirmed this interpretation of the statute and regulations in litigation. In the context of considering whether an individual's habeas petition was mooted when that individual was released from immigration detention, or if the possibility of revocation of release made the cause of action capable of repetition yet evading review, ICE took the position that unless the Petitioner's "removal becomes reasonably foreseeable, any future detention will result from ICE's determination that [Petitioner] has violated the conditions of his [OSUP]." *Leybinsky v. U.S. Immigr. & Customs Enf't*, No. 10 CIV. 5137 RA, 2013 WL 132544, at *2 (S.D.N.Y. Jan. 8, 2013), *vacated*, 553 F. App'x 108 (2d Cir. 2014). ICE further confirmed that absent either condition, "there can be no reasonable expectation that [Petitioner] will be detained again"" and that it was within the Petitioner's control to avoid detention by simply complying with the terms of his release. *Id.* Considering this same issue and argument by ICE, the court in *Hubacek v. Holder* similarly held that a petitioner is "able . . . to prevent such a possibility [of detention]

[8] Revocation for violations of the terms of the individual's supervised release is clearly articulated. 8 C.F.R. § 241.4(l)(2)(ii). Other changed circumstances enumerated in the regulations, not relevant here, are that "[t]he purposes of release have been served" and that the "conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate." 8 C.F.R. § 241.4(l)(2)(i), (iv).

from occurring by complying with the conditions set forth in his [OSUP]." No. 13-CV-1085C, 2014 WL 1096949, at *2 (W.D.N.Y. Mar. 19, 2014); *see also e.g., Mohamed v. Sessions*, No. CV 16-3828 (SRN/BRT), 2017 WL 4417706, at *3 (D. Minn. Sept. 14, 2017), *report and recommendation adopted*, No. CV 16-3828 (SRN/BRT), 2017 WL 4410765 (D. Minn. Oct. 3, 2017) ("[T]he government is already foreclosed under federal law from further detaining him unless he violates his release provisions or, due to changed circumstances, there again exists a significant likelihood of removal.").

The statutory scheme appears to anticipate exactly the harm presented by the present case. In those unusual circumstances where, as with Mr. Pullara, the government releases a post-order individual, not because he cannot be removed but rather because of a permanent situation that makes removal "contrary to the public interest," 8 U.S.C. § 1231(a)(7), there is significant public value in creating the certainty that an individual will be able to remain in the United States if they comply with the conditions of their OSUP. Accordingly, insofar as Mr. Pullara has not violated any condition of his OSUP and poses no risk to the community, ICE's decision to redetain him is contrary to law.

C. ICE's Decision to Abruptly Redetain Mr. Pullara and Revoke His OSUP Without Any Pre-Deprivation Process Violates His Right to Procedural Due Process

Any procedural due process claim must be evaluated under the familiar three prong *Mathews v. Eldridge* balancing test. 424 U.S. 319, 335 (1976). As to *Mathews* first prong, Mr. Pullara enjoys among the most heightened private interests recognized under law, including: protection of his physical freedom from redetention, *United States v. Melendez-Carrion*, 790 F.2d 984, 998 (2d Cir. 1986) ("[P]hysical confinement of an individual is the ultimate deprivation of liberty."), *see also Young v. Harper*, 520 U.S. 143, 146–47 (1997) (recognizing

the same liberty interest individuals released and at risk of redetention); the right to pursue his colorable claim related to citizenship, *Fedorenko v. United States*, 449 U.S. 490, 505 (1981) (noting that "the right to acquire American citizenship is a precious one"); *Azize v. Bureau of Citizenship & Immigration Servs.*, 594 F.3d 86, 91 (2d Cir. 2010) (holding that with "such an important matter as citizenship potentially at stake," the petitioner should have an opportunity for district court fact finding on his *nunc pro tunc* naturalization claim), and; his right to have his redetention and OSUP revocation adjudicated in compliance with agency regulations intended to protect his fundamental constitutional rights, *Augustin v. Sava*, 735 F.2d 32, 37–38 (2d Cir. 1984) (recognizing that "constitutionally protected liberty or property interests may have their source in positive rules of law creating a substantive entitlement to a particular government benefit"); *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996) (recognizing due process right to fair rendition of the procedures established by the INS).

When, as here, significant liberty or property interests are at stake, courts routinely require procedural protections, including: a pre-deprivation hearing; notice of the reasons of the government intended deprivations; an opportunity for the individual to examine and respond to the evidence against him; an explanation of the basis for any adverse determination; and, an opportunity for review by the judiciary or, at minimum, some neutral arbiter. *See, e.g.*, *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (explaining the due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975) (explaining the danger of leaving detention decisions in the hands of "zealous officers" rather than "neutral and detached magistrate[s]"); *Bell v. Burson*, 402 U.S. 535, 542 (1971) (explaining that absent some exigency "notice and opportunity for hearing appropriate

to the nature of the case' *before* the [deprivation] becomes effective" (emphasis added)); *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970) (requiring that "recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence"); *Ng Fung Ho v. White*, 259 U.S. 276, 283-85 (1922) (holding that habeas petitioner was entitled to judicial review of citizenship claim); *Kapps v. Wing*, 404 F.3d 105, 123 (2d Cir. 2005) ("In order to be constitutionally adequate, notice of [agency's ultimate deprivation decision] must provide claimants with enough information to understand the reasons for the agency's action" and thus "whether a challenge to an agency's action is warranted.").

The Second Circuit and other courts have specifically recognized the applicability of these types of due process protections to redetention determinations by ICE. *Villiers v. Decker*, 31 F.4th 825, 833 (2d Cir. 2022) ("[A]n individual whose release is sought to be revoked [by ICE] is entitled to due process such as notice of the alleged grounds for revocation, a hearing, and the right to testify at such a hearing"); *see also Torres-Jurado*, 2023 WL 7130898, at *4 (holding that due process requires ICE to provide notice and an opportunity to be heard before revoking a stay of removal); *Saravia for A.H. v. Sessions*, 905 F.3d 1137, 1144–45 (9th Cir. 2018) (upholding preliminary injunction requiring hearings for class of minors redetained by ICE after initial release from immigration detention); *Ying Fong v. Ashcroft*, 317 F. Supp. 2d 398, 402–03 (S.D.N.Y. 2004), *amended on reconsideration on other grounds,* 2004 WL 1348994 (S.D.N.Y. June 15, 2004) (discussing the due process violation implicated in ICE's decision to execute a removal order in a manner that deprives the noncitizen of the opportunity to seek redress from federal court); *Ortega v. Bonnar*, 415 F. Supp. 3d 963, 970 (N.D. Cal. 2019) (enjoining ICE from redetaining the petitioner without adequate notice and a hearing); *Ragbir v. Sessions*, No. 18-

CV-236 (KBF), 2018 WL 623557 (S.D.N.Y. Jan. 29, 2018), *vacated and remanded on other grounds*, 2019 WL 6826008 (2d Cir. July 30, 2019) (recognizing that due process requires notice and an opportunity for orderly departure when revoking an OSUP); *Rombot v. Souza*, 296 F. Supp. 3d at 389 (emphasizing that ICE does not have "a carte blanche to re- incarcerate someone [with a removal order] without basic due process protection"). In *Azize,* the Second Circuit specifically held that an individual, like Mr. Pullara, with a potential *nunc pro tunc* naturalization claim is entitled to federal court fact-finding and legal determinations. 594 F.3d at 91.

However, ICE provided Mr. Pullara no meaningful notice or process in deciding to redetain him and revoke his OSUP. Ex D, Pullara Jr. Decl. ¶¶ 8-11. Thereafter, DO Love ignored Mr. Pullara's repeated attempts (through family and counsel) to learn the basis for this decision, to rebut ICE's reasoning, and to demonstrate why Mr. Pullara should not be detained. *See* discussion *supra* at pp. 7-8. Nor did DO Love adhere to the statute and regulations for revocation of OSUP, *see* discussion *supra* at Sections II.A-B, which were "promulgated to protect a fundamental right derived from the Constitution or a federal statute,' like the opportunity to be heard." *Rombot,* 296 F. Supp. 3d at 388 (quoting *Waldron v. I.N.S.*, 17 F.3d 511, 518 (2d Cir. 1993)). In short, Mr. Pullara has not been provided any process and therefore ICE has denied Mr. Pullara his due process right to notice and an opportunity to be heard *and* his right to a fair rendition of the revocation procedures created by the statutory and regulatory scheme.[9]

[9] After the filing of this action, ICE agreed to forestall detaining Mr. Pullara and revoking his OSUP for such time as is necessary for it to consider an application for and administrative stay and has further stated that it now intends to comply at least with the OSUP revocation procedures set forth in 8 CFR § 241.4(l). ECF 14. However, even if the due process violation could be cured post-hoc, those processes fail to satisfy due process in the unique context of this case where an elderly infirm man, who previously relied on ICE representation that he would live out his days in New York, has been fully compliant with the conditions of his release, and is diligently taking steps to assess and stabilize his dire medical situation and to pursue a colorable claim related to citizenship. In this unique context, the failure of these administrative processes to provide the type of pre-deprivation hearing, adequate notice, an opportunity to examine and rebut

In regard to the second and third *Mathews* factors, 424 U.S. at 335, given the evidence in this case, *see* discussion *infra* at pp. 8-9, and in the public record, *see* discussion *infra* at note 2, there is a substantial risk that ICE's decision to redetain Mr. Pullara and revoke his OSUP has not been made (and will not be made in the administrative proceedings below) in in accordance with the law and factors set forth in the statute and regulations, 8 U.S.C. § 1231(a)(6); 8 C.F.R. §§ 241.4(e), (d), (l). However, adherence with those provisions of law could be assured through an order directing ICE to provide notice of the basis of its intention to redetain him and revoke his OSUP, to allow examination of any evidence or policy upon which its decision is based, and by holding a pre-deprivation hearing where the Court, a neutral arbiter, could evaluate the evidence of both parties in light of the controlling legal standards. The burden these procedures would place on the government is negligible insofar any ruling requiring such process would be individualized and applicable only to the unique facts of this case. *See* discussion *infra* at note 9.

D. Needlessly Redetaining Mr. Pullara and Subjecting Him to Life-Threatening Barriers to Essential Medical Care, Notwithstanding the Agency's Finding that He Poses No Risk of Flight or Danger to the Community, Violates Substantive Due Process.

It is beyond dispute that constitutional substantive due process protections extend to noncitizens. *See Reno v. Flores*, 507 U.S. 292, 306 (1993). Indeed, in *Zadvydas*, the Supreme Court held that the unnecessary immigration detention of post-order individuals, like Mr. Pullara, violated their substantive due process rights. 533 U.S. at 690. "'[T]he touchstone of due process is protection of the individual against arbitrary action of government.'" *Leebaert v.*

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evidence, and to seek impartial review violates due process. *See Jennings v. Rodriguez*, 583 U.S. 281, 314 (2018) ("[D]ue process is flexible, we have stressed repeatedly, and it calls for such procedural protections as the particular situation demands." (internal quotation marks omitted & alterations in original)).

Harrington, 332 3d 134, 139 (2d Cir. 2003) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998)). Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Flores*, 507 U.S. at 301–02; *see also Goe v. Zucker*, 43 F.4th 19, 30 (2d Cir. 2022). The ultimate substantive due process inquiry is whether the government conduct "shocks the conscience." *Goe*, 43 F.4th at 30. Here, Mr. Pullara's rights to life and freedom from physical restraint are unquestionably fundamental rights. *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992). Senseless redetention and life-threatening disruption to Mr. Pullara's medical care, while he is diligently pursuing efforts to stabilize himself for relocation to Italy, violates substantive due process for two independent reasons.

First, in *Zadydas*, the Court reasoned that detention is arbitrary and impermissible where the ongoing deprivation of liberty does not serve the alleged government interest underlying detention. 533 U.S. at 690 (stating that detention must "bear . . . [a] reasonable relation to the purpose for which the individual [was] committed"). The purpose of post-order immigration detention is "effectuating an [noncitizen's] removal." *Id.* at 697. However, detention is wholly unnecessary to serve that purpose here. Before making the decision to release Mr. Pullara on the OSUP in May 2023, ICE was required to find that he poses no flight risk, *see generally* discussion *supra* at Section II.B, and that he is likely to "comply with the order of removal," 8 U.S.C. § 1231(a)(6). Since his release, he has been in full compliance with three supervising entities: ICE, NYS Parole, and Federal Probation. Accordingly, there is no governmental interest whatsoever that would be served by his return to immigration detention. Depriving Mr. Pullara of his fundamental right to physical liberty for no reason plainly violates substantive due process. *Zadydas*, 533 U.S. at 690; *Flores*, 507 U.S. at 301–02.

Second, the deliberate indifference ICE has shown to Mr. Pullara by subjecting him to life- threatening disruption in critical medical care without any consideration of his dire medical condition or a reasonable period of time to assess and stabilize his health, shocks the conscience. "[D]eliberately indifferent conduct" directed towards civil detainees, such as federal immigration detainees, is "egregious enough to state a substantive due process claim." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849–50 (1998). The Second Circuit has held that "prisoners may not be . . . exposed to conditions that pose an unreasonable risk of serious damage to [their] future health." *Jabbar v. Fischer*, 683 F.3d 54, 57 (2d Cir. 2012); *see also Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (explaining that for claims "based on a failure to prevent harm" individuals must show that the challenged detention poses "a substantial risk of serious harm.").

Under these principles, courts in this circuit have repeatedly held that when immigration detention subjects individuals to unreasonable health risks, release on habeas is appropriate. *See, e.g.*, *Coronel v. Decker*, 449 F. Supp. 3d 274 (S.D.N.Y. 2020) (J., Nathan) (granting habeas petitions and ordering the release of immigration detainees because ICE failed to protect vulnerable detainees from serious health risk and thus showed "deliberate indifference to their medical needs and thus violate the Fifth Amendment's substantive due process guarantee"); *Avendano Hernandez v. Decker*, 450 F. Supp. 3d 443 (S.D.N.Y. 2020) (same); *Basank v. Decker*, 449 F. Supp. 3d 205 (S.D.N.Y. 2020) (same); *Barbecho v. Decker*, No. 20-CV-2821 (AJN), 2020 WL 1876328 (S.D.N.Y. Apr. 15, 2020) (same). Courts have further recognized that "due process, require[s] that we not pluck [a long-time resident] out of his life without a moment's notice, remove him from his family and community without a moment's notice." *Ragbir v. Sessions*, No. 18-CV- 236 (KBF), 2018 WL 623557, at *2 (S.D.N.Y. Jan. 29, 2018), *vacated and remanded sub nom. Ragbir v. Barr*, No. 18-1595, 2019 WL 6826008 (2d Cir. July 30,

2019). "[A]fter a life lived among us" due process requires that we avoid "unnecessar[y] cruel[ty]" and allow an individual subject to an order of removal the time to "organize his affairs" before being forced to depart. Id.

The danger to Mr. Pullara's health posed by ICE decision to redetain him and the abrupt termination of his OSUP cannot be overstated. He is midstream in an intensive series of medical appointments and tests to evaluate a critical spinal condition that he has been told could cause him to lose the use of his legs and will likely require a second spinal surgery. Ex. O, Feb. 21, 2025 Neurologist Progress Notes; Ex. A, Pullara Sr. Decl. ¶ 34, 50; Ex. D, Pullara Jr. Decl. ¶ 19. With regard to his cardiac issues, Dr. Taylor, a medical expert who conducted a holistic review of his Mr. Pullara's medical records, explained that Mr. Pullara is "highly dependent on consistent follow- up with his general cardiologist and electrophysiologist," Ex. C, Dr. Taylor Decl. ¶ 15, and "[a]ny disruption in his cardiac device would rapidly result in a life-threatening cardiac emergency." *Id.* Specifically, Dr. Taylor explained that an interruption in "access to his physicians" could create an "increased risk of thromboembolic events, including stroke." *Id.* Dr. Taylor ultimately concludes that "[s]udden removal from his physicians and the disruption of his care continuity could lead to a lack of necessary monitoring and interventions, potentially resulting in serious health deterioration or even life-threatening complications." *Id.* He further notes that a long transcontinental flight "[w]ithout prior medical consultation" would create "a high risk of exacerbating his conditions during the flight, potentially leading to an emergency with no access to necessary care." *Id.* at ¶ 16.

By exposing Mr. Pullara "to conditions that pose an unreasonable risk of serious damage to [his] future health." *Jabbar v. Fischer*, 683 F.3d 54, 57 (2d Cir. 2012), ICE has acted with "deliberate[] indifferen[ce]" violating his substantive due process. *Lewis*, 523 U.S. at 849–50.

F. Mr. Pullara's Abrupt Detention and Revocation of His OSUP Without Any Consideration of His Disability or Reasonable Accommodation Violates the Rehabilitation Act

Under § 504 of the Rehabilitation Act ("RA"), federal public entities must act affirmatively to accommodate qualified individuals with disabilities, in order to ensure that they have meaningful access to the programs, services, and benefits to which they are legally entitled. 29 U.S.C. § 794(a); 6 C.F.R. § 15.30. Mr. Pullara is unquestionably a "qualified individual with a disability," with multiple qualified disabilities that "substantially limit" major life activities. *See generally* 42 U.S.C. § 12102(1); *see also* Ex. D. Pullara Jr. Decl. ¶¶ 6, 20; Ex. C, Dr. Taylor Aff. ¶ 10. It is equally clear that, ICE is subject to the RA because it is an "executive agency" within the meaning of 29 U.S.C. § 794(a). *See* 5 U.S.C. § 551(a). Accordingly, Mr. Pullara RA claims turns on whether ICE has made "reasonable adjustments" to ensure meaningful participation in its programs. *Alexander v. Choate*, 469 U.S. 287, 301 n.21 (1985); *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016) (discussing the RA prohibition on an agency's "failure to make a reasonable accommodation").

Mr. Pullara has been in ICE's OSUP program and is entitled to participate in the programmatic benefit of an orderly departure, i.e., adequate time to arrange for continuity of medical care pending his deportation. The failure of ICE to provide for the reasonable accommodation of delayed revocation of OSUP for the brief time necessary to assess and stabilize Mr. Pullara's critical medical situation is a violation of the RA. The record is clear that ICE decision to revoke Mr. Pullara's OSUP was done without any consideration, or even knowledge, of his disability. Ex. D, Pullara Jr. Decl. ¶¶ 9-10. *Compare Velesaca v. Decker*, 458 F. Supp. 3d 224, 243 (S.D.N.Y. 2020) (acknowledging the applicability of RA to ICE detention but denying the claim because, unlike in this case, there was a "lack[of] evidence that ICE is in

fact disregarding disability in its custody determinations").

III. THE BALANCE OF EQUITIES IS DECIDELY IN FAVOR OF MR. PULLARA AND THE INJUNCTION WILL SERVE THE PUBLIC INTEREST

There is no reason why ICE needs to act so abruptly, without any reasonable process, in forcing Mr. Pullara's departure or redetaining him. ICE has already determined that he poses no danger or risk of flight. The grave medical consequences of ICE reckless abrupt reversal do nothing to serve the public interest.

IV. IN THE ALTERNATIVE, THE COURT SHOULD GRANT BAIL UNDER *MAPP v. RENO*, 241 F.3d 221, 226 (2d Cir. 2001)

Regardless of the Court's assessment of Petitioners' motion for a TRO and preliminary injunction, "federal courts have inherent authority to admit to bail individuals properly within their jurisdiction." *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001). This power "is a limited one, to be exercised in special cases only." *Id.* To obtain relief, "[t]he petitioner must demonstrate that the habeas petition raise[s] substantial claims and that extraordinary circumstances exist[] that make the grant of bail necessary to make the habeas remedy effective." *Id.* (second alteration in original) (quoting *Grune v. Coughlin*, 913 F.2d 41, 44 (2d Cir. 1990)).

Release under *Mapp* is appropriate only if "extraordinary circumstances" make protection from detention necessary to make the habeas remedy effective. 241 F.3d at 230. "Severe health issues" are "the prototypical . . . case of extraordinary circumstances that justify release pending adjudication of habeas." *Coronel v. Decker*, 449 F. Supp. 3d 274, 289 (S.D.N.Y. 2020) (Nathan, J.) (granting release under *Mapp* on an immigration habeas because of extraordinary medical concerns); *see also Avendano Hernandez v. Decker*, 450 F. Supp. 3d 443, 446–47 (S.D.N.Y. 2020) (same); *S.N.C. v. Sessions*, No. 18 CIV. 7680 (LGS), 2018 WL

6175902, at *7 (S.D.N.Y. Nov. 26, 2018) (same); *Kiadii v. Decker*, 423 F. Supp. 3d 18, 20–21 (S.D.N.Y. 2018) (same). The substantial claims and extraordinary medical issues in the present case are more than sufficient to justify release under *Mapp*.

V. THE COURT SHOULD COMPEL THE PRODUCTION OF THE RELEVANT ADMINISTRATIVE RECORDS AND GRANT LIMITED ADDITIONAL EXPEDITED DISCOVERY[10]

It is routine and essential for courts to order production of the administrative record that formed the basis of an agency decision challenged under the APA. *See, e.g., Rural & Migrant Ministry v. United States Env't Prot. Agency*, 565 F. Supp. 3d 578, 606 (S.D.N.Y. 2020); *Saleh v. Pompeo*, No. 17CV4574NGGCLP, 2018 WL 11424350, at *1 (E.D.N.Y. Aug. 8, 2018); *Batalla Vidal v. Duke*, No. 16CV4756NGGJO, 2017 WL 4480198, at *2 (E.D.N.Y. Oct. 3, 2017). This is because the Supreme Court has been clear that, an APA challenge "must be based upon the information that was before the agency at the time of its decision" *New York v. Salazar*, 701 F. Supp. 2d 224, 235 (N.D.N.Y. 2010), *aff'd,* No. 6:08-CV-644 LEK/DEP, 2011 WL 1938232 (N.D.N.Y. Mar. 8, 2011) (characterizing Supreme Court precedent); thus, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).

The APA challenge herein cannot be adjudicated without access to the requested administrative records upon which ICE decided to: (i) release Petitioner and place under an OSUP in 2023, (ii) reverse its 2023 decision to release Petitioner and place him on an OSUP and instead to redetain him if he did not depart by February 18, 2025 (as communicated to Petitioner's family

[10] Undersigned counsel wrote to Respondents' counsel mid-day on March 18, 2025, to request to meet and confer regarding the request for expedited discovery or, alternatively, to seek their position as to this request. As of this filing, we have received no response.

by Deportation Officer Love on February 5, 2025); and (iii) the administrative record upon which ICE makes its upcoming decision on Petitioner's pending administrative stay and related requests submitted to ICE on March 19, 2025.

A court may inquire beyond the administrative record "when there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers or where the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency's choice." *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (citing Cit*izens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 420 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977)); *see also Hill Dermaceuticals, Inc. v. Food & Drug Admin.*, 709 F.3d 44, 47 (D.C. Cir. 2013) (consultation of evidence outside administrative record appropriate "to challenge gross procedural deficiencies—such as where the administrative record itself is so deficient as to preclude effective review").

Here, limited additional discovery as is appropriate because, in addition, the "absence of formal administrative findings," *Nat'l Audubon Soc.*, 132 F.3d at 14, and the "gross procedural deficiencies," *Hill Dermaceuticals, Inc.*, 709 F.3d at 47, there is evidence in this case, as well in the public record, that political directives to the agency have created a new ICE policy which prevents it from conducting the individualized OSUP revocation determination, based on the enumerated circumstances specific factors, that are required by the regulations. *See* discussion *supra* at note 7. Put plainly no facts relevant to Mr. Pullara or to the criteria set forth in the regulatory scheme for OSUP decisions, 8 U.S.C. § 1231(a)(6); 8 C.F.R. § 241.4, have changed since his release in 2023 that could possible justify his redetention. The agency's active efforts to evade explaining their decision, Ex. D, Pullara Jr. Decl. ¶¶ 9-13, Ex. Nash Decl. ¶¶ 4-5,

together with the Congressional Research Service's conclusion that new policies issued since the inception of the new presidential administration have "terminate[d] a long-standing policy of releasing into the country certain aliens who are found by immigration authorities to pose no security threat or flight risk and whose continued detention is determined not to be in the public interest," *See also Recent White House Actions on Immigration*, Cong. Research Serv. (Feb. 10, 2025), are sufficient to warrant limited discovery.

Specifically, Petitioner seeks an order directing ICE to produce any new policies, procedures, directives, instructions, or communications that have been issued to ICE ERO, or any component or employee thereof, since January 20, 2025, which bear upon any of the three administrative decisions for which the administrative records are sought. In addition, Petitioner seeks the answer to a single interrogatory: How many individuals with final orders of removal and detained by ICE, have been released and placed on an OSUP, notwithstanding the availability of travel documents and a willing receiving country, since January 20, 2025?

CONCLUSION

For the foregoing reasons, the motion should be granted.

Respectfully Submitted,

Dated: March 19, 2025
New York, N.Y.

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