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.)
(Henry, M.J.)

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN OPPOSITION RESPONDENTS-DEFENDENTS' MOTION TO DISMISS

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INTRODUCTION

Petitioner-Plaintiff Mr. Vincenzo Pullara is a 71-year-old man suffering from a myriad of critical health conditions. Dkt. 19 at ¶ 1. He has lived in New York for half a century, since he was fourteen, when he legally entered the United States as a lawful permanent resident. *Id.* Mr. Pullara has a removal order based on a quarter-century-old conviction but, two years ago, ICE determined he was too sick to detain and deport and released him from detention to live out his remaining days under an order of supervision ("OSUP"). *Id.*

In reliance upon ICE's representation, Mr. Pullara and his family have devoted themselves to building a complex and lifesaving team of doctors and caregivers here in New York. *Id.* at ¶ 2. Unfortunately, since his release, his health has continued to deteriorate. *Id.* His doctors are currently treating him for multiple diagnosed medical conditions including severe systolic heart failure, chronic atrial fibrillation, chronic kidney disease, type 2 diabetes, and spinal cord compression, and he will likely soon need spinal surgery to preserve the use of his legs. *Id.* at ¶¶ 6, 40–45, 53–55, 62–70, 106

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 conditions, and without any process whatsoever, ICE abruptly decided to revoke his OSUP and redetain Mr. Pullara if he did not leave the country on his own within two weeks. *Id.* at ¶¶ 4, 56–61. Mr. Pullara is currently working diligently with a team of doctors to assess and stabilize him for travel to Italy. *Id.* at ¶¶ 62–70. ICE's abrupt and arbitrary reversal of its decision to release him on an OSUP puts him at imminent risk of losing the loss of his legs and of complete cardiac failure. *Id.* at ¶¶ 26, 68–71, 106. It likewise compromises his ability to pursue his pending claim related to U.S. citizenship. *Id.* at ¶¶ 7, 28–36, 78.

The instant proceeding was initiated on February 14, 2025, asserting claims that ICE's

actions: were arbitrary and capricious and not in accordance with the Administrative Procedure Act ("APA"); violated Mr. Pullara's procedural and substantive due process rights; and violated his rights under the Rehabilitation Act. *Id.* at ¶¶ 80–113. Respondents' instant motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) is overwhelmingly focused on persuading this Court it lacks the power to review ICE's unlawful behavior. However, these arguments are premised primarily on mischaracterizations of Mr. Pullara's claims and the relief he seeks and Respondents repeatedly ignore binding authority in favor of reliance upon unpublished cases and summary orders. For the reasons set forth below, this Court has jurisdiction and Mr. Pullara's claims are well pled.

BACKGROUND

Mr. Pullara's Removal Order, ICE Detention, and Release on OSUP

Mr. Pullara legally immigrated to the United States as a child but was ordered removed in 2004, losing his lawful permanent resident status as the result of a conviction for a murder that he steadfastly maintains he did not commit. Dkt. 19 at ¶¶ 24, 37. In May 2023, after serving twenty-six years in New York State prison, Mr. Pullara was transferred to ICE custody. *Id.* at ¶ 37. Once in ICE custody, he was immediately placed in the infirmary, where he stayed for the next four days, until his release. *Id.* at ¶ 38. During this period, he was unable to walk unassisted, his heart was incredibly weak, and his blood oxygen level continuously dipped. Eventually, ICE informed Mr. Pullara that he was "too sick to get on a plane" and that he would be released on an OSUP to live out his final years in New York. *Id.* at ¶¶ 2, 38–39.

Deteriorating Health and Compliance with OSUP

Over the last two years, since being released, Mr. Pullara has required no less than two surgeries (one cardiac, to implant life-sustaining cardiac device, and one spinal, to prevent paralysis) and an emergency cardiac procedure after experiencing cardiogenic shock, a life-

threatening condition with a very high risk of mortality (approximately fifty percent); had numerous trips to the emergency room with difficulty breathing and other life-threatening circumstances; seen countless doctors, for innumerable visits, who are collectively treating him for over two dozen diagnosed medical conditions including severe systolic heart failure, chronic atrial fibrillation, chronic kidney disease, type 2 diabetes, and spinal cord compression; and will likely soon need spinal surgery to preserve the use of his legs. Dkt. 19 at ¶¶ 6, 40–45, 53–55, 62–70, 106. The complexity and gravity of his medical condition cannot be overstated. Nevertheless, he has fully complied with his OSUP throughout.[1] *Id.* at ¶¶ 46–52.

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

On February 5, 2025, Mr. Pullara's new deportation officer ("DO") informed him (through his family) that ICE had decided to revoke his OSUP and would redetain him if he was still in the United States in two weeks. Dkt. 19 at ¶¶ 8, 27. The DO provided no explanation for ICE's abrupt reversal and, when pressed on the reason for the reversal, responded only with facts well known at the time of ICE's original decisions: that Mr. Pullara was a "felon" and "has a deportation order." *Id.* at ¶¶ 56–57. The DO confessed that she was completely unaware of Mr. Pullara's medical situation but, thereafter, actively avoided and failed entirely to respond to multiple attempts by Mr. Pullara's family, and later his attorneys, to seek clarification and an opportunity to provide critical information about his dire medical situation. *Id.* at ¶¶ 59–61. The decision to revoke Mr. Pullara's OSUP and redetain him was thus made without notice or any process that he could participate in whatsoever. *Id.* at ¶¶ 4, 56–61.

[1] Respondents improperly rely upon evidence outside the pleadings to intimate—though they never directly allege—that Mr. Pullara failed to comply with his OSUP by not submitting travel documents. MTD at 3–4. The Petition plainly alleges that Mr. Pullara "fully complied with every obligation of his OSUP," Dkt. 19. at ¶ 46, which must be accepted as true in evaluating Respondents motion to dismiss. *See* discussion *infra* pp. 5-6. Moreover, the Petition provides detailed allegations documenting his compliance with regard to submission of his passport, which are fully corroborated by the Gordan Declaration. *Compare* Dkt. 19 at ¶¶ 46–52 *with* Gordon Decl. at ¶¶ 16–18, Exs. F-G.

Filing of Habeas Petition-Complaint and Post-Filing Events

On February 14, 2025, just two business days before ICE's stated day for redetention, unable to obtain any response from Respondents, lacking any administrative mechanism to prevent his unlawful redetention, and with his "life and health at great risk should he be held in immigration detention," Mr. Pullara filed the instant action. Dkt. 19 at ¶¶ 70–71. On March 19, 2025, Mr. Pullara filed the operative First Amended Habeas Petition and Complaint (the "Petition"). Dkt. 19. The Petition in no way challenges the merits or legality of Mr. Pullara's underlying removal order. *Id.* at Prayer for Relief. Rather, the Petition seeks only to challenge ICE's unlawful attempt to redetain Mr. Pullara and the processless, arbitrary, capricious, and unlawful manner in which ICE decided to revoke Mr. Pullara's OSUP. *Id.*

Since being notified of ICE's decision to revoke his OSUP and redetain him, and continuing after the filing of the instant action, Petitioner has worked diligently to obtain the medical evaluations and treatment necessary to stabilize himself for relocation to Italy.[2] During this period, he has had more than eleven in-person office visits with his physicians and two telehealth appointments. Dkt. 22, Exs. O–T (reproducing progress notes and after-visit summaries from most recent appointments related to newly discovered spinal issue from Feb. 21, Mar. 7, Mar. 12, Mar. 14, and Mar. 17); *see also* Dkt. 22, Ex. D at ¶ 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, a CT scan of his spine, and an x-ray of his spine. Dkt. 22, Ex. D at ¶ 33. The effort is ongoing, but the medical evidence is clear that if he is forced to relocate to Italy without completing the

[2] Post-filing events are generally irrelevant to a motion to dismiss, but insofar as Respondents make assertions of such events and insofar as extraneous evidence may be considered in evaluating jurisdictional challenges, *see* discussion *infra* pp. 5-6, Petitioner briefly sets forth these facts.

necessary evaluations and stabilization, it could trigger life-threatening cardiac complications, stroke, or the loss of use of his legs. Dkt. 22, Ex. C at ¶¶ 15–18; Ex. A at ¶ 34; Ex. O.

Petitioner has also filed an administrative application for a stay of removal with ICE and a motion to reopen in the immigration court to pursue his claim related to citizenship. Both remain pending and, at the Court's urging, Respondents have agreed not to detain Mr. Pullara during the pendency of the administrative stay request or, if the application is denied, prior to a subsequently noticed interview. March 20, 2025, Tr. at 28–33.

ARGUMENT

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Mallet v. New York State Dep't of Corr. & Cmty. Supervision*, 126 F.4th 125, 131 (2d Cir. 2025) (internal quotation marks omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" but this standard is "not akin to a 'probability requirement.'" *Iqbal*, 556 U.S. at 678. On a "motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) . . . [courts] accept the allegations in the complaint as true and draw all reasonable inferences in [plaintiffs'] favor." *Dieujuste v. Sin*, 125 F.4th 397, 399 (2d Cir. 2025); *see also Sweet v. Sheahan*, 235 F.3d 80, 83 (2d Cir. 2000).

In considering a 12(b)(1) motion, "a district court may consider evidence outside the pleadings," *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008), but "when matters outside the pleadings are presented in response to a 12(b)(6) motion," a district court must either "exclude the additional material and decide the motion on the complaint alone" or "convert the motion to one for summary judgment under Fed. R. Civ. P. 56 and afford all parties the opportunity

to present supporting material." *Fonte v. Bd. of Managers of Cont'l Towers Condo.*, 848 F.2d 24, 25 (2d Cir.1988); *see also* Fed. R. Civ. P. 12(d).

Accordingly, the Gordon Declaration (and accompanying exhibits) submitted with Respondents' motion may not be considered in adjudicating any 12(b)(6) arguments that the Petition fails to state a claim. In regard to Respondents' 12(b)(1) motion, the Court may consider such evidence. However, to the extent the Court perceives any factual dispute between the Petition and the extraneous evidence, the party asserting jurisdiction must "be permitted discovery of facts demonstrating jurisdiction, at least where the facts are peculiarly within the knowledge of the opposing party." *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986).[3]

As is their recent pattern in immigration litigation across the country, Respondents devote the majority of their motion to attempting to convince the Court it lacks the power to review ICE's unlawful actions. In this regard, they deploy a "throw everything against the wall and see what sticks" strategy, arguing that the Court lacks jurisdiction because the action is not ripe, because various provisions of the Immigration and Nationality Act ("INA") strip the Court of jurisdiction, because Mr. Pullara does not meet the habeas custody requirement, because Mr. Pullara did not exhaust administrative remedies, and because the Rehabilitation Act claim is jurisdictionally barred. In regard to the merits of the APA claims, Respondents do not contest Mr. Pullara's claim that they acted arbitrarily, capriciously, and contrary to law. Instead, their sole argument is that ICE has taken no final agency action required for APA review. Respondents thereafter summarily

[3] For example, Gordon asserts Mr. Pullara was "cleared for travel," Gordon Decl. at ¶ 13, but the Petition alleges that "ICE decided in 2023 that he was too sick to get on a plane." Dkt. 19 at ¶ 56. Elsewhere, Gordon asserts "Pullara's OSUP remains in effect," Gordon Decl. at ¶ 21 but the Petition alleges that ICE made a "decision[to] . . . revoke his OSUP," Dkt. 19 at ¶¶ 8, 27. These assertions can be read in harmony—if, for example, Mr. Pullara was first cleared for travel and later determined to be too sick for travel and if ICE decided to revoke his OSUP but had not yet done so. However, to the extent the Court perceives any inconsistency between the extraneous evidence and the Petition that is material to jurisdiction, Petitioner respectfully requests leave to file a motion for jurisdictional discovery.

argue that Mr. Pullara's rights under the due process clause and Rehabilitation Act have not been violated. For the reasons stated below, Respondents' arguments are meritless.

I. ALL OF MR. PULLARA'S CLAIMS ARE JUSTICIABLE

A. All Claims Are Ripe for Adjudication

Respondents' argument that the action should be dismissed as unripe fails for two reasons. First, it ignores the uncontroverted allegation establishing the imminence of Mr. Pullara's redetention at the time of filing.[4] *See generally* MTD. Second, it is premised on a legally flawed argument related to their *post-filing* temporary agreement to refrain from detention, which has no bearing on ripeness. *See* MTD at 8-9, 13, 16.[5]

"[T]o say a plaintiff's claim is constitutionally unripe is to say the plaintiff's claimed injury, if any, is not 'actual or imminent,' but instead 'conjectural or hypothetical.'" *See Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "[A] person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 435 (2021). "[I]t is not necessary that petitioner first expose himself to actual arrest . . . to be entitled to challenge" a violation of his "constitutional rights" that would flow from such arrest. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Accordingly, "[d]etermining whether administrative action is ripe for judicial review requires [courts] to evaluate (1) the fitness of the issues for judicial

[4] The matter is likewise ripe because ICE had already decided to revoke Mr. Pullara's OSUP. Dkt. 19 at ¶¶ 8, 27, 57, 84, 87. Whether it was revoked at the time of that decision or would imminently have been revoked on February 12, when he was set to be redetained, Dkt. 19 at ¶¶ 8, 27, is immaterial. Either way, the imminence of the injury is apparent.

[5] To the extent Respondents argue that the action is premature because Petitioner should have exhausted the administrative remedies that he now pursues (the motion to reopen and the application for an administrative stay) prior to filing, this argument likewise fails. *See* discussion *infra* Section I.D.

decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003).

The uncontroverted allegation in the Petition is that on February 5, 2025, without any prior process, notice, or knowledge of Mr. Pullara's current medical condition, ICE informed the Petitioner (through his family) that it would redetain him if he did not leave the country within two weeks. Dkt. 19 at ¶¶ 27, 56-57. In the days that followed, efforts by Petitioner's family and then counsel to seek and provide additional information were rebuffed by the agency. Dkt. 19 at ¶¶ 58-61. On February 14, 2025, just two business days before ICE's stated day for redetention, unable to obtain any response from Respondents, lacking any administrative mechanism to prevent his unlawful redetention, and with his "life and health at great risk should he be held in immigration detention," Mr. Pullara filed the instant action. Dkt. 19 at ¶¶ 70–71. This is precisely the type of "imminent and substantial" future harm that is sufficient to confer standing and presents a ripe controversy for adjudication. *TransUnion LLC*, 594 U.S. at 435; *see Torres-Jurado v. Biden*, No. 19-CIV-3595, 2023 WL 7130898, at *1-2 (S.D.N.Y. Oct. 29, 2023) (exercising jurisdiction based on ICE's stated decision to detain petitioner if he did not self-deport).

Neither the pending application for an administrative stay nor the pending motion to reopen Mr. Pullara's removal proceedings can provide any protection against imminent redetention. *See* 8 C.F.R. §§ 241.6(a), 1003.23(b)(1)(v); 8 U.S.C. § 1231; March 20, 2025, Tr. at 8. ("COURT: Is there a guarantee that they are not re-detained, or? MR. SCHACHNER: Well, again, you know, [you] never can tell what might happen."). Moreover, even if granted, a stay of removal (from either ICE or the immigration court) and a motion to reopen only forestall removal; they do not divest ICE of its authority to detain an individual. *Id.*; *see, e.g., Jack v. Decker*, 2022 WL 4085749 (SDNY 2022) (habeas petition of individual continued in detention after the grant of

his motion to reopen); *Mitchell v. Wolf*, 2021 WL 12326804 (W.D.N.Y. Nov. 19, 2021) (habeas petition of individual with stay or removal challenging ICE detention). It was only post-filing, and at the urging of the Court, that ICE agreed to temporarily forestall redetaining Mr. Pullara during the pendency of the application for the administrative stay. March 20, 2025, Tr. at 8–17, 30–33.[6]

This temporary voluntary cessation of ICE's plan to unlawfully redetain Mr. Pullara does not deprive this Court of jurisdiction. To establish that voluntary post-filing actions obviate the need for court-ordered relief (which relates only to mootness not ripeness), the government bears a "formidable burden," *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 170 (2000), to show "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," *id.* at 190; *see also Eng v. Smith*, 849 F.2d 80, 83 (2d Cir. 1988). Respondents, who retain the right to redetain Mr. Pullara, cannot meet this burden. MTD at p. 23.

B. The INA Does Not Deprive this Court of Jurisdiction

Respondents next argue that two provisions of 8 U.S.C. § 1252 deprive this Court of jurisdiction to review the legality of ICE's imminent redetention of Mr. Pullara and revocation of his OSUP. MTD at 9-17. These arguments, however, are premised on a mischaracterization of the relief sought by Mr. Pullara—he challenges his imminent detention and the manner in which his OSUP was revoked, not the validity of his removal order nor ICE's discretionary decision to execute it. Moreover, Respondents' jurisdiction-stripping arguments simply cannot be reconciled with binding authority, which plainly establish this Court's jurisdiction to determine the lawfulness of detention and of the manner in which administrative grants of protection from removal are revoked. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (rejecting § 1252 jurisdictional

[6] The cases upon which Respondents rely are not about ripeness. MTD at 9. They involve cases challenging physical custody that were rendered moot when the petitioner was released. *See* MTD at p. 9 (citing *Chocho v. Shanahan*, 308 F. Supp. 3d 772 (S.D.N.Y. 2018); *Celestine v. Decker*, 2019 WL 7946027, at *2 (S.D.N.Y. July 22, 2019)).

challenge to the lawfulness of post-removal order of detention claim); *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1, 19 (2020) (rejecting § 1252 jurisdictional challenge on claim related to the manner in which administrative protection from removal was revoked).

In reviewing Respondents' jurisdiction-stripping arguments, the Court must be "guided by longstanding principles . . . requiring Congress to speak clearly and specifically when it wishes to deprive the federal courts of jurisdiction" because "in the INA context, the Supreme Court has declared that we should 'take account . . . of the presumption favoring interpretations of statutes [to] allow judicial review . . . absent clear statement.'" *Ozturk v. Hyde*, 136 F.4th 382, 394 (2d Cir. 2025) (alteration in original) (collecting and quoting cases). Respondents' arguments that 8 U.S.C. § 1252(a)(5), (b)(9), and (g) strip this Court of jurisdiction are based on overbroad readings of these provisions that have been repeatedly rejected by the Supreme Court and the Second Circuit.

1. Section 1252(b)(9) Does Not Deprive this Court of Jurisdiction

Section 1252(b)(9) provides that "[j]udicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien . . . shall be available only in" a petition for review to a circuit court. 8 U.S.C. § 1252(b)(9); *see also id.* § 1252(a)(5). The Supreme Court has explained that this provision is not a jurisdiction-stripping provision but rather a "zipper clause" that "channels" certain claims away from the district courts to the circuit courts. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482–83 (1999). The Second Circuit has defined the category of such claims (where jurisdiction lays only at the circuit courts under § 1252(b)(9)) as "claims that may be brought in removal proceedings." *Calcano-Martinez v. INS*, 232 F.3d 328, 340 (2d Cir. 2000). That is why the Supreme Court has cautioned courts against reading § 1252(b)(9) to allow "cramming judicial review" of issues that cannot be raised to the immigration courts in removal proceedings into petitions for review, because such a reading "would be absurd" and would make such issues "effectively

unreviewable." *Jennings v. Rodriguez*, 583 U.S. 281, 293 (2018). Thus § 1252(b)(9)'s sole purpose and effect is to require that all claims that can be raised in a removal proceeding, may only be raised there, and thereafter appealed to the circuit court. *Id.* at 294.

The Second Circuit has further explained that § 1252(b)(9) not only prevents district courts from "entertaining . . . a direct challenge to a removal order" but also "applies equally to preclude . . . an indirect challenge." *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011). However, as the *Delgado* court explained, "a suit brought against immigration authorities is not *per se* a challenge to a removal order" and, therefore, "whether the district court has jurisdiction will turn on the substance of relief that a plaintiff is seeking." *Id.* The key inquiry is thus whether the relief sought would "*automatically* render her removal order invalid," in which case jurisdiction is only available in the circuit court. *Barros Anguisaca v. Decker*, 393 F. Supp. 3d 344, 349 (S.D.N.Y. 2019) (emphasis added) (holding habeas claim barred because petitioner sought a declaration that removal order was legally defective). *Compare Ceesay v. Kurzdorfer*, --- F. Supp. 3d ---, 2025 WL 1284720, at *9 (W.D.N.Y. May 2, 2025) (holding challenge to manner of revocation of OSUP was not an indirect challenge to removal under *Delgado*).

Mr. Pullara's claims are not barred by § 1252(b)(9) because they could not have been "brought in removal proceedings," *Calcano-Martinez*, 232 F.3d at 340, and any attempt to "cram[] judicial review" of his claims into petitions for review "would be absurd" and would impermissibly make them "effectively unreviewable," *Jennings*, 583 U.S. at 293. Respondents' argument to the contrary is premised on a mischaracterization of the relief sought. Mr. Pullara plainly is not "seeking a stay of removal," MTD at 11, but rather is challenging his imminent redetention and the unlawful manner in which his OSUP is being revoked. Dkt. 19 at Prayer for Relief. A holding that Respondents must comply with due process in any decision to redetain Mr. Pullara or to revoke

his OSUP in no way goes to the merits of his removal order and neither issue could be raised in his removal proceedings. That is why the Supreme Court has made clear that neither of these challenges are barred by § 1252(b)(9). *See Regents*, 591 U.S. at 19; *Jennings*, 583 U.S. at 293.[7]

In *Jennings*, the Supreme Court flatly rejected the argument that § 1252(b)(9) bars challenges, like Mr. Pullara's, to immigration detention, characterizing the argument as an "absurd," "'uncritical literalism'" that "'no sensible person'" would advance. 583 U.S. at 292–95 (quoting *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 319 (2016)). The Second Circuit in *Delgado* likewise recognized that districts courts have jurisdiction over petitions that challenge an "arrest and detention, *not* the underlying administrative order of removal." 643 F.3d at 55 (internal quotation marks and citation omitted); *see also Ceesay*, 2025 WL 1284720, at *8 (rejecting jurisdictional challenges under §§ 1252(b)(9), 1252(g) because "courts routinely hear habeas petitions filed by individuals subject to a final order of removal"); *Ahmed v. Freden*, 744 F. Supp. 3d 259, 264 (W.D.N.Y. 2024) (noting that while "[d]istrict courts do not have jurisdiction over challenges to the legality of final orders of deportation, exclusion, and removal," they retain "jurisdiction to hear immigration-related detention cases"); *Torres-Jurado v. Biden*, 2023 WL 7130898, at *3 (S.D.N.Y. Oct. 29, 2023) ("Defendants' reading of § 1252(b)(9) would permit ICE to arrest, detain, and remove Plaintiff without any statutory or constitutional constraints. This is the precise result that the Supreme Court sought to avoid in *Jennings*.").[8]

Moreover, the Supreme Court's decision in *Regents*—wherein it held that a challenge to the manner in which deferred action (DACA) protections against deportation were revoked was

[7] Moreover, the Supreme Court, as recently as last month, specifically held that courts have jurisdiction in habeas proceedings to enjoin removal where the claim does not go to the merits of a removal order. *A.A.R.P. v. Trump*, 145 S. Ct. 1364, 1368 (2025).

[8] Any interpretation of § 1252(b)(9) that bars Mr. Pullara's challenges to imminent detention would not only be inconsistent with these binding precedents but would also violate the cannon of statutory interpretation requiring this Court to avoid the serious constitutional questions that would then arise under the Suspension Clause. *See* discussion *infra* Section I.C; *see generally* U.S. Const. art. 1, § 9, cl. 2.

not barred by § 1252(b)(9)—dictates that Mr. Pullara's challenge to the manner in which his OSUP was revoked is likewise not barred by § 1252(b)(9). 591 U.S at 19 (holding that § 1252(b)(9) "is certainly not a bar" because "the parties are not challenging any removal proceedings"). The revocation of "deferred action" in *Regents* is materially indistinguishable from the revocation of OSUP here. Both are administrative forms of protection from removal. *Compare* 8 C.F.R. § 241.4 *with* 8 C.F.R. §§ 236.21–236.23. Both can be granted to individuals, like Mr. Pullara, with final orders of removal. *Id.* And the revocation of both is entirely unrelated to the merits of the underlying removal order, cannot be challenged in such proceedings, and is thus unreviewable on a petition for review to the courts of appeals. *Id.*

As one district court in this circuit recently explained, a petition arguing that "detention is unlawful because the government improperly revoked [an] order of supervision" is not barred by § 1252(b)(9) because it "does not ask this Court to rule—even indirectly—on the lawfulness of [a] removal order." *Ceesay*, 2025 WL 1284720, at *9; *see also Calderon v. Sessions*, 330 F. Supp. 3d 944, 955–56 (S.D.N.Y. 2018) (holding that § 1252(b)(9) does not bar habeas jurisdiction over claims that do not challenge the merits of a final order of removal); *Torres-Jurado*, 2023 WL 7130898, at *3 (same); *S.N.C. v. Sessions*, No. 18 Civ. 7680, 2018 WL 6175902, at *4 (S.D.N.Y. Nov. 26, 2018) (same);; *You v. Nielsen*, 321 F. Supp. 3d 451, 455–59 (S.D.N.Y. 2018) (same).[9]

[9] The cases Respondents rely upon to argue that § 1252(b)(9) strips this Court of jurisdiction are unhelpful because they stand for the uncontroversial proposition that direct challenges to removal must be brought to the circuit, *see, e.g., Barros Anguisaca*, 393 F. Supp. 3d at 350, *Scott v. Napolitano*, 618 F. Supp. 2d 186, 190 (E.D.N.Y. 2009); *Joseph v. U.S. Att'y Gen.*, No. 17-CV-5008, 2017 WL 6001776, at *1 (E.D.N.Y. Dec. 4, 2017), *Akhuemokhan v. Holder*, No. 12-CV-1181, 2013 WL 6913170, at *2 (E.D.N.Y. Dec. 30, 2013), *Royale v. INS*, No. 10-CV-2105, 2010 WL 2348651, at *1 (E.D.N.Y. June 9, 2010), or are distinguishable because they involved petitioners seeking a legal process collateral to removal proceedings that would grant status necessarily nullifying a removal order, *see, e.g., Delgado*, 643 F.3d 52, 54 (affirming dismissal of mandamus seeking to force USCIS to grant I-212 application for readmission); *Singh v. USCIS*, 878 F.3d 441, 445–46 (2d Cir. 2017) (affirming dismissal of APA action seeking to force USCIS to adjudicate adjustment application); *Noor v. Homan*, No. 17-CV-1558, 2018 WL 1313233, at *3–4 (E.D.N.Y. Feb. 27, 2018) (dismissing APA action asking court to directly grant refugee or LPR status). Respondents place considerable weight on *Asylum Seeker Advoc. Project v. Barr*, 409 F. Supp. 3d 221 (S.D.N.Y. 2019). But this case too stands for the unremarkable and inapplicable proposition that issues that can be raised in removal proceedings and appealed to

2. Section 1252(g) Does Not Deprive this Court of Jurisdiction

Section 1252(g) directs that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. § 1252(g). Despite being repeatedly rebuked by the Supreme Court and Second Circuit, the government continues to "dramatically overstate[] the reach of § 1252(g)." *Ozturk*, 136 F.4th at 396. As the Second Circuit has recently explained:

> Section 1252(g) is directed "against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." . . . 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). . . . The Supreme Court has already "rejected as 'implausible' the Government's suggestion that § 1252(g) covers 'all claims arising from deportation proceedings' or imposes 'a general jurisdictional limitation.'"

Id. at 396–97 (quoting *Reno,* 525 U.S. at 485 n.9; then quoting *Regents*, 591 U.S. at 19); *see Duamutef v. I.N.S.*, 386 F.3d 172, 181 (2d Cir. 2004) (observing that the Supreme Court "expressly requires that we construe § 1252(g) narrowly"). Put plainly, as applied here, § 1252(g) bars review of only one issue: the prosecutorial discretion determination of whether to execute a removal order.

Applying this principle, courts have consistently held that § 1252(g) plainly "does not preclude jurisdiction over challenges to the legality of [a noncitizen's] detention." *Ozturk*, 136 F.4th at 397 (internal quotation marks and citation omitted); *see Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (rejecting jurisdictional challenge on claim related to lawfulness of post-removal order of detention); *see also Ceesay*, 2025 WL 1284720, at *8; *Michalski v. Decker*, 279 F. Supp. 3d

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the circuit—in *Asylum Seeker* a claim related to a deficiency in the charging documents in such proceedings—may not be raised in habeas proceedings. *Id.* at 225 ("Plaintiffs' Complaint . . . [is] littered with assertions that the challenged *in absentia* removal orders . . . 'were not properly entered,' or are otherwise 'unlawful.' . . . [T]heir 'ultimate goal' is to challenge the lawfulness of the removal orders themselves."). The other unpublished authority that Respondents rely upon are inconsistent with binding authority and with the numerous other district court decisions in this circuit cited above.

487, 495 (S.D.N.Y. 2018). As with § 1252(b)(9), the Supreme Court has also made clear that § 1252(g) should not be read broadly to deprive courts of jurisdiction to review the unlawful manner in which administrative protections against removal are revoked. *See Regents*, 591 U.S. at 19; *see also Ceesay*, 2025 WL 1284720, at *8; *Torres-Jurado*, 2023 WL 7130898, at *2–3.

These holdings flow from the general principle that § 1252(g) only strips courts of jurisdiction to review the prosecutorial discretionary decision of *whether* to execute a removal order; it does not deprive them of jurisdiction to review the legality of the manner of *how* ICE seeks to execute such orders. *See Ceesay*, 2025 WL 1284720, at *8 ("[C]ourts in this circuit have distinguished between challenges to ICE's discretion to execute a removal order, which are barred, and challenges to the manner in which ICE executes the removal order, which are not."); *Ragbir v. Sessions*, No. 18-CV-236, 2018 WL 623557, at *2 (S.D.N.Y. Jan. 29, 2018) (permitting a challenge to the "manner in which deportation was and is to be effected"), *vacated on other grounds by Ragbir v. Barr*, No. 18-1595, 2019 WL 6826008 (2d Cir. July 30, 2019); *Chhoeun v. Marin*, No. 17-CV-1898, 2018 WL 1941756, at *4 (C.D. Cal. Mar. 26, 2018) (holding that § 1252(g) does not restrict judicial review of "the manner in which [petitioners] were re-detained" after being released); *You v. Nielsen*, 321 F. Supp. 3d 451, 457 (S.D.N.Y. 2018) ("That courts can review 'how' Respondents exercise their discretion is, therefore, an uncontroversial proposition"). As one court explained it, ICE can "remove Petitioner at their discretion. But they cannot do so in any manner they please. Respondents could not, for example, execute a removal by dropping Petitioner on a life raft in the middle of the Atlantic Ocean." *You*, 321 F. Supp. 3d at 457.

Here, Mr. Pullara's Petition plainly does not challenge ICE's prosecutorial discretion to execute his removal order, nor does it seek a stay or injunction against the execution of such

order.[10] Dkt. 19 at Prayer for Relief. He challenges only the legality of ICE's attempt to redetain him and the manner in which ICE decided to revoke his OSUP. Moreover, he has been clear that, if so ordered, he will comply with ICE's order that he depart on his own. Dkt. 19 at ¶¶ 85–86; *see also* Dkt. 17, Ex. A at ¶ 57. Accordingly, § 1252(g) virtually never bars challenges to detention, and it most certainly does not bar a challenge to detention where, as here, such detention is not even a necessary part of the removal process. *Zadvydas*, 533 U.S. at 688; *Ozturk*, 136 F.4th at 397.

Moreover, the Supreme Court's decision in *Regents*—holding that a challenge to the manner in which DACA protections against deportation were revoked was not barred by § 1252(g)—dictates that Mr. Pullara's challenge to the manner in which his OSUP was revoked is likewise not barred by § 1252(g). 591 U.S. at 19 ("The rescission, which revokes a deferred action program with associated benefits, is not a decision to 'commence proceedings,' much less to 'adjudicate' a case or 'execute' a removal order."). As set forth *supra* Section I.B.1, the revocation of "deferred action" in *Regents* is materially indistinguishable from the revocation of OSUP here. Both can be revoked when ICE decides to exercise its prosecutorial discretion authority to execute a removal order, or for reasons unrelated to removal. In either circumstance, the decision to revoke OSUP is not one of the three discrete actions covered by § 1252(g). *Regents*, 591 U.S. at 19; *see also Torres-Jurado*, 2023 WL 7130898, at *3 ("Plaintiff does not challenge the validity of his final removal order or ICE's discretion to execute the removal order [and] does not dispute the wisdom of ICE's decision to remove him, but challenges ICE's legal authority to revoke the ICE Stay

[10] Respondents argue that § 1252(g) categorically deprives habeas courts of jurisdiction to issues stays of removal. MTD at 11. This argument, however, cannot be reconciled with recent Supreme Court precedent,m *A.A.R.P.*, 145 S. Ct. at 1368, and is at odds with the plain language of the statute, which sets forth the standard for such stays in the section immediately preceding § 1252(g). *See* 8 U.S.C. § 1252(f)(2) ("[N]o court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law."); *see also Nken v. Holder*, 556 U.S. 418 (2009) (rejecting interpretation of § 1252(f)(2) as applicable to circuit court stays pending resolution of petition for review). However, since Petitioner does not seek a stay, the Court need not engage with the deficiencies of Respondents' argument.

without process. Accordingly, his request is not barred by § 1252(g)." (internal quotations and citations omitted).

Startlingly, and tellingly, Respondents' argument to the contrary—that Petitioners' claims are barred by § 1252(g)—are not supported by even a single citation to binding authority discussing § 1252(g). MTD at 14–17. Nor do Respondents address the binding authority Petitioner has explicitly relied upon. Dkt. 17 at 2–3. Instead, they rely almost entirely on unpublished and easily distinguishable cases.[11]

C. In the Alternative, this Court Has Habeas Jurisdiction under the Suspension Clause

The Supreme Court has been clear that challenges to unlawful immigration detention and to removal are both part of the core writ of habeas corpus protected by the Constitution. *Trump v. J.G.G.*, 145 S. Ct. 1003, 1005 (2025); *see also INA v. St. Cyr*, 533 U.S. 289, 301 (2001); s*ee generally* U.S. Const. art. 1, § 9, cl. 2. Accordingly, the jurisdictional provisions discussed *infra* must be interpreted, if possible, to avoid barring challenges to the lawfulness of either Mr. Pullara's detention or removal. *Calcano-Martinez,* 232 F.3d at 340–41 (noting the imperative to interpret the INA's jurisdiction-stripping provisions, when possible to preserve habeas jurisdiction and "avoid the serious constitutional question that a repeal of habeas jurisdiction . . . would raise"). Assuming, arguendo, that no such interpretation is possible, then the Suspension Clause provides an alternative source of subject matter jurisdiction for this Court. *See Ragbir v. Homan*, 923 F.3d 53, 73–78 (2d Cir. 2019), *cert. granted, judgment vacated sub nom. on other grounds, Pham v. Ragbir*, 141 S. Ct. 227 (2020).

[11] The cases Respondents cite wherein courts found claims to be barred by § 1252(g) all involved parties, who, unlike Mr. Pullara, sought stays of removal, challenged the prosecutorial discretion decision whether to execute a removal order, and/or did not challenge detention nor the manner in which administrative protections were revoked. *See* MTD 14–17.

Respondents attempt to avoid such jurisdiction by arguing that Mr. Pullara is not "presently being detained by ICE." MTD at 18. This argument, however, is foreclosed by longstanding binding precedent providing "that an alien who has been released on bail from [immigration] detention but is subject to a final order of removal is in [immigration] custody" for habeas jurisdictional purposes. *Simmonds v. INS*, 326 F.3d 351, 354–56 (2d Cir. 2003); s*ee also Hensley v. Mun. Court, San Jose Milpitas Judicial Dist.*, 411 U.S. 345, 350–52 (1973).[12]

D. There Are No Adequate Administrative Procedures that Petitioner Could Have Exhausted

In Respondents' final attempt to avoid adjudication of the merits of the Petition, they argue that Mr. Pullara has failed to exhaust administrative remedies. Again, Respondents' effort fails because there were no adequate administrative remedies to exhaust, pursuit of inadequate administrative remedies would have caused irreparable harm, and the Petition raises substantial constitutional questions that do not require exhaustion. The prudential exhaustion inquiry applicable in this case is not jurisdictional, *see* discussion *infra*, and thus the legal standards governing a Fed. R. Civ. P. 12(b)(6) motion are applicable. *See* discussion *supra* pp. 5-6.

Generally, "[t]here is no statutory requirement that a habeas petitioner exhaust his administrative remedies before challenging his immigration detention." *Araujo Cortes v. Shanahan*, 35 F. Supp. 3d 533, 538 (S.D.N.Y. 2014). Thus, any exhaustion requirement "is discretionary and includes a number of exceptions." *Beharry v. Ashcroft*, 329 F.3d 51, 56 (2d Cir. 2003), *as amended* (July 24, 2003). As relevant here, exhaustion of administrative remedies is generally not required when "(1) available remedies provide no genuine opportunity for adequate relief; (2) irreparable injury may occur without immediate judicial relief; . . . and [(3)] in certain

[12] The cases Respondents cite, where a habeas petition was dismissed because an individual was not in custody, are primarily cases where a petition was rendered moot because the challenged physical custody had ended, and did not involve challenges to the jurisdictional habeas custody requirement. *See* MTD 18–19.

instances, [when] a plaintiff has raised a substantial constitutional question." *Id.* at 62 (internal quotation marks and citations omitted).

The two administrative processes that Respondents argue Petitioner should have exhausted involved seeking a stay of removal from ICE and from the immigration court. MTD at 12. However, as Respondents have conceded, neither the pendency, nor even a grant of such applications would provide Mr. Pullara with the protection from detention he seeks through this petition. *See* discussion *supra* Section I.A. Put simply, a stay of removal (from either ICE or the immigration court) was not an adequate remedy because it would not prevent ICE from arresting and detaining an individual with a final order of removal.[13] Moreover, given the "unreasonable . . . timeframe" of pre-filing events and the agency's conduct during the time, it was likely that any attempt to pursue such remedies would have exposed Mr. Pullara to the irreparable harms of detention and the inadequate medical care this extremely ill man would receive in such detention. *McCarthy v. Madigan*, 503 U.S. 140, 147 (1992); *see* Dkt. 19 at ¶¶ 56-66, 70–72; *see also Hardy v. Fischer*, 701 F. Supp. 2d 614, 619 (S.D.N.Y. 2010) (stating that threat of unlawful detention and reimprisonment constitute "quintessential irreparable harm"). Finally, the Petition plainly raises "substantial constitutional question[s]" that also militate against any exhaustion requirement. *Beharry*, 329 F.3d at 62; *see* discussion *infra* Sections III, IV. As many other courts in this circuit have held, immigration petitions like this do not require administrative exhaustion. *See, e.g.*, *Davis v. Garland*, 708 F. Supp. 3d 283, 290 (W.D.N.Y. 2023); *Alfaro v. Barr*, 426 F. Supp. 3d 6, 13 (W.D.N.Y. 2019); *O.F.C. v. Decker*, No. 22-CIV-2255, 2022 WL 4448728, at *8

[13] Respondents' present agreement not to detain Mr. Pullara during the pendency of the stay application, extracted only at the urging of this Court, March 20, 2025, Tr. at 8–17, 30–33, is not relevant to the exhaustion inquiry because it was not a remedy available through administrative processes.

(S.D.N.Y. Sept. 12, 2022); *Mathurin v. Barr*, No. 6:19-CV-06885, 2020 WL 9257062, at *4 (W.D.N.Y. Apr. 15, 2020).

II. PETITIONER'S APA CLAIM IS WELL PLED

Respondents notably do *not* challenge Mr. Pullara's assertions that, in deciding to revoke his OSUP and redetain him, they violated the APA by acting arbitrarily and capriciously, and not in accordance with law.[14] Dkt. 19 ¶¶ 81–89; *see generally* 5 U.S.C. § 706(2)(A). The sole basis upon which Respondents seek to dismiss these claims is their assertion that the APA's "final agency action" requirement has not been satisfied. MTD at 19–20.[15] As set forth below, the challenged agency action here—the decision to revoke Mr. Pullara's OSUP and redetain him—easily satisfies the controlling standard for "final agency action." Respondents' arguments to the contrary are (again) based on a mischaracterization of the allegations in the Petition and rehash their flawed ripeness argument. *See* discussion *supra* at Section I.A.

"There is a strong presumption favoring judicial review of administrative action." *Salazar v. King*, 822 F.3d 61, 75 (2d Cir. 2016). Accordingly, "[i]n the absence of an express statutory prohibition, the agency 'bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [its] decision.'" *Id.* (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)). Agency action is deemed sufficiently final for judicial

[14] Moreover, any such challenge would be premature insofar as the Petitioner and Respondents would require access to the administrative record underlying such decisions prior to adjudication. *Clifford v. U.S. Coast Guard*, 915 F. Supp. 2d 299, 307 (E.D.N.Y.) ("[W]ith respect to an APA claim, whether the defendant styles the motion under Rule 12 or Rule 56 . . . it is clear that the court reviewing the agency decision can consider the administrative record and generally should confine its review to such record."), *aff'd,* 548 F. App'x. 23 (2d Cir. 2013).

[15] Respondents are unclear whether they so move under Fed. R. Civ. P. 12(b)(1) or 12(b)(6), noting only that "it is an 'open question' if finality is a jurisdictional requirement." MTD at 19 n.6. While Respondents correctly observe that the issue of whether the APA's "final agency action" requirement is jurisdictional has not been conclusively resolved in this circuit, the Second Circuit has suggested (and other circuits have squarely held) that the Supreme Court's decision in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514–15 (2006), dictates that "final agency action" is not a jurisdictional issue. *Sharkey v. Quarantillo*, 541 F.3d 75, 87 n.10 (2d Cir. 2008) (citing cases so holding from D.C, First, Fourth, and Sixth circuits). Accordingly, the Court should adjudicate Respondents' challenge under the standards for Fed. R. Civ. P. 12(b)(6) motions.

review under the APA if the action: (1) "mark[s] the consummation of the agency's decisionmaking process," and (2) is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quoting *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). "At bottom, the finality inquiry is a 'pragmatic' one." *See Doe v. U.S. Immigr. & Customs Enf't*, 490 F. Supp. 3d 672, 687 (S.D.N.Y. 2020) (quoting *FTC v. Standard Oil of Cal.*, 449 U.S. 232, 239 (1980)). Agency action that has a "substantial practical impact" is of "sufficient legal force" to constitute final agency action and thus warrant judicial review. *Paskar v. U.S. Dep't of Transp.*, 714 F.3d 90, 98 (2d Cir. 2013); *see also Salazar*, 822 F.3d at 82–84. Moreover, the finality of agency action is not necessarily undermined by the "possibility of further proceedings in the agency on related issues." *Sharkey v. Quarantillo*, 541 F.3d 75, 89 (2d Cir. 2008) (citing *Bell v. New Jersey*, 461 U.S. 773, 779–80 (1983)) (internal quotation marks omitted).

Respondents egregiously mischaracterize the Petition in asserting that "Petitioner does not allege that ICE has made a final decision to revoke his OSUP or to detain him." MTD at 20. In fact, the Petition plainly and repeatedly alleges precisely that. *See* Dkt. 19 ¶ 8 ("ICE abruptly reversed its prior determination and informed Mr. Pullara that it would redetain him if he does not leave the country within two weeks"); *id.* at ¶ 57 ("ICE had reversed its prior decision"); *id.* at ¶ 27 ("ICE decided to revoke his order of supervision and redetain Mr. Pullara"); *id.* at ¶ 80 ("ICE's abrupt decision to revoke the order of supervision and redetain"); *id.* ¶ 84 ("Mr. Pullara was informed by ICE that he would be redetained"); *id.* at ¶ 87 ("ICE's decision to revoke his OSUP and redetain him").[16]

[16] Respondents' argument here also improperly relies on the Gordon Decl. and other evidence outside the petition, MTD at 20, which is impermissible under Fed. R. Civ. P. 12(b)(6). *Fonte v. Bd. of Managers of Cont'l Towers Condo.*, 848 F.2d 24, 25 (2d Cir.1988). To the extent the Court perceives this argument as jurisdictional, which it is not, *see* discussion *supra* at note 15, Petitioner respectfully requests leave to pursue jurisdictional discovery on this matter prior to any resolution. *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1010–11 (2d Cir. 1986); *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106, 112 (D. Conn. 2010).

Respondents go on to assert that these decisions are not "final agency action" because, as a result of this lawsuit, ICE has not yet been able to fully implement them by physically arresting and detaining Mr. Pullara. MTD at 20. But the fact that ICE has been prevented from implementing its decision to redetain Mr. Pullara and revoke his OSUP is inapposite to the "final agency action" inquiry. As the Supreme Court has made clear, it is the consummation of the "*decisionmaking process*" from which, thereafter, "'legal consequences *will flow,*'" in the future, not the implementation of a decision after those consequences *have taken effect*, that renders agency action final under the APA. *Bennett*, 520 U.S. at 177–78 (emphasis added) (quoting *Port of Boston Marine Terminal Ass'n.*, 400 U.S. at 71). Respondents' arguments here are merely a restatement of their failed arguments regarding ripeness. *See* discussion *supra* Section I.A.

The allegations in the Petition squarely satisfy the two-prong "pragmatic" test for APA finality. *Standard Oil of Cal.*, 449 U.S. at 239; *see Bennett*, 520 U.S. at 177–78. Mr. Pullara's DO conveyed the final decision of the agency to redetain him and revoke his OSUP, which had a "substantial practical impact" on his right to remain at liberty and triggered obligations with "sufficient legal force" that serious legal consequence could flow therefrom. *Paskar*, 714 F.3d at 98; *see, e.g.*, 8 U.S.C. § 1253 (imposing criminal penalties for failure to depart).

III. PETITIONER'S PROCEDURAL DUE PROCESS CLAIM IS WELL PLED

Mr. Pullara asserts that his procedural due process rights were violated when, without any prior notice or explanation of its decision, without any knowledge of the critical facts about his health conditions, or any opportunity for him to present evidence or participate in any pre-deprivation process whatsoever, ICE informed him (through is sons) that it had decided to revoke his OSUP and redetain him if he was still in the United States in two weeks. Dkt. 19 at ¶¶ 8, 27. Respondents argue that these allegations fail to state a claim because, they assert, Mr. Pullara: (1)

has no "cognizable liberty or property interest" and (2) is "being afforded the process that is due." MTD at 23. They are incorrect on both counts.

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 Respondents' argument regarding the first *Mathews* prong, Mr. Pullara enjoys several of the most heightened liberty and property interests recognized under law, including: (1) 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 for individuals released and at risk of redetention); (2) 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 & Immigr. Servs.*, 594 F.3d 86, 91 (2d Cir. 2010), *withdraw on other grounds*, 2018 WL 11701259 (2d Cir. 2018) (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; (3) the 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 immigration authorities). Accordingly, Respondents' argument that he lacks a cognizable liberty or property interest simply cannot be

squared with a large body of binding precedent.[17]

In the alternative, Respondents argue that Mr. Pullara has been (or is being) afforded adequate process by virtue of the processes underlying his original removal order and his now-pending motions before the immigration court and application for an administrative stay pending before ICE. However, this argument fails for three independent reasons: (1) Respondents (again) fail to acknowledge that none of these processes can provide any legal protection against detention, *see* discussion *supra* Section I.A; (2) the binding precedent discussed *infra* require a pre-deprivation process and thus the post-detention processes upon which Respondents' rely are insufficient; and (3) under the unique and compelling facts of this case, the processes upon which Respondents rely are inadequate insofar as they fail to allow Mr. Pullara to examine and respond to evidence against him and fail to provide for review by a neutral arbiter. *See generally 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.").

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's 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

[17] Moreover, Respondents misread the authority upon which they rely in asserting that a discretionary benefit can never constitute a cognizable liberty or property interest for due process analysis. MTD at 23. Respondents fail to appreciate the distinction between a discretionary benefit not yet granted and one that has been granted, is possessed by an individual, and which the government then seeks to revoke. Respondents' OSUP and release from detention fall squarely in the latter category and the Second Circuit has held, in the immigration context, that an "individual whose release is sought to be revoked is entitled to due process." *Villiers v. Decker*, 31 F.4th 825, 833 (2d Cir. 2022).

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 the government must afford "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 . . . 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, holding that "an 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." *Villiers v. Decker*, 31 F.4th 825, 833 (2d Cir. 2022); *see also Trump v. J. G. G.*, 145 S. Ct. 1003, 1006 (2025) (holding that due process requires pre-deprivation process for individuals facing 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); *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);

Rombot v. Souza, 296 F. Supp. 3d 383, 389 (D. Mass. 2017) (emphasizing that ICE does not have "a carte blanche to re-incarcerate someone [with a removal order] without basic due process protection"); *Ying Fong v. Ashcroft*, 317 F. Supp. 2d 398, 402–03 (S.D.N.Y. 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), *amended on reconsideration on other grounds,* 2004 WL 1348994 (S.D.N.Y. June 15, 2004); *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); *Ragbir v. Sessions*, No. 18-CV-236, 2018 WL 623557, at *2–3 (S.D.N.Y. Jan. 29, 2018) (recognizing that due process requires notice and an opportunity for orderly departure when revoking an OSUP), *vacated and remanded on other grounds*, 2019 WL 6826008 (2d Cir. July 30, 2019). 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.

ICE's decision to redetain Mr. Pullara and revoke his OSUP implicates the gravest of liberty deprivations and was made without any meaningful process whatsoever. Respondents' assertion that these deficiencies could be cured by the fig leaf of inadequate post-arrest processes that provide no legal protection against detention must fail.[18]

IV. PETITIONER'S SUBSTANTIVE DUE PROCESS CLAIM IS WELL PLED

ICE's abrupt and processless decision to revoke Mr. Pullara's OSUP and redetain him after determining he is neither a flight risk nor a danger, and when he faces the risk of death and paralysis in detention because of his grave medical condition, violates his substantive due process rights. It is beyond dispute that constitutional substantive due process protections extend to

[18] For a fuller discussion of the inadequacy of the regulatory scheme for revocation of OSUP and Respondents' failure to follow even those inadequate procedures, see Dkt. 21 at 10-18.

noncitizens. *See Reno v. Flores*, 507 U.S. 292, 306 (1993). Indeed, in *Zadvydas v. Davis*, 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. 678, 690 (2001). "'[T]he touchstone of due process is protection of the individual against arbitrary action of government.'" *Leebaert v. Harrington*, 332 F.3d 134, 139 (2d Cir. 2003) (alteration in original) (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. *See 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, when he has been determined not to be a flight risk, and when he has reaffirmed his commitment to comply with any order, violates substantive due process for two independent reasons.

First, in *Zadvydas*, 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" (alterations in original)). 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 posed no flight risk and that he was

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. Dkt. 19 at ¶ 104. Moreover, he has been clear that, if so ordered, he will comply with ICE's order that he depart on his own. Dkt. 19 at ¶¶ 85–86; *see also* Dkt. 17, Ex. A at ¶ 57. 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. *Zadvydas*, 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 of 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." *Lewis*, 523 U.S. at 849–50. 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) (internal quotation marks omitted); *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, 286 (S.D.N.Y. 2020) (J., Nathan) (granting release of immigration detainees because ICE was deliberately indifferent to serious health in violation of substantive due process guarantee); *Avendaño Hernandez v. Decker*, 450 F. Supp. 3d 443, 448 (S.D.N.Y. 2020) (same); *Basank v. Decker*, 449 F. Supp. 3d 205, 214–15 (S.D.N.Y. 2020) (same);

Barbecho v. Decker, No. 20-CV-2821, 2020 WL 1876328, at *6 (S.D.N.Y. Apr. 15, 2020) (same). Courts have further recognized that abruptly redetaining an individual for deportation without "the chance to make some preparations for serious healthcare concerns" "could create serious substantive due process concerns." *Ceesay v. Kurzdorfer*, --- F. Supp. 3d ---, 2025 WL 1284720, at *8, *24 n.27 (W.D.N.Y. May 2, 2025); *see also Ragbir*, 2018 WL 623557, at *2 ("[D]ue 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.").

The gravity of Mr. Pullara's fragile medical condition cannot be overstated. *See* discussion *supra* pp. 2–3. By exposing Mr. Pullara "to conditions that pose an unreasonable risk of serious damage to [his] future health." *Jabbar*, 683 F.3d at 57, ICE acted with "deliberate[] indifferen[ce]" violating his substantive due process. *Lewis*, 523 U.S. at 849–50.

V. PETITIONER'S REHABILITATION ACT CLAIM IS WELL PLED

After (again) attempting to avoid the merits through an entirely unfounded attack on this Court's jurisdiction,[19] Respondents argue that Mr. Pullara fails to state a claim for relief under the Rehabilitation Act ("RA") because ICE is not discriminating against him because of his disability. They are incorrect. Under § 504 of the RA, 29 U.S.C. § 794, 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.

[19] Respondents argue that § 504 of the Rehabilitation Act does not waive sovereign immunity for claims like Mr. Pullara's against an "Executive agency." MTD at 24–25; 29 U.S.C. § 794(a). But the cases they cite clearly apply only to "monetary damage awards" and explicitly acknowledge that the APA waives sovereign immunity for claims, like Mr. Pullara's, seeking non-monetary relief. *See, e.g., Lane v. Pena*, 518 U.S. 187, 191-197 (1996) (discussing waiver of sovereign immunity under RA and distinguishing between damages claims and "relief other than money damages" available under the APA); *Moya v. U.S. Dep't of Homeland Sec.*, 975 F.3d 120, 128 (2d Cir. 2020) ("[T]he APA provides an express cause of action for plaintiffs who wish to sue an executive agency for violating the Rehabilitation Act."); *see generally* 5 U.S.C. § 702.

See Alexander v. Choate, 469 U.S. 287, 301 n.21 (1985) (explaining how, under the RA, "reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access"); *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016) (discussing the RA's prohibition on an agency's "failure to make a reasonable accommodation"); *see generally* 6 C.F.R. § 15.30(b)(1)(ii), (iii).

Mr. Pullara is unquestionably a "qualified individual with a disability," with multiple qualifying disabilities that "substantially limit" major life activities. *See generally* 42 U.S.C. § 12102(1); *see also* discussion *supra* pp. 2–3. 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's RA claim turns on whether ICE has made "reasonable adjustments" to ensure meaningful participation in its programs. Mr. Pullara has been in ICE's OSUP program and is entitled the reasonable accommodation of delayed revocation for the brief time necessary to assess and stabilize his critical medical situation.

CONCLUSION

For the foregoing reasons, Respondents' motion to dismiss should be denied.

Respectfully Submitted,

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New York, N.Y.

/s/ Peter Markowitz

PETER MARKOWITZ, PM9052
LINDSAY NASH, LN1717
ELIZABETH WU, EW0416
Kathryn O. Greenberg
Immigration Justice Clinic
Cardozo School of Law
55 Fifth Avenue, 11th Floor
New York, NY 10003
Tel: (646) 592-6537
peter.markowitz@yu.edu