UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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VINCENZO PULLARA,

Petitioner-Plaintiff,

-against-

Civil Action No.:
25-cv-870

(Gujarati, J.)
(Henry, M.J.)

BILL JOYCE, in his official capacity as New York Field Office Director, U.S. Immigration and Customs Enforcement, *et al.*,

Respondents-Defendants.

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF RESPONDENTS-DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Respondents-Defendants (collectively, "Respondents"), by and through their attorneys, Joseph Nocella, Jr., United States Attorney for the Eastern District of New York, Geoffrey M. Stannard and Elliot M. Schachner, Assistant U.S. Attorneys, of counsel, respectfully submit this reply memorandum in further support of their motion to dismiss this action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) by responding to arguments contained in the Memorandum of Law in Opposition Respondent-Defendants' [sic] Motion to Dismiss ("Opp.") served by Petitioner-Plaintiff Vincenzo Pullara ("Petitioner").

ARGUMENT

I. PETITIONER'S CLAIMS ARE UNRIPE

Respondents' Memorandum of Law in Support of Respondent-Defendants' Motion to Dismiss ("Mem.") explained that this action is unripe because it rests upon events that may not occur. Mem. at 8-9. Petitioner contends that the issue of ripeness should be determined as of the time of the filing of this action. Opp. at 7. That contention contrary to "[a] foundational principle of Article III" of the Constitution—that an action must be ripe during each and every stage of the litigation, and not just when the complaint is filed. *Trump v. New York*, 592 U.S. 125, 131 (2020). Thus, on a motion to dismiss for lack of ripeness, post-filing events "should be considered and may be determinative." *Am. Motorists Ins. Co. v. United Furnace Co.*, 876 F.2d 293, 302 n.4 (2d Cir. 1989) (the court "focused on several events that occurred after the filing of the complaint"); *see also Ahmed v. Cissna*, 327 F. Supp. 3d 650, 661, 667 (S.D.N.Y. 2018) (considering a post-filing event in holding certain claims unripe). Petitioner cites *Friends of the Earth, Inc. Laidlaw Env't Servs.*, 528 U.S. 167, 170 (2000), which deals with mootness, not ripeness, and *Eng v. Smith*, 849 F.2d 80, 83 (2d Cir. 1985), which deals with the scope of injunctive relief. Contrary to Petitioner's contention (Opp. at 9 n.6), *Chocho v. Shanahan*, 308 F. Supp. 3d 772, 775 (S.D.N.Y

2018) (Nathan, J.) dealt with ripeness by holding that the "mere potentiality" that Chocho may be detained "is insufficient to warrant this Court's retention of jurisdiction."

Looking to all of the relevant facts, this action is not ripe. More than 4.5 months after Immigration and Custom Enforcement ("ICE") allegedly notified Petitioner's older son of its intent to revoke Petitioner's order of supervision ("OSUP") and detain Petitioner (Amended Petition, Dkt. 19 ("Am. Pet.") ¶ 56), the OSUP remains in effect and ICE has not detained him. Supplemental Declaration of Marlon G. Gordon ("Supp. Decl.") ¶ 6. Furthermore, the representations Respondents previously made to the Court remain in effect. Mem. at 9. Petitioner remains free under the OSUP during the pendency of his I-246 application for a stay of removal, and he will not be detained, at the earliest, until the date of an interview with ICE. Dkt. 23 at 43:4-19. If ICE approves the I-246, he will not be detained and will remain on the OSUP.[1]

II. CONGRESS HAS STRIPPED THIS COURT OF JURISDICTION

A. This Action Is Jurisdictionally Barred By 8 U.S.C. §§ 1252(a)(5), 1252(b)(9)

Respondents have demonstrated that, assuming *arguendo* that this action is ripe, it is barred by 8 U.S.C. § 1252(a)(5), and its corollary, 8 U.S.C. § 1252(b)(9), as a challenge to a removal order because Petitioner, in effect, seeks a stay of removal. Mem. at 9-14. In response, Petitioner contends that that he is not challenging his removal order, but only his allegedly "imminent re[-]detention" and revocation of his OSUP. Opp. at 11, 13 n.9. Yet if USCIS were to revoke the OSUP and re-detain him, it would do so for one purpose only—to remove him. By Petitioner's own account, this action arises from his "potential re-detention *and removal.*" Am. Pet. ¶ 62 (emphasis added). To support his account, he alleges that an ICE officer warned that Petitioner "had until February 18 to leave the country or he would be re[-]detained by ICE." *Id.* ¶ 56.

[1] In any event, even by Petitioner's own incorrect assertion as to when ripeness may be assessed, this suit was not ripe when filed. Subsequent events have only further illustrated this.

Thus, looking to the substance of the relief he seeks, *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011), Petitioner seeks a stay of removal, which is a challenge to a removal order. Consistent with *Delgado*, several district courts in this Circuit have held that § 1252(a)(5) bars, as a challenge to a removal order, an action to enjoin ICE from detaining an individual for the purpose of removal. Most recently, *Ceesay v. Bondi*, 25-cv-3716, 2025 WL 1435615, at *2 (S.D.N.Y. May 16, 2025), held that § 1252(a)(5) bars an action for an order prohibiting ICE from detaining Ceesay for the purpose of removing him, because such an order "would . . . interfere with the execution of a lawful removal order"; *accord Rodriguez v. Warden, Orange County Correctional Facility*, 23-cv-242, 2023 WL 2632200, at *4 (S.D.N.Y. Mar. 23, 2023) (dismissing action "seek[ing] an end to [Rodriguez's] detention, which was undertaken for the precise purpose of effectuating his existing removal orders"); *Bumu v. Barr*, 20-cv-6742, 2020 WL 6465433, at * 3 (W.D.N.Y. Nov. 3, 2020) (§ 1252(a)(5) bars challenge to detention that "threaten[s] the execution of the removal order"); *Chocho*, 308 F. Supp. 3d at 774 (claim to enjoin re-detention of the petitioner "results from the removal order");[2] *Achbani v. Homan*, 3:17-cv-1512, 2017 WL 4227649, at *3-5 (D. Conn. Sept. 22, 2017) (dismissing claim for an order prohibiting ICE from detaining Achbani "in order to effectuate removal"). Likewise, one district court has held that § 1252(a)(5) bars a challenge to ICE's revocation of an individual's OSUP in anticipation of removing him. *Andoh v. Barr*, 19-cv-8016, 2019 WL 4511623, at *3-4 (S.D.N.Y. Sept. 18, 2019).

Petitioner relies heavily (Opp. at 11, 12) on *Ceesay v. Kurzdorfer*, -- F. Supp. 3d --, 2025 WL 1284720 (W.D.N.Y. May 2, 2025). Yet the court in that case did not construe the petition as

[2] Petitioner's contention that *Chocho* dealt with mootness (Opp. at 9) is not entirely correct because it overlooks *Chocho*'s holding regarding § 1252(a)(5). Contrary to Petitioner's implication, Respondents have never relied on *Celestin v. Decker,* 17-cv-2419, 2019 WL 7946027, at *2 (S.D.N.Y. July 22, 2019) for arguing that any statute bars jurisdiction here; they cited *Celestine* solely for purposes of demonstrating the lack of a case or controversy. Mem. at 9.

challenging a detention related to an effort to remove him. Likewise, *Ahmed v. Fredeon*, 744 F. Supp. 3d 259, 265-67 (W.D.N.Y. 2024) (Opp. at 12) was unrelated to any ICE removal effort.

Many of the decisions cited by Petitioner (Opp. at 9-11) are unavailing to him because they predate the May 11, 2005 effective date of § 1252(a)(5) and of the current iteration of § 1252(b)(9), Pub. L. 109-13, § 106(a). *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Reno v. Am.-Arab Anti-Disc. Comm.*, 525 U.S. 471 (1999); *Calcano-Martinez v. INS*, 232 F.3d 328 (2d Cir.2000). Indeed, Petitioner's brief contains only two passing mentions of § 1252(a)(5). Other decisions did not involve a final order of removal, so the § 1252(a)(5) jurisdictional bar did not apply. *See, e.g.*, *DHS v. Regents of Univ. of Cal.*, 591 U.S. 1 (2020); *Jennings v. Rodriguez*, 583 U.S. 281 (2018); *Ozturk v Hyde*, 136 F.4th 382, 401 (2d Cir. 2025).[3] *AARP v. Trump*, 145 S. Ct. 1364, 1368 (2025) (Opp. at 12 n.7), involved a removal under the Alien Enemies Act, 50 U.S.C. § 21 ("AEA"), so the § 1252(a)(5) jurisdictional bar—which applies only to removal orders "entered or issued under . . . this chapter", *i.e.*, 8 U.S.C. §§ 1101-1537—did not apply in *AARP*.

Petitioner contends that, under *Delgado*, a challenge to a removal order is barred only if the challenge would automatically render the order invalid. Opp. at 11 (citing *Barros Anguisaca v. Decker*, 393 F. Supp. 3d 344, 349 (S.D.N.Y. 2019)). Yet the Second Circuit in *Delgado* held that the action was barred because adjudication of the I-212 waiver was merely "a *necessary prerequisite* to her ultimate goal of adjustment of status," and rejected the argument that the action was not barred because the granting of the I-212 waiver "would not 'per se prevent her removal.'" *Delgado*, 643 F.3d at 55 (emphasis added). *See also Singh v. USCIS*, 878 F.3d 441, 445-46 (2d

[3] Petitioner (Opp. at 10) cites *Ozturk* for the presumption of reviewability—*i.e.*, that courts will not construe a statute to strip jurisdiction unless the statute clearly does so—but does not explain why he believes that the relevant statutes fail to meet this standard. Nor could he credibly do so, as 8 U.S.C. § 1252 expressly strips jurisdiction. Furthermore, Petitioner neglects to mention that the Supreme Court has held that the presumption as to jurisdiction applies only when the statute is silent. *Patel v. Garland*, 596 U.S. 328, 346 (2022). As just noted, that is not the case here.

Cir. 2017) (summarized at Mem. at 11). Thus, as *Barros Anguisaca* noted, 393 F. Supp.3d at 349, Delgado "sought a stay of removal pending adjudication of an I-212 waiver, *which in turn was a necessary prerequisite* for [her] to obtain an adjustment of status that would render her a permanent resident" and invalidate her removal order. *Id.* (emphasis added).[4]

B. This Action Is Jurisdictionally Barred By 8 U.S.C. § 1252(g)

Respondents have explained that 8 U.S.C. § 1252(g) independently bars review. Mem. at 14-18. Petitioner argues that this statute does not apply because he challenges only his detention. Opp. at 14-17. Yet, by Petitioner's own account, the allegedly imminent detention would be for the sole purpose of executing his removal order. Three of the decisions cited in Part IIA above relied in part on § 1252(g) in holding that district courts lack jurisdiction to prohibit ICE from detaining an individual for the purpose of removal. *Ceesay*, 2025 WL 1435615, at *2; *Rodriguez*, 2023 WL 2632200, at *4; *Bumu,* 2020 WL 6465433, at *2-3.

Petitioner cites several decisions, many of which contain general language that § 1252(g) should be narrowly construed or does not cover all removal-related claims. However, two of those decisions *enforced* the § 1252(g) bar. Opp. at 14; *Reno*, 525 U.S. at 482-87 (selective-enforcement claim); *Duamutef v. INS*, 386 F.3d 172, 182 (2d Cir. 2004) (claim for an order directing ICE's predecessor to execute his final order of removal). Petitioner places great emphasis on another decision that contains such general language, *Ozturk*. Opp. at 14. But *Ozturk* is self-distinguishing. The Second Circuit expressly noted that Ozturk "does not challenge the government's decision to . . . execute a removal order", *Ozturk*, 136 F.4th at 397—the very type of decision that Petitioner challenges here. Like *Ozturk*, *Regents* and *Michalski v. Decker*, 279 F. Supp. 3d 487 (S.D.N.Y. 2018), also cited by Plaintiff (Opp. at 14-15), did not involve individuals subject to final orders of

[4] Respondents have previously addressed (Mem. at 13 n.2) other decisions cited in Opp. at 13, second paragraph, and in the interest of brevity, will not do so again here.

removal, and *Regents* did not involve any type of detention or revocation of an OSUP. *Zadvydas*, also cited by Petitioner (Opp. at 14), is equally inapposite and made only one passing reference to § 1252(g), 533 U.S. at 688, and involved an alien who, unlike Petitioner, was detained beyond a statutory period because ICE's predecessor was unable to remove him. *AARP* involved a removal under the AEA, so § 1252(g)—which applies to "removal orders . . . under this chapter," *i.e.*, 8 U.S.C. §§ 1101-1537—did not apply. *Nken v. Holder*, 556 U.S. 418 (2009) concerned stays pending appeal disposition, and thus is inapplicable in district court.[5]

Thus, none of Petitioner's cases alter the conclusion that this Court lacks jurisdiction.

III. THE COURT LACKS *HABEAS* JURISDICTION

In their opening brief, Respondents demonstrated that *habeas* jurisdiction is lacking because, at the time Petitioner commenced this action, he was not in custody anywhere, let alone in this district. Mem. at 18-19. In response, Petitioner cites decisions holding that release on bail constitutes custody. Opp. at 18. Yet Petitioner has been released not on bail, but under an OSUP, which is not custody for *habeas* purposes. Mem. at 18-19. As he concedes (Opp. at 18 n.2), under the decisions Respondents cited (Mem. at 18-19), when ICE releases an individual from detention under an OSUP, the individual is no longer in custody for *habeas* purposes. Opp. at 18 n.12. Likewise, because Petitioner has never been in ICE custody at any time during the pendency of

[5] Also inapposite is, as discussed above, *Ceesay v. Kurzdorfer*, another decision cited by Petitioner (Opp. at 14) which treated the plaintiff's detention in that case as unrelated to any effort by ICE to remove him. Furthermore, that decision, and three others—*You, Xiu Qing* v. *Nielsen*, 321 F. Supp. 3d 451, 457-58 (S.D.N.Y. 2018); *Torres-Jurado v. Biden*, 19-cv-3595, 2023 WL 7130898, at *2-3 (S.D.N.Y. Oct. 29, 2023); and *Chhoeun v. Marin*, 17-1898, 2018 WL 1941756, at *4 (C.D. Cal. Mar. 26, 2018)—as discussed in greater detail in Respondents' opening brief, incorrectly limited the § 1252(g) bar to claims challenging discretionary decisions, and therefore incorrectly held that the bar does not extend to claims alleging violations of law. *See* Mem. at 15-17 & n.4. Equally unavailing is Petitioner's citation to *Ragbir v. Sessions*, 18-cv-236, 2018 WL 623557, at *2-3 & n.1 (S.D.N.Y. Jan. 29, 2018), *vacated and remanded sub nom. Ragbir v. Barr*, 2019 WL 6826008 (2d Cir. July 30, 2019) (Opp. at 15) as that case did not mention any statute in Title 8, and was predicated on sympathy for Ragbir, whom the court believed was "targeted as a result of his speech and political advocacy." Here, Petitioner makes no such claim, as he has been ordered removed due to his murder conviction.

this action (Supp. Decl. ¶ 6), this Court has never had *habeas* jurisdiction.

Petitioner also contends that the Court has *habeas* jurisdiction under the Suspension Clause. Opp. at 17-18. But he cites no authority that the Suspension Clause can override the limitations of *habeas* jurisdiction under 28 U.S.C. § 2241. Furthermore, the Second Circuit has held that, for Suspension Act purposes, the statutory motion to reopen a removal proceeding—a remedy that Petitioner has sought (Supp. Decl. ¶ 4)—constitutes "an adequate and effective substitute" that precludes *habeas* review. *Luna v. Holder*, 637 F.3d 85, 87 (2d Cir. 2011); *see also Calcano-Martinez*, 232 F.3d at 342 (Opp. at 17) (recognizing that *habeas* relief is unavailable if Congress has provided an adequate substitute remedy). Petitioner relies upon *Ragbir v. Homan*, 923 F.3d 53 (2d Cir. 2020), *vacated sub nom.*, *Pham v. Ragbir*, 141 S. Ct. 227 (2020) (Opp. at 17), but that decision's holding regarding the Suspension Clause is no longer good law due to *DHS v. Thuraissigiam*, 591 U.S. 103 (2020). *See Alomaisi v. Mayorkas*, 20-cv-5059, 2021 WL 3774117, at *3, n.4 (S.D.N.Y. Aug. 25, 2021). *Trump v. J.G.G.*, 145 S. Ct. 1003 (2025), also cited by Petitioner, made no mention of the Suspension Clause.

IV. THE APA CLAIM IS BARRED BY LACK OF FINALITY

Respondents' opening brief explains that Petitioner's APA claim fails because there has been no final agency action. Mem. at 19-20. Petitioner incorrectly contends that a February 5, 2025 phone call during which ICE allegedly informed Petitioner's son that Petitioner "had until February 18 to leave the country or he would be redetained by ICE" constitutes final agency action. Am. Pet. ¶ 56; Opp. at 20-22. Petitioner misunderstands the finality standard, and his claim does not pass the test in *Bennett v. Spear*, 520 U.S. 154 (1997).[6] *See* Mem. at 19. Petitioner's account

[6] Petitioner also incorrectly alleges that ICE has been "prevented" from revoking Petitioner's OSUP or re-detaining him. Opp. at 22. To the contrary, ICE has voluntarily agreed not revoke the OSUP or re-detain him during the pendency of his I-246.

of that phone call does not amount to a custody order or stay denial. The alleged statements of an ICE officer, even if true, changed no rights or legal obligations, and therefore fail to satisfy the second *Bennett* prong. A final custody decision will not be made until Petitioner's I-246 is reviewed, and thus agency deliberations remain open. Supp. Decl. ¶ 5.

A decision Petitioner cites (Opp. at 21), *Paskar v. U.S. Dep't of Transp.*, 714 F.3d 90, 99 (2d Cir. 2013), which found no final agency action because the agency's letter "did not deny a right, impose an obligation, or have legal consequence," further highlights the distinction. By arguing that ICE denied him the "right" to continued non-detention on an OSUP (Opp. at 22), Petitioner mischaracterizes the nature of an OSUP. An OSUP is a conditional, discretionary grant, not a fixed, vested right. Mem. at 23. Its revocation is an exercise of existing executive authority to detain an alien with a final order of removal, not the creation of a new legal obligation or the denial of an established right in the sense contemplated by *Paskar*.[7] [8]

V. PETITIONER'S DUE PROCESS CLAIMS SHOULD BE DISMISSED

A. Petitioner Failed to Exhaust Administrative Remedies

Respondents' opening memorandum explained that Petitioner's failure to exhaust administrative remedies prior to filing suit precludes his due process claims. Mem. at 20-21. Petitioner concedes that he did not seek a stay of removal from ICE or the Immigration Court prior

[7] Petitioner concedes that review of final agency action under the APA's arbitrary and capricious standard is premature without "access to the administrative record." Opp. at 20 n.14. Indeed, because there has been no final action, including a decision on Petitioner's I-246, there is simply no record to review, and the APA claim is premature.

[8] Petitioner's reliance on *Sharkey v. Quarantillo*, 541 F.3d 75, 89 (2d Cir. 2008) (Opp. at 21) is misplaced. *Sharkey* addressed a conclusive revocation of lawful-permanent-resident ("LPR") status through the inscription of "cancelled with prejudice" on the plaintiff's stamped passport. The agency action in *Sharkey* was deemed final because it denied a vested legal status, and there was no method of challenging the revocation itself. The court held that Sharkey's pending application for LPR status did not render the revocation with prejudice nonfinal. Here, by contrast, the revocation of Petitioner's OSUP has not yet occurred, and a final decision remains subject to resolution of Petitioner's pending I-246.

to initiating this action, yet insists exhaustion is excused because those avenues would not "prevent ICE from arresting and detaining" him and would expose him to "irreparable harm" if pursued. Opp. at 19. That premise is wrong on both counts. ICE's agreement not to detain Petitioner during the pendency of his I-246 provides an administrative remedy that offers the protection he seeks. His own decision to bypass the administrative process does not convert an available, adequate safeguard into an inadequate one.

Petitioner misguidedly relies on *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 538 (S.D.N.Y. 2014) for the proposition that there is no statutory exhaustion requirement. Yet Petitioner ignores that "courts generally do require such exhaustion 'as a prudential matter.'" *Guzman v. Joyce*, 25-cv-4777, 2025 WL 1696891, at *2 (S.D.N.Y. June 17, 2025) (collecting decisions). Contrary to Petitioner's contention (Opp. at 18-19), no exceptions to prudential exhaustion—such as futility or irreparable injury—are present here. Petitioner's pending I-246, if granted, would stay his removal, and he will not be detained during the pendency of his I-246. Petitioner's desire to remain on an OSUP for an indeterminate period pending his eventual voluntary departure—if and when he decides to depart—does not render his due process claims actionable without exhaustion of his administrative remedies. In the absence of a showing of futility, no imminent injury, and no obstacle to filing the I-246, prudential exhaustion remains mandatory and his due process claims should be dismissed.

B. Petitioner Fails to State a Substantive Due Process Claim

As set forth in Respondents' opening memorandum, Petitioner fails to state a substantive due process claim because (1) ICE's enforcement of a final removal order—which he alleges would require him to seek medical care in Italy, a first-world country, rather than the United States—does not "shock the conscience," and (2) ICE's alleged conduct is related to a legitimate objective. Mem. at 21-22. Petitioner's argument that ICE's actions shock the conscience due to his

alleged medical conditions (Opp. at 26-29) misapplies this stringent standard and overlooks the government's broad authority in immigration enforcement. Far from demonstrating *intent* to injure in a manner unjustifiable by any governmental interest, ICE has allowed Petitioner to remain free on an OSUP since May 2023—more than 21 months before he commenced this action (Am. Pet. ¶ 39)—and has allowed him to remain free during the pendency of his I-246 request for an administrative stay of removal. That request is the vehicle for giving him the opportunity to place evidence of medical issues before ICE, issues of which ICE could not have been aware as Petitioner only embarked on this slew of medical care *after filing this suit*. Had Petitioner actually initiated the administrative process (of which his counsel was aware) prior to prematurely filing suit, his current medical situation would have been properly before the relevant authority. ICE being unaware of his medical status is his own fault. He cannot now assert a substantive due process claim by seeking to fault ICE for failing to consider what was not before it.[9]

C. Petitioner Fails to State a Procedural Due Process Claim

Respondents have explained that Petitioner's procedural due process claim fails the test in *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) because he does not identify a liberty interest or a

[9] Plaintiff's reliance on *Zadvydas* and *Coronel v. Decker*, 449 F. Supp. 3d 274 (S.D.N.Y. 2020) (Opp. at 28), is misplaced. In *Zadvydas*, the Supreme Court considered whether an indefinite, "*potentially permanent*" detention of an alien violates due process where his removal is not reasonably foreseeable. 533 U.S. at 691 (emphasis added). Here, by contrast, Plaintiff is not being detained, and if he were detained, the detention would not be permanent, as he has submitted a travel document to ICE. Declaration of Marlon G. Gordon, dated May 9, 2025 ¶ 18. In *Coronel*, the court found a likelihood that government had been deliberately indifferent to the plaintiffs' medical needs by taking no action in response to the spread of the COVID-19 pandemic where the government knew that the plaintiffs had underlying medical conditions. 449 F. Supp. 3d at 284. Here, Petitioner has applied for a stay of removal citing his alleged health problems, and that application is presently pending. Petitioner has not demonstrated that his medical needs would be unmet should he be required to travel to Italy, and thus fails to allege conscience-shocking conduct. Petitioner also relies on *dicta* in *Ceesay*, 2025 WL 1284720, at *24 n.27, which poses an extreme hypothetical of a diabetic forced to board an 18-hour flight without insulin he needs every 12 hours to stay alive. *Ceesay* noted that that such a fact pattern "could create serious substantive due process concerns." *Id.* Here, by contrast, Petitioner has had *years* to make medical preparations for his travel to Italy and has known for over *four months* that his OSUP is subject to revocation.

deprivation of a liberty interest without due process. Mem. at 23-24. Petitioner incorrectly asserts that he has a liberty interest in an OSUP (Opp. at 23), and extensively relies on distinguishable cases which state broad principles regarding physical restraint and detention—even though Petitioner is not detained. None of the cases concerns a specific, heightened procedural right to a pre-revocation hearing for an OSUP.[10] Further, Petitioner fails to establish that ICE's notice and I-246 stay procedure fail the *Mathews* test. As Respondents argued and Petitioner did not dispute, he received (and continues to receive) process via the I-246 and the immigration court proceedings he has since filed. Mem. at 23.[11] Thus, he fails to identify any process deprivation.

VI. PETITIONER'S REHABILITATION ACT CLAIM SHOULD BE DISMISSED

Respondents explained that Petitioner's Rehabilitation Act claim is jurisdictionally barred[12] and also ill-pled. Mem. at 24-26. Petitioner responds by belatedly attempting to shoehorn himself into what Respondents demonstrated was the sole private right of action under "program

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[10] *See, e.g.*, *Trump v. J. G. G.*, (aliens who, unlike Petitioner, are subject to summary removal under the AEA are entitled to notice of their removability); *Young v. Harper*, 520 U.S. 143 (1997) (Oklahoma pre-parole program); *Azize v. Bureau of Citizenship & Immigr. Servs.*, 594 F.3d 86, 91–92 (2d Cir. 2010), *opinion withdrawn*, 18-1429, 2018 WL 11701259 (2d Cir. Aug. 1, 2018) (naturalization proceeding allegedly improperly terminated); *Villiers v. Decker*, 31 F.4th 825 (2d Cir. 2022) (district court improperly denied the government's request to re-detain an individual who was arrested pending his removal proceedings); *Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018) (rights of unaccompanied minor aliens in custody with alleged connections to criminal gangs); *Marincas v. Lewis* 92 F.3d 195 (3d Cir. 1996) (asylum procedures for stowaways); *Rombot v. Souza*, 296 F. Supp. 3d 383 (D. Mass. 2017) (ICE detained an alien beyond the 90-day removal period and failed to follow its own regulations). *Ragbir v. Sessions*, which was subsequently vacated by the Second Circuit, involved a revocation of an OSUP without providing Ragbir notice or the opportunity to say goodbye to his family members; it did not imply a general right to indefinite pre-removal release or a formal pre-OSUP revocation hearing.

[11] Added to which, even under Petitioner's interpretation of a liberty interest in a discretionary OSUP, which he does not have, Petitioner remains undetained today, meaning no deprivation has occurred. Without a protected interest or deprivation, his procedural due process theory fails, and the claim should be dismissed.

[12] Petitioner's argument that the Court has jurisdiction over his Rehabilitation Act claim is incorrect. The Rehabilitation Act provides no private remedy against an Executive agency, whether for money damages or injunctive relief. *See Moya v. USDHS*, 975 F.3d 120, 128 (2d Cir. 2020) (no express or implied private right for injunctive relief). While Petitioner argues that he could have asserted a Rehabilitation Act claim under APA, he failed to do so, *see* Am. Pet., and he *cannot* plead such a claim, *see* Part IV, *infra*; Mem. at 19-20.

or activity receiving Federal financial assistance," (Opp. at 29) but appears to be unsure of which "program or activity" he was allegedly denied participation in. *See* 29 U.S.C. § 794(a). Although he previously alleged that he was denied "programmatic benefit of an orderly departure" (*see* Dkt. 21 at 26), he now claims that the OSUP itself is the "program or benefit" and that it was revoked based on his disability. He does not explain how the OSUP is a "program or activity receiving federal financial assistance" rather than an executive agency program for which there is no right of action. *See* Opp. at 30. In any event, Petitioner's attempt to move the goalposts does not salvage his ill-pled claim. An OSUP is a conditional privilege, and its potential revocation is an enforcement action, not a program or activity denied based on his disability which is what is required to plead such a claim. Mem. at 26. Furthermore, Petitioner undermines his own claim by repeatedly alleging that the decision to revoke his OSUP was done without any "knowledge or consideration" of his alleged disability. *See* Opp. at 1, 8, 22. This directly contradicts the requirement that discrimination occur "solely by reason of" disability. *See* 29 U.S.C. § 794(a).[13]

CONCLUSION

For the foregoing reasons, and those set forth in Respondents' opening papers, the Court should dismiss this action and grant such other and further relief as the Court deems proper.

Dated: Brooklyn, New York
June 25, 2025

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[13] Since Petitioner's disability was not a factor in the revocation decision, he cannot plausibly claim discrimination based on disability. Moreover, the indefinite deferral Petitioner seeks would impose an undue administrative burden and fundamentally alter ICE's statutory removal duties, which the Rehabilitation Act does not require.